



Public Defense Backup Center
REPORT

Volume XXV Number 2

March–May 2010

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Defender News

Supreme Court Holds that Counsel Has Affirmative Obligation to Advise Clients of Immigration Consequences

The United States Supreme Court issued a landmark decision on March 31, 2010, which held, as a matter of constitutional law, that criminal defense counsel have an affirmative obligation to advise noncitizen clients of the potential immigration consequences resulting from a guilty plea. Writing for the majority, Justice Stevens observed in *Padilla v Kentucky*: “[A]s a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” Contrary to the standard enunciated by the New York State Court of Appeals in *People v Ford* (86 NY2d 397 [1995]), the Supreme Court decision makes clear that defense counsel’s representation as to immigration consequences no longer requires misadvice in order to be deemed ineffective. The Supreme Court’s decision is available at www.supremecourt.gov/opinions/09pdf/08-651.pdf.

Padilla makes it even more imperative that public defense lawyers become knowledgeable about the immigration consequences of criminal convictions. NYSDA’s Criminal Defense Immigration Project (CDIP) serves as a statewide legal resource and training center for public defenders, assigned counsel, advocates, and immigrants themselves on developing defense strategies. CDIP helps lawyers both understand and minimize the potential consequences facing immigrants impacted by the criminal justice system. CDIP Director Joanne Macri is available to provide legal support or assistance on specific criminal/immigration matters that may arise in your office. If you have any questions relating to this decision or other immigration matters, please contact Joanne Macri at 716-913-3200 or jmacri@nysda.org.

Soon after *Padilla* was decided, the Immigrant Defense Project (IDP) in New York City released a practice advisory regarding criminal defense counsel’s duties when representing an immigrant defendant. The advisory is available on the IDP website, [\[project.org\]\(http://project.org\), along with a variety of resources for counsel representing noncitizen clients.](http://www.immigrantdefense-</p>
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Second Circuit Finds New York’s Persistent Felony Offender Statute Invalid

On March 31, 2010, the Second Circuit held that “the Sixth Amendment right to a jury trial, applicable to the states as incorporated by the Fourteenth Amendment, prohibits the type of judicial fact-finding resulting in enhanced sentences under New York’s [persistent felony offender] PFO statute [Penal Law 70.10].” The Court concluded that New York Court of Appeals’ decisions affirming enhanced sentences under the PFO statute, including *People v Rivera* (5 NY3d 61 [2005]) and *People v Quinones* (12 NY3d 116 [2009]), unreasonably applied clearly established federal law as set forth in *Blakely v Washington* (542 US 296 [2004]) and *Cunningham v California* (127 SCt 856 [2007]).

The opinion addressed five federal habeas cases, *Besser v Walsh* (No. 05-4375-pr), *Phillips v Artus* (No. 06-3550-pr), *Portalatin v Graham* (No. 07-1599-pr), *Morris v Artus* (No. 07-3588-pr), and *Washington v Poole* (No. 07-3949-pr). The Court found that since the petitioner Besser’s conviction was final before the Supreme Court’s decision in *Blakely*, the state court decisions affirming his conviction were not an unreasonable application of clearly established federal law. However, the state court decisions affirming the enhanced sentences of the remaining four petitioners were issued after *Blakely*; the Court remanded these cases to the district court for a determination of whether the application of the unconstitutional statute was harmless. The decision is available at www.ca2.uscourts.gov/opinions.htm.

Contents

Defender News1
 Conferences & Seminars5
 Job Opportunities5
 Case Digest:
 US Supreme Court6
 NY Court of Appeals9
 First Department14
 Second Department18
 Third Department29
 Fourth Department34

The respondents and the petitioner Besser have filed petitions for rehearing en banc. The Second Circuit has not ruled on these petitions yet. It is unclear whether the New York Court of Appeals, which is not bound by *Besser*, will agree with the circuit court's analysis. For several years, Andrew C. Fine, counsel for the petitioner Morris, has encouraged defense counsel to use the *Cunningham* decision in state courts to challenge "the continuing legitimacy of *Rivera*." See *Preliminary Assessment of Cunningham v California's Impact on Persistent Felony Offender (PFO) Provisions* (January-February 2007 issue of the *REPORT*), available at www.nysda.org/07_Jan-Feb_2007_REPORT.pdf. Although the Court of Appeals held last year that the Supreme Court's decision in *Cunningham* did not render New York's PFO statute unconstitutional (see *People v Quinones*, 12 NY3d 116 [2009]), defense counsel should challenge the application of Penal Law 70.10 in state courts based on the holding and analysis in *Besser*.

Double Jeopardy Prohibits Resentencing to Post-Release Supervision When Defendant Has Already Served Prison Term

On February 23rd, the Court of Appeals held courts have no authority to impose post-release supervision (PRS) terms on clients previously sentenced to determinate terms of imprisonment without a required PRS component if the client has already been released from imprisonment under the original sentence (at the 6/7 date or upon maximum expiration) and the prosecutor's time to seek correction of the sentence on direct appeal or by way of a CPL § 440.40 motion has expired. See *People v Williams*, 2010 NY Slip Op 1527 (2/23/2010), available at www.nycourts.gov/reporter/3dseries/2010/2010_01527.htm. Newly imposed PRS terms under these circumstances frustrate a defendant's "reasonable expectation of finality" in the original sentence and violate the Double Jeopardy Clause. Furthermore, because courts lack jurisdiction to resentence under these circumstances, the constitutional error is correctable even if the defendant did not object at the resentencing proceeding. The court summarized its holding:

[O]nce a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined, there is a legitimate expectation that the sentence, although illegal under the Penal Law, is final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of post-release supervision.

On March 5, John W. McConnell, counsel to Chief Administrative Judge Ann Pfau, issued a memo setting

forth an expedited procedure for vacating PRS in light of *People v Williams*. According to the memo, almost 1,000 defendants who were resentenced to PRS are now entitled to have the PRS component of their resentence vacated. More than 100 of those defendants were in prison for violating the conditions of the illegally-imposed PRS; those defendants' cases were scheduled to be returned to court within a week for a conference and determination of the applicability of *Williams*.

The Manhattan District Attorney's office applied to the United States Supreme Court for a stay of enforcement of *Williams*, which the Court denied on April 19. (www.law.com, 04/20/2010.)

Probation Department Issues Emergency Rules for Ignition Interlock Program

The state Department of Probation and Correctional Alternatives (DPCA) recently issued emergency regulations governing the ignition interlock program established by Chapter 496 of the Laws of 2009, also known as Leandra's Law. The emergency regulations, 9 NYCRR Part 358, are available at <http://dpca.state.ny.us/>. As noted in the January-February 2010 issue of the *REPORT*, beginning on August 15, 2010, courts must sentence individuals convicted of a violation of Vehicle and Traffic Law 1194(2), (2-a), or (3) to probation or conditional discharge, a condition of which is the installation and maintenance of an ignition interlock device in every car owned or operated by the defendant for the duration of the probation or conditional discharge or six months, whichever is longer. (www.nysda.org/2010-BackupCenter-REPORT-Jan-Feb.pdf.)

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The emergency regulations require that each county and New York City create an ignition interlock program plan, which must be submitted to DPCA by June 15, 2010. *See* 9 NYCRR 358.4. Counties must designate one or more persons or entities to act as monitors when an ignition interlock device has been imposed as part of a conditional discharge and create procedures for notifying the probation department and monitor when a court imposes an ignition interlock condition and for addressing failure reports. The regulations require that county plans be developed in consultation with members of the local criminal justice community, including “a representative of an agency providing legal services to those unable to afford counsel in criminal cases designated by the county executive.”

Defendants subject to an ignition interlock condition must pay for the installation and maintenance of the interlock device unless the court concludes that they are financially unable to afford those costs. DPCA, in consultation with the Office of Court Administration, created a financial disclosure report form that defendants must complete prior to sentencing. The form requires disclosure of income, assets, and expenses. According to the emergency regulations, courts will give copies of the report to defense counsel and the prosecution. *See* 9 NYCRR 358.8.

The emergency regulations also set forth rules for defendant operators (§ 358.7(c)), procedures for intrastate and interstate probation and conditional discharge transfers (§ 358.7), and rules governing manufacturers, installers, and service providers (§ 358.5).

First Department Concludes that Merger of Bronx Criminal and Supreme Courts Violates New York State Constitution

In a 4 to 1 decision, the First Department reversed the defendant’s misdemeanor conviction, concluding that the Criminal Division of the Bronx County Supreme Court (BCD) never acquired jurisdiction to try and sentence the defendant under the misdemeanor information. *See People v Correa*, 70 AD3d 532. In September 2004, the Chief Judge promulgated 22 NYCRR Part 42, which gave the Chief Administrative Judge the authority to merge the Bronx Criminal Court with the Bronx County Supreme Court. Under the Chief Administrative Judge’s rules (22 NYCRR Part 142), which were effective November 5, 2004, the Criminal Court retained preliminary jurisdiction over all criminal cases, but all misdemeanor and felony cases not resolved at arraignment were transferred to the BCD.

The majority held: “[T]he establishment of the BCD by administrative decree, which eviscerates the Bronx Criminal Court by depriving it of its jurisdiction over class A misdemeanors and effectively restructures the constitutionally created Unified Court System, is not jus-

tifiable under the State Constitution, the Criminal Procedure Law, the Judiciary Law or any of the statutes or rules governing the administrative powers of the Chief Judge of the State of New York and Chief Administrator of the Courts.”

Justice Rolando T. Acosta, who dissented in *Correa*, granted the prosecution leave to appeal to the Court of Appeals. The Court of Appeals set an expedited briefing schedule with oral argument set for May 5. The Office of Court Administration filed an amicus brief in support of the prosecution. Chief Judge Lippman, who was the Chief Administrator of the Courts at the time of the merger, recused himself from the case.

The Court of Appeals will also hear arguments on May 5 in *People v Fernandez*, (897 NYS2d 158 [2nd Dept 2010]), which addresses whether specialty courts can exercise jurisdiction over misdemeanor charges, and *People v Wilson* (59 AD3d 153 [1st Dept 2010] *lv granted* 12 NY3d 790 [2010]), another case from Bronx County that raises the same issue as in *Correa*.

Forensic Science News

Federal District Court Judge Issues Procedural Order on Trace Evidence; Urges Defense Counsel to Challenge Admissibility

United States District Court Judge Nancy Gertner (D. Mass.) issued a procedural order addressing the admissibility of various types of trace evidence. Judge Gertner issued the order in response to the National Academy of Science’s February 2009 report, *Strengthening Forensic Science in the United States: A Path Forward*. “In the past, the admissibility of this kind of evidence was effectively presumed, largely because of its pedigree – the fact that it had been admitted for decades. As such, counsel rarely challenged it, and if it were challenged, it was rarely excluded or limited. *But see United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999) and *United States v. Green*, 405 F. Supp. 2d 104 (D. Mass. 2005). The NAS report suggests a different calculus – that admissibility of such evidence ought not to be presumed; that it has to be carefully examined in each case, and tested in the light of the NAS concerns, the concerns of *Daubert/Kumo* case law, and Rule 702 of the Federal Rules of Evidence.”

The order requires that appointed counsel notify the court as to whether expert funds are sought to deal with trace evidence and requires that the parties state whether they seek to introduce trace evidence and whether a *Daubert/Kumo* hearing is requested, and if a hearing is requested, the witnesses and exhibits that will be presented. The order is available at www.mad.uscourts.gov/boston/pdf/ProcOrderTraceEvidenceUPDATE.pdf.

Queens County Supreme Court Judge Finds Low Copy Number DNA Testing Satisfies Frye

After holding a *Frye* hearing that spanned from 2008 to 2009, Judge Robert Hanophy ruled that the prosecution established that low copy number (LCN) DNA testing “as conducted by the OCME [New York City Office of the Chief Medical Examiner] is generally accepted as reliable in the forensic scientific community under the standard enunciated in *Frye* . . .” *People v Megnath*, No. 917/2007, 2010 NY Slip Op 20037 (Supreme Ct, Queens Co 2/8/2010). The court also concluded that, under the *Frye* doctrine, the OCME’s LCN DNA testing is not a novel scientific technique because LCN testing uses the same analysis as high copy number DNA testing, which has been admissible in New York for over 20 years. With regard to defense counsel’s objections, including concerns about transference and the increased incidence of allelic drop-out, drop-in, and stutter, the court found that they relate to the weight of the evidence, not its admissibility.

Low copy number DNA testing is done on extremely small DNA samples or samples that are in poor condition that could not be tested using standard DNA testing protocol. The federal government’s DNA Initiative offers a free web course on LCN DNA and other types of DNA testing: www.dna.gov/training/markers/. *DNA’s Identity Crisis*, a recent article in the journal *Nature*, discusses LCN testing and questions that have been raised about the accuracy of the practice, particularly in the United Kingdom. (www.nature.com/news/2010/100317/full/464347a.html.) That article references a 2009 Los Angeles Superior court decision, which held that LCN DNA evidence was inadmissible. See *People v Espino*, No. NA-076620 (3/13/2009). Attorneys who would like more information about LCN DNA testing and other forensic evidence should contact the Backup Center.

Nominations for NYSDA’s Annual Meeting Awards Sought

Nominations are sought for two awards that will be presented at NYSDA’s 43rd Annual Meeting and Conference.

Kevin M. Andersen Memorial Award

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defender’s Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This award is presented to an attorney who has

been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin’s hallmarks. Nominations with supporting materials should be forwarded to the Genesee County Public Defender’s Office, One West Main Street, County Building, Batavia, NY 14020.

Wilfred R. O’Connor Award

Wilfred R. O’Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid’s Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous client-centered representation. The NYSDA Board of Directors created the Wilfred R. O’Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be presented to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill’s life. Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314.

Federal Loan Forgiveness Program to be Administered by States

The United States Department of Justice’s Bureau of Justice Assistance (BJA) has released information about the administration of the recently funded John R. Justice Prosecutors and Defenders Incentive Act (JRJ) program. (www.ojp.usdoj.gov/BJA/grant/johnrjustice.html.) BJA will be partnering with state governors and their designated state agencies to establish state JRJ programs that are consistent with the JRJ and BJA program guidelines. A program solicitation will be posted on the BJA website soon. Each state that applies for funding will receive a minimum of \$100,000; additional funding will be provided in an amount proportional to each state’s share of the national population. More information about the Act and other loan repayment assistance is available in the January-February 2010 and June-August 2009 issues of the *REPORT*. (www.nysda.org/html/the_report.html.) ☪

CONFERENCES & SEMINARS

Sponsor: ABA Criminal Justice Section
Theme: Prescriptions for Criminal Justice Forensics
Date: June 4, 2010
Place: New York City
Contact: ABA Criminal Justice Section (Carol Rose): tel (202) 662-1519; email carolrose@staff.abanet.org; website www.abanet.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Wayne County DWI Update 2010
Date: June 11, 2010
Place: Lyons, NY
Contact: NYSACDL: tel (212) 532-4434; website www.nysacdl.com

Sponsor: **New York State Defenders Association**
Theme: **Defender Institute Basic Trial Skills Program**
Dates: **June 13-18, 2010**
Place: **Troy, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

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; website www.nysda.org**

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2010 Annual Meeting—Putting the Pieces Back Together: Preventing & Correcting Wrongful Convictions
Dates: August 11-14, 2010
Place: Toronto, Canada
Contact: NACDL (Tamara Kalacevic): tel (202) 872-8600 x 241; email tamara@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: The Modern Day “Scarlet Letter”
Dates: August 26-28, 2010
Place: Las Vegas, NV
Contact: NCADRC: tel (419) 865-0513; email info@falseallegation.org; website www.falseallegation.org

Sponsor: National Legal Aid & Defender Association
Theme: Nuts & Bolts of Leadership & Management
Dates: September 24-26, 2010
Place: Cincinnati, OH
Contact: NLADA (Karl Doss): tel (202) 452-0620 x 244; email k.doss@nlada.org; website www.nlada.org/Training

Job Opportunities

The Wyoming County-Attica Legal Aid Bureau, Inc. and Wyoming County Public Defender’s Office seek a full-time **Staff Attorney**. Some of the responsibilities will include felony trial work, local criminal courts, appeals, and prison litigation, which includes Article 78 and Article 70 petitions. Full benefits. Send resume and cover letter to: Norman P. Effman, Executive Director/Public Defender, 18 Linwood Ave, Warsaw, NY 14569. No phone calls please. EOE. Application deadline: June 1.

The Public Defender Service for the District of Columbia (PDS) seeks an **Appellate Attorney**. PDS is a federally funded, independent organization that provides legal representation to the indigent clients of the District of Columbia who are charged with criminal offenses and are facing a loss of liberty. An Appellate Division attorney is expected to handle criminal appeals in the District of Columbia Court of Appeals. The attorney

must be able to work well with clients and write and argue a substantial number of appellate briefs in serious criminal cases each year. Other responsibilities include representing clients in post-conviction proceedings, participating in moot court for colleagues and advising and training Public Defender Service and Criminal Justice Act attorneys on legal issues and appellate practice. Qualifications required: J.D. or equivalent degree from an accredited law school; membership in the DC Bar or eligibility for reciprocity admission to the DC Bar; and excellent research, writing, and oral persuasion skills. Preferred qualifications include experience as an appellate attorney, experience representing indigent clients in criminal cases, and experience preparing and presenting cases in trial courts. For more information, including application instructions, visit www.pdsdc.org/Employment/JobOpportunities.aspx. Position open until filled.

The Council of State Governments (CSG) Justice Center is hiring a **Project Director** for the Criminal Justice/Mental Health Consensus Project. The Consensus Project is a national effort to help criminal justice and mental health professionals improve the response to people with mental illnesses involved in the criminal justice system. The ideal candidate will have the following experience and qualifications: demonstrated success working in the policy arena in policy formation, analysis, advocacy, research or the like; excellent analytical skills and knowledge of current trends, principal theories, leading thinkers and major concerns in the criminal justice field; solid management skills; an ability to plan, organize and follow through with staff; experience administering budgets and assessing organizational capacity; demonstrated success in project and grants management,

(continued on page 39)

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

Forensics (General)	FRN; 173(10)
Habeas Corpus (Federal)	HAB; 182.5(15)
Witnesses (Experts)	WIT; 390(20)

McDaniel v Brown, 558 US __, 130 Sct 665 (2010)

The respondent was convicted of rape. While the eyewitness evidence was not definitive, the circumstantial evidence showed that the respondent had the time and opportunity to commit the rape and the prosecution's expert testified that the respondent's DNA matched the rape kit profile. The state courts affirmed the conviction and denied his postconviction motion. In his federal habeas petition, the respondent argued that, in conducting its review under *Jackson v Virginia* (443 US 307 [1979]), the court should exclude some of the prosecution's DNA evidence for two reasons: the expert mischaracterized the random match probability and misstated the probability of a match among the respondent's brothers. The respondent presented a new expert report (the Mueller report) in support of his claim. The district court granted the petition and the Circuit Court affirmed.

Holding: The court incorrectly applied *Jackson* by considering the Mueller report. When conducting a *Jackson* analysis, the court must determine, based on the record evidence, whether the jury acted in a rational manner in returning a guilty verdict. Even assuming that the court could have considered the Mueller report, it erred in holding that the state supreme court's rejection of the respondent's insufficiency of the evidence claim involved an unreasonable application of clearly established federal law. *See* 28 USC 2254(d)(1). The Mueller report did not provide a basis for completely excluding the DNA evidence. The report showed that the prosecution's expert committed the prosecutor's fallacy, the assumption that the random match probability is the same as the probability that the defendant was not the source of the sample, and may have incorrectly calculated the probability of a match between the brothers. But the report did not contest that the respondent's DNA matched the rape kit profile and did not challenge the expert's qualifications or the validity of her tests. The court also failed to review the non-DNA evidence in the light most favorable to the prosecution. And the respondent forfeited his due process

claim, based on *Manson v Braithwaite* (432 US 98 [1977]), by not raising it in his federal habeas petition. Judgment reversed and matter remanded for consideration of the ineffective assistance of counsel claim.

Concurrence: [Thomas, J] The Court should not have reviewed the Muller report since it was not part of the record and thus, could not be considered in deciding the *Jackson* claim.

Counsel (Competence/Effective Assistance/Adequacy)	COU; 95(15)
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Death Penalty (Penalty Phase) (States [Ohio])	DEP; 100(120) (155[jj])
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Instructions to Jury (Burden of Proof) (General)	ISJ; 205(20) (35)
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Smith v Spisak, 558 US __, 130 Sct 676 (2010)

The respondent was convicted of murder and sentenced to death. In his federal habeas petition, the respondent alleged constitutional error in the penalty phase instructions and ineffective assistance of counsel. The district court denied his petition, but the Circuit Court reversed. The Supreme Court vacated and remanded for further consideration and the Circuit Court reinstated its earlier opinion.

Holding: The state courts' denial of the respondent's objection to the penalty phase instructions was not contrary to or did not involve an unreasonable application of clearly established federal law. *See* 28 USC 2254(d)(1). Unlike in *Mills v Maryland* (486 US 367 [1988]), the trial court did not instruct the jury that it must determine the existence of each mitigating factor unanimously. Instead, the instructions and forms clearly required that, in order to recommend a death sentence, the jury find unanimously and beyond a reasonable doubt that the aggravating factors outweighed any mitigating evidence. And this Court has never found jury instructions unconstitutional because, as in this case, they required the jury to unanimously reject a death sentence before considering sentencing alternatives. The respondent's claim that his counsel's sentencing phase closing argument deprived him of effective assistance of counsel must be denied; even assuming counsel's representation fell below an objective standard of reasonableness, there is no reasonable probability that, but for counsel's errors, the result would have been different. *See Strickland v Washington*, 466 US 668 (1984). Given the prosecution's evidence regarding the killings and the respondent's boastful confessions and threats to commit further violence, it is not reasonably probable that a greater emphasis on the expert testimony about the respondent's mental illness and a more explicit or elaborate appeal for mercy could have changed the result. And the respondent did not identify other mitigat-

US Supreme Court *continued*

ing factors that counsel could have mentioned. Judgment reversed.

Concurrence: [Stevens, J] The jury instructions requiring the jury to unanimously reject a death sentence before considering other sentencing options violated *Beck v Alabama* (447 US 625 [1980]), but the error was harmless in light of respondent's conduct before the jury and the aggravating circumstances. While counsel's closing argument was so egregious that it was constitutionally deficient under any standard, "even the most skillful of closing arguments . . . would not have created a reasonable probability of a different outcome in this case."

Courts (Federal) (Rules) CRT: 97(10) (55)

Trial (Prejudicial Publicity) TRI; 375(40)

Hollingsworth v Perry, 558 US __, 130 Sct 705 (2010)

The District Court for the Northern District of California amended its local rule prohibiting the recording or broadcast of proceedings by creating an exception for participation in a pilot or other project authorized by the Ninth Circuit. The chief judge of the district court, who is presiding over a lawsuit challenging California's Proposition 8, issued an order allowing the trial in that case to be broadcast live to a number of federal courthouses around the country. The defendant/intervenors in that case sought a stay of the order.

Holding: A stay is appropriate because the district court's amendment to its local rules likely did not comply with federal law (*see* 28 USC 2071), and the applicants for the stay have demonstrated that irreparable harm would likely result from the district court's actions. "Reasonable minds differ on the proper resolution of [the] debate [about broadcasting courtroom proceedings] and on the restrictions, circumstances, and procedures under which such broadcasts should occur. We do not here express any views on the propriety of broadcasting court proceedings generally." Courts and legislatures have proceeded with appropriate caution when addressing this issue. In 1996, after a multiyear study, the Judicial Conference of the United States adopted a policy opposing such broadcasting and the Judicial Conference continues to adhere to this position. "The arguments in favor of developing procedures and rules to allow broadcast of certain cases have considerable merit, and reasonable minds can surely differ over the general and specific terms of rules and standards adopted for that purpose. Here, however, the order in question complied neither with existing rules or policies nor the required procedures for amending them." Application for a stay granted pending the timely filing and disposition of a certiorari petition or the filing and disposition of a mandamus petition.

Dissent: [Breyer, J] The applicants did not meet any of the requirements for a stay. *See Rostker v Goldberg*, 448 US 1306, 1308 (1980). "I recognize that the Court may see this matter not as one of promulgating and applying a local rule but, rather, as presenting the larger question of the place of cameras in the courtroom. But the wisdom of a camera policy is primarily a matter for the proper administrative bodies to determine."

Juries and Jury Trials (Selection)

JRY; 225(55)

Trial (Public Trial)

TRI; 375(50)

Presley v Georgia, 558 US __, 130 Sct 721 (2010)

Just before the prospective jurors entered the courtroom for voir dire, the judge told the lone audience member, the petitioner's uncle, to leave the room and that floor of the courthouse during the voir dire. The court rejected the petitioner's counsel's objection to the exclusion, stating that there was no room for the public during jury selection. After his conviction, the petitioner moved for a new trial, which the court denied, finding that the court had the discretion to decide whether to have family members in the courtroom intermingling with or sitting behind the jurors. The state supreme court affirmed.

Holding: The defendant's Sixth Amendment right to a public trial extends to jury voir dire. This issue is well settled under *Press-Enterprise Co v Superior Court of Cal, Riverside Cty* (464 US 501 [1984]) and *Waller v Georgia* (467 US 39 [1984]). In *Press-Enterprise*, this Court held that the First Amendment requires that voir dire of prospective jurors be open to the public. And in *Waller*, this Court, relying heavily on *Press-Enterprise*, found that the Sixth Amendment right to a public trial extends beyond the actual proof at trial, including pretrial suppression hearings. "[T]here is no legitimate reason, at least in the context of juror selection proceedings, to give one who asserts a First Amendment privilege greater rights to insist on public proceedings than the accused has." There are exceptions to the accused's right to insist that the juror voir dire be public, but those circumstances are rare and the court must specifically articulate the particular interest and the threat to that interest. Trial courts must consider all reasonable alternatives to courtroom closure, even when they are not offered by the parties. The general risk that jurors will overhear prejudicial remarks, not supported by specific threats or incidents, exists whenever the public is present during jury selection. But if this concern was sufficient to override the defendant's Sixth Amendment right to a public trial, a court could exclude the public under almost any circumstances. Judgment reversed.

Dissent: [Thomas, J] Summary disposition is inappropriate because *Waller* and *Press-Enterprise* do not expressly state that jury voir dire is part of the Sixth Amendment

US Supreme Court *continued*

public trial right. Even assuming that the Sixth Amendment applies, precedent does not clearly establish that the court must consider alternatives to closure in the absence of a proffer.

Death Penalty (States [Georgia]) DEP; 100(155[n])

Habeas Corpus (Federal) HAB; 182.5(15)

Wellons v Hall, 558 US __, 130 SCt 727 (2010)

The petitioner was convicted of rape and murder and sentenced to death. After trial, defense counsel learned that there were unreported *ex parte* contacts between the jury and the judge, that the jurors and a bailiff planned a reunion, and that during or immediately after the penalty phase, some jurors gave the judge and bailiff chocolate shaped as male genitalia and female breasts. The state courts affirmed the conviction and denied the petitioner’s habeas petition and request to develop the evidence. The district court denied his federal habeas petition, finding the claims were procedurally barred, and the Circuit Court affirmed.

Holding: The court erred in concluding that the petitioner’s claims were procedurally barred because the state court declined to review the merits of his claim on the ground that it has already done so. *See Cone v Bell*, 556 US __, __ (2009) (slip op at 17-18). Although the court found that the petitioner was not entitled to habeas relief based on the existing record, it did not address whether his motions for discovery and a hearing were properly denied. Even if the court did so, it is not clear that the court’s analysis was independent of the *Cone* error. Because the opinion is ambiguous, it is appropriate to remand to allow the court to fully consider the issue. Judgment vacated and case remanded.

Dissent: [Scalia, J] The Court should not issue a GVR order (grant the *certiorari* petition, vacate, and remand) because, despite its *Cone* error, the Circuit Court decided that the petitioner was not entitled to relief on the merits. If the Court believes that the Circuit Court’s merits holding was erroneous or that it should have held an evidentiary hearing, it should either summarily reverse or set the case for argument.

Dissent: [Alito, J] A GVR order is inappropriate because the Court has not identified any recent authority or development that provides a basis for reconsideration of the Circuit Court’s decision on the merits. The majority may disagree with the decision, but there is no good reason for suggesting that it did not carefully consider the issue.

Death Penalty (Penalty Phase) (States [Alabama]) DEP; 100(120) (155[a])

Developmentally Disabled (Defenses) (General) DSB; 108(15) (30)

Habeas Corpus (Federal) HAB; 182.5(15)

Wood v Allen, 558 US __, 130 SCt 841 (2010)

The petitioner was convicted of murder and sentenced to death. The petitioner’s penalty phase attorney had only been admitted to practice law for five months at the time of his appointment. The state courts affirmed his conviction. After three evidentiary hearings, the state court denied his post-conviction petition, finding that: (1) the petitioner was not mentally retarded, and therefore was eligible for the death penalty under *Atkins v Virginia* (536 US 304 [2002]); and (2) his counsel made a strategic decision not to pursue evidence of his alleged mental retardation, and that because the decision was reasonable, his performance was not deficient and there was no reasonable probability of a different result had the post-conviction evidence been presented to the jury or the court. The district court granted the petitioner’s federal habeas petition, concluding that counsel’s failure to investigate and present mitigation evidence of his mental deficiencies amounted to ineffective assistance of counsel. The Circuit Court reversed.

Holding: The state court’s factual determination that the petitioner’s counsel made a strategic decision not to pursue or present mitigating evidence of his borderline mental retardation was not an unreasonable determination of facts based on the evidence presented during the post-conviction hearings. *See* 28 USC 2254(d)(2). A state court’s factual finding is not unreasonable merely because a federal habeas court would have reached a different conclusion. *Cf Williams v Taylor*, 529 US 362, 410 (2000). The evidence the petitioner highlights, including testimony from one of his attorneys that he did not remember if he decided not to present evidence based on an expert witness report, that his two experienced attorneys designated the inexperienced third attorney to handle the penalty phase, and that the inexperienced attorney did not recall considering the petitioner’s mental deficiencies, relates to whether counsel’s judgment was reasonable, not whether counsel made a strategic decision. This Court need not decide how 28 USC 2254(e)(1), which provides that a state court’s factual decision is presumed correct, fits with 2254(d)(2). Because the question presented in the certiorari petition did not include the claim that the circuit court misapplied 28 USC 2254(d)(1) and *Strickland v Washington* (466 US 668 [1984]), it cannot be reviewed on the merits. Judgment affirmed.

Dissent: [Stevens, J] The state court’s determination was unreasonable. “[T]he failure to investigate was the product of inattention and neglect by attorneys preoccu-

US Supreme Court *continued*

pied with other concerns and not the product of a deliberate choice between two permissible alternatives.”

Forensics (General) FRN; 173(10)

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

Briscoe v Virginia, 558 US __, 130 SCt 1316 (2010)

“We vacate the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with the opinion in *Melendez-Diaz v. Massachusetts*, 557 US __, [129 SCt 2527] (2009).”

New York State Court of Appeals

Extradition (Defenses) (Escape) (General) EXT; 160(15) (20) (24)

People ex rel Blake v Pataki, 13 NY3d 912, 895 NYS2d 283 (2010)

Holding: “Once a governor of an asylum state has granted extradition, a court considering release on habeas corpus must decide ‘(a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive’ (*Michigan v Doran*, 439 US 282, 289 [1978]). A fugitive is one who, ‘having committed a crime in a demanding State, is present in an asylum State when a demanding State seeks to prosecute the offense’ (*People ex rel. Strachan v Colon*, 77 NY2d 499, 502-503 [1991]). Relator is a fugitive because he was convicted of a crime in South Carolina and escaped from incarceration. If, in 1993 or thereafter, South Carolina determined that it no longer sought to classify relator as a fugitive, it could have granted relator a pardon. Hence, relator’s equitable arguments are more appropriately posited to South Carolina.” Order affirmed and certified question not answered as unnecessary.

Evidence (Business Records) (Hearsay) EVI; 155(15) (75)

People v Ramos, 13 NY3d 914, 895 NYS2d 294 (2010)

Holding: “The trial court erred when it admitted hearsay evidence without a proper foundation (CPLR 4518[a]). Even assuming some documents may be admitted as business records without foundation testimony (*see People v. Kennedy*, 68 NY2d 569, 577 n 4), the record at issue in this case was not such a document. Nothing on its face

indicates that it ‘was made in the regular course of business and that it was the regular course of business to make it’ (CPLR 4518[a]). Nor can the error be deemed harmless in the circumstances of this case.” Order reversed, new trial ordered on the first-degree scheme to defraud and petit larceny counts, and present indictment otherwise dismissed without prejudice.

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

People v Leopold, 13 NY3d 923, 895 NYS2d 302 (2010)

Holding: “Correction Law § 168-n (3) requires the court fixing a sex-offender’s risk level determination to ‘render an order setting forth . . . the findings of fact and conclusions of law on which the determinations are based.’ Here, neither the Supreme Court nor the Appellate Division order set forth the findings of fact and conclusions of law justifying the risk level determination. We therefore remit this case to Supreme Court to specify its findings of fact and conclusions of law (*see People v Smith*, 11 NY3d 797, 798 [2008]).” Order reversed and case remitted for further proceedings.

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

Confessions (Counsel) CNF; 70(23)

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

People v Edwards, No. 80, 2/11/2010

Holding: The court properly denied the defendant’s request for a missing witness charge. The defendant had the initial burden of showing that the prosecution failed to call a witness who could be expected to have knowledge of a material issue and to provide testimony favorable to the opposing party. *See People v Macana*, 84 NY2d 173, 177. While the defendant asserted that the “uncalled witness could have either contradicted or corroborated the complaining witness,” he did not show that the witness’ testimony would have been non-cumulative or expected to be favorable to the prosecution. “Whether a particular request for counsel ‘is or is not unequivocal is a mixed question of law and fact,’ which, if supported by record evidence, is beyond further review by this Court (*People v Glover*, 87 NY2d 838, 839 [1995]). Such record evidence exists here.” Order affirmed.

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

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (Detention) SEA; 335(10[g(i)]) (25)

NY Court of Appeals *continued*

People v Francois, 14 NY3d 732, 896 NYS2d 300 (2010)

Holding: “The Appellate Division’s determination that the officer’s conduct did not elevate his encounter with defendant from a common-law inquiry to a seizure necessitating reasonable suspicion constitutes a resolution of a mixed question of law and fact that is supported by the record evidence (*see generally People v Wheeler*, 2 NY3d 370, 373 [2004]), and is therefore beyond this Court’s further power of review (*see People v Battaglia*, 86 NY2d 755, 756 [1995]).” Order affirmed.

Speedy Trial (Cause for Delay) SPX: 355(12) (32)
(Prosecutor’s Readiness for Trial)

People v Price, 14 NY3d 61, 896 NYS2d 719 (2010)

The defendant was arraigned on a felony complaint charging attempted first-degree disseminating indecent material to minors. The defendant allegedly engaged in sexually motivated communication with a person posing as a 14 year old girl. No sexual images were transmitted. Almost six months later, the Second Department held in *People v Kozlow* (31 AD3d 788) that a defendant could not be convicted for this offense where the communication did not include sexual images. The prosecution took no action on the defendant’s felony complaint until May 2007, a month after the Court of Appeals reversed in *Kozlow* (8 NY3d 554), when they presented the case to the grand jury. The defendant was arraigned on the indictment on June 14, 2007, more than 16 months after his initial arraignment. The court granted the defendant’s motion to dismiss on speedy trial grounds and the Appellate Division affirmed.

Holding: The court properly found that the exception circumstances exclusion in CPL 30.30(4)(g) did not apply. The dominant legislative intent informing CPL 30.30 was to discourage prosecutorial inaction. *See People v Sinistaj*, 67 NY2d 236, 239. This Court has limited the application of CPL 30.30(4)(g) to cases where the prosecution for practical reasons beyond their control cannot proceed with a legally viable prosecution. *See eg People v Washington*, 43 NY2d 772. While not required, the text of CPL 30.30 contemplates that the prosecution will seek a prior judicial ruling as to exceptional circumstances rather than ask the court to apply the exclusion after the fact, which would ensure that the defendant is kept abreast of the status of his case. The circumstances in this case show “prosecutorial inaction resulting in the prolonged pendency of a criminal complaint without any judicial intervention and any notification to defendant of the status of the proceeding. This is precisely the sort of conduct the Legislature intended to curb when it enacted CPL 30.30.” Speedy trial decisions do not depend on the issue of a particular defen-

endant’s guilt or the disposition of a specific case. *See People v Prosser*, 309 NY 353, 361. Order affirmed.

Fraud (General)

FRD; 176(10)

People v Taylor, 14 NY3d 727, __ NYS2d __ (2010)

The law firm defendant was convicted of four counts of offering a false instrument for filing. The law firm allegedly filed retainer statements with the Office of Court Administration that contained false representations as to the source of client referrals. The Appellate Division reversed the convictions.

Holding: The plain language of Penal Law 175.35 does not “require[] that the receiving agency take action in reliance upon the filing of such information and itself be misled to its detriment.” The intent to defraud element relates to the defendant’s state of mind in acting with a conscious aim and objective to defraud. *See Penal Law 15.05(1)*. Order reversed, conviction of the law office defendant reinstated, and case remitted for further proceedings.

Search and Seizure

SEA; 335(10[a] [g(iv)]) (15[f])

**(Arrest/Scene of the
 Crime Searches [Automobiles and
 Other Vehicles] [Probable Cause
 (Observations and State of Mind)])
 (Automobiles and Other Vehicles
 [Impound Inventories])**

People v Edwards, 14 NY3d 741, __ NYS2d __ (2010)

During a traffic stop, the police saw cocaine residue on the defendant’s hand. After they arrested the defendant, the officers found crack cocaine in his pocket and in the car. The court denied the defendant’s motion to suppress the drugs, and the defendant later pleaded guilty to drug and assault charges. The Appellate Division reversed.

Holding: The trial court properly denied the defendant’s motion to suppress the drugs. The initial stop was permissible because the police had probable cause to believe that the defendant committed a traffic infraction. The officers’ subjective motivation to investigate possible drug activity does not negate the objective reasonableness of their actions. *See People v Wright*, 98 NY2d 657, 658-659. And, “as a matter of law, the officers did not inordinately prolong the detention beyond what was reasonable under the circumstances to address the traffic infraction (*cf. People v Banks*, 85 NY2d 558, 562 [1995], *cert denied* 516 US 868 [1995]). Rather, it was proper for the police officers to return to defendant’s vehicle in order to complete the traffic stop. Because drug residue was first seen while the police had a justifiable basis to continue the detention for the traffic infraction, that observation provided probable

NY Court of Appeals *continued*

cause to arrest and search defendant, and the subsequent impoundment and inventory search of the vehicle were valid." Order reversed, motion to suppress denied, and judgment of the trial court reinstated.

Narcotics (Diversion) (Drug Treatment) (Treatment Programs) **NAR; 265(10) (14) (60)**

Sentencing (Alternatives to Incarceration) (General) (Hearing) **SEN; 345(7) (37) (42)**

People v Fiammegta, 14 NY3d 90, 896 NYS2d 735 (2010)

The defendant was charged with burglary and related offenses. The prosecution agreed to allow the defendant to participate in its Drug Treatment Alternative-to-Prison Program (DTAP). Under the plea agreement, the prosecution would agree to dismissal of the indictment once the defendant successfully completed a residential drug treatment program and aftercare, but if he was unsuccessful, he would be sentenced to a term of imprisonment. The defendant was at risk of discharge from the first program and the court allowed him to enter a new program. The second program discharged him after he was accused of theft. The DTAP supervisor would not allow the defendant to participate in a third program. The court denied defense counsel's request for a hearing regarding the defendant's discharge, found that the defendant was unsuccessful, and sentenced him to the term stated in the plea agreement. The Appellate Division affirmed.

Holding: "[W]hen a program discharges a defendant for misconduct, the court must carry out an inquiry of sufficient depth to satisfy itself that there was a legitimate basis for the program's decision, and must explain, on the record, the nature of its inquiry, its conclusions, and the basis for them." See *People v Outley*, 80 NY2d 702. The trial court has broad discretion when supervising a defendant who is in DTAP and deciding whether the conditions of the DTAP plea agreement were met. See *People v Jenkins*, 11 NY3d 282, 289. And the Legislature endorsed such judicial flexibility in the new judicial diversion program. See CPL 216.05(9)(b). Because sentencing is a critical stage of the proceeding, the court must comply with due process, including assuring itself that the factual basis for the sentence is reliable and accurate. In this case, the court did not need to conduct an evidentiary hearing or to determine by a preponderance of the evidence that the defendant was guilty of the thefts. But it should have considered the defendant's argument that his discharge was based on little evidence after an inadequate investigation and allowed the defendant to submit letters and testimony or affidavits from his family regarding the matter. This

inquiry was necessary even though the prosecution refused to agree to further treatment. If the court concluded that he was improperly discharged, it could at least give the defendant the opportunity to withdraw his plea before imposing sentence. Order reversed and case remitted.

Appeals and Writs (General) (Judgments and Orders Appealable) **APP; 25(35) (45)**

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

Matter of Kachalsky v Cacace, 14 NY3d 743, __ NYS2d __ (2010)

The petitioner asserted that Penal Law 400.00(2)(f) violates the Second Amendment of the United States Constitution.

Holding: Appeal dismissed *sua sponte*, upon the ground that no substantial constitutional question was directly involved.

Dissent: [Smith, J] Article 6, § 3 (b)(1) of the New York State Constitution and CPLR 5601(b) state that appeals to this Court in civil cases may be taken as of right from an order that finally determines an action that directly involves the construction of the constitution of the state or the United States. These provisions do not require that the constitutional question be substantial. This Court has given the term substantial such a flexible meaning that it gives the Court "in effect, discretion comparable to what we have in deciding whether to grant permission to appeal under CPLR 5602." The petitioner's case directly raises two constitutional questions, neither of which is insubstantial. Therefore, the petitioner has a constitutional right to have this Court hear his appeal.

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

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

People v Ochoa, Nos. 22 & 23, 2/16/2010

The defendants were convicted of robbing Cruz. Cruz and Ruballo, who was present during the incident, testified at trial. Defense counsel impeached Cruz with false statements he made before the grand jury, but Cruz testified that he was "confused" by some of the grand jury questions. The court, over counsel's objection, allowed the prosecution to ask Cruz whether he was confused when he testified about other specific parts of the incident. And after Ruballo admitted during cross-examination that parts of her prior statement were untrue, the court, again over counsel's objection, allowed the prosecution to elicit

NY Court of Appeals *continued*

from Ruballo that other parts of her statement were true. An hour after the jury reached a verdict, the foreperson sent a note to the judge stating that he did not “feel comfortable reading this verdict.” Without telling defense counsel, the judge met with the foreperson. Immediately after the meeting, the judge told the parties about the foreperson’s note and that, after discussing the method for reading the verdict, the foreperson seemed relieved and said, “Oh, okay, fine.” Defense counsel did not object to how the court addressed the note. The Appellate Division affirmed.

Holding: The prosecution’s redirect was proper and did not amount to improper bolstering. The questions the prosecutor asked Cruz related to the matters raised during defense counsel’s cross-examination, and “did no more than to explain, clarify and fully elicit a question only partially examined by the defense” (*People v Regina*, 19 NY2d 65, 78 [1966]” The prosecution’s redirect of Ruballo merely “fill[ed] in the gaps that defense counsel left during cross-examination, after defense counsel implied that Ruballo’s entire statement to police was a lie.” See *People v Torres*, 42 NY2d 1036, 1037. Because the foreperson’s note was ambiguous and could have been substantive, it may have been more prudent for the judge to follow the procedures set forth in *People v O’Rama* (78 NY2d 270) before responding to the note. However, the judge acted within his discretion by clarifying the note’s meaning before notifying defense counsel. See *People v Lykes*, 81 NY2d 767, 770. Since the foreperson’s note related to a ministerial issue (see *gen People v Hameed*, 88 NY2d 232, 240-241), the judge did not have to notify defense counsel or give them an opportunity to respond. Orders affirmed.

Dissent: [Jones, JJ] The court permitted improper bolstering and the error was not harmless. The prosecution was attempting to recast the entire testimony of the two witnesses who gave several different versions of the crime and the surrounding events. Given that the foreperson’s note came “one hour after the jury announced that it had reached a verdict, following three days of deliberations and two notes declaring a deadlock, this court had every reason to believe that the verdict was a problem to at least one juror.” The judge’s response to the note cannot be justified by facts that came to light as a result of the judge’s meeting with the foreperson.

Accusatory Instruments (General) ACI; 11(10)

Jurisdiction (General) JSD; 227(3)

People v Pierce, No. 27, 2/16/2010

The defendant was charged in two separate felony complaints with fourth-degree grand larceny, based on

theft of funds from a bank account, and fourth-degree criminal possession of stolen property, based on possession of a stolen vehicle. Regarding the grand larceny charge, the defendant waived indictment and agreed to be prosecuted by a superior court information (SCI) that charged him with grand larceny, as well as third-degree criminal possession of stolen property. The Appellate Division affirmed.

Holding: The third-degree criminal possession of stolen property charge was improperly included in the waiver of indictment and SCI because that charge was not sufficiently similar in law to the fourth-degree grand larceny charge, which was the prosecution’s basis of the consolidation of charges. See CPL 195.20; 200.20(2)(c). Therefore, the SCI is jurisdictionally defective. A comparison of the two charges shows that they have little, if anything, in common. The two incidents were not factually similar and the elements of the offenses are quite distinct. The waiver of indictment and SCI are not invalid based on the rationale of *People v Zanghi* (79 NY2d 815), however. Unlike in *Zanghi*, the SCI in this case included the exact offense that was charged in the superior court felony complaint. That the SCI also contained the third-degree criminal possession charge, which is a higher grade offense than the grand larceny charge, standing alone, does not invalidate the waiver of indictment and the SCI. Since reversal is based on a statutory violation, the defendant’s claim that CPL 195.20 is unconstitutional because it allows waiver of indictment and prosecution by SCI of offenses for which the defendant was never held for action by the grand jury is not addressed. Order reversed, guilty plea vacated, SCI dismissed and case remitted for further proceedings.

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

People v Brown, No. 28, 2/18/2010

The defendant, unable to make bail, was held in custody from his arrest until his guilty plea. During that time, the defendant consistently maintained his innocence. Shortly after his indictment, the defendant’s son was hospitalized and was in a coma. Jail officials denied the defendant’s request to visit his son. The defendant then accepted a plea offer after the court agreed to give him a furlough of three weeks to visit his son. During the plea colloquy, the court confirmed that no threats or promises were made to him, other than the furlough. The court did not ask whether the plea was voluntary. At sentencing, the defendant moved to withdraw his plea on the ground that it was involuntary, which the court denied without a hearing. The Appellate Division affirmed.

Holding: The court erred in denying the defendant’s motion to withdraw his plea without a hearing. Although

NY Court of Appeals *continued*

the nature and extent of the fact-finding inquiry rests largely in the discretion of the judge (*see People v Tinsley*, 35 NY2d 926, 927), an evidentiary hearing was required because the record raised a legitimate question as to the voluntariness of the defendant's plea. The defendant asserted that the jail officials denied his request to visit his son on the mistaken belief that his son's condition was not serious, that he pleaded guilty "as a result of emotional and mental distress caused by his fear of his son's death," and that he would not have pleaded guilty if his son was not in a coma. "[W]hether defendant admitted his guilt to the charged crimes does not inform the analysis of whether the plea was voluntary." This case is distinguishable from *People v Fiumefreddo* (82 NY2d 536). The record does not indicate that the terms of the plea were subject to extended discussion or that the defendant had sufficient time to consider the alternatives to taking it. The court failed to ask the defendant about the impact that the promised furlough had on his decision to plead guilty. And it did not ask whether the defendant's plea was voluntary. The court's statement about the defendant's interest in the plea because of the promised furlough indicates that the court was aware of the central influence the furlough had on his decision to plead guilty. A plea bargain granting a furlough is not per se invalid, but such a plea may require special scrutiny by the court prior to acceptance of it. Order reversed and matter remitted for further proceedings.

Evidence (Business Records) (Relevancy) (Sufficiency) **EVI; 155(15) (125) (130)**

People v Kisina, No. 25, 2/18/2010

The defendant, a physical medicine and rehabilitation specialist, treated motor vehicle accident victims who were eligible for no-fault insurance coverage. The defendant was convicted of two counts each of first-degree falsifying business records and third-degree insurance fraud, but was acquitted of first-degree scheme to defraud. The falsifying business records charges were based upon false certificate of treatment claim forms and consultative reports detailing the testing performed that the defendant submitted to an insurance company. The Appellate Division affirmed.

Holding: Although the defendant was not employed by or an agent of the insurance company, she could still be convicted of falsifying business records of that company. *See People v Bloomfield*, 6 NY3d 165, 170-172; *see eg People v Myles*, 58 AD3d 889, 890-892. Penal Law 175.10 "proscribes no limitation or preconditions on the types of persons who may fall within the ambit of this crime." The documents filed by the defendant fit the definition of a business record, *ie*, "any writing or article . . . kept or

maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity' (Penal Law § 175.00[2] . . .)." The stipulated testimony of the insurance company representative provided sufficient evidence that the company was obligated to keep and maintain the consultation reports and claim forms submitted by doctors seeking payment for services rendered and that the company's financial condition was affected by false submissions because they gave rise to liabilities under its policies. The defendant was not prejudiced by the trial court's decision precluding her from presenting evidence that a state investigator posed as an accident victim and that the defendant did not administer any unnecessary procedures or submit false claims regarding that patient. While the evidence was relevant to the scheme to defraud charge, the defendant was acquitted of that charge, and the evidence did not relate to the fraudulent submission of claims regarding two other patients. Order affirmed.

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

People v Rivera, No. 86, 2/18/2010

Holding: "Defendant has not demonstrated the absence of a legitimate explanation for his appellate counsel's failure to brief the issue whether his guilty plea should be vacated under *People v Catu* (4 NY3d 242 [2005]) (*see People v Borrell*, 12 NY3d 365, 369 [2009]; *People v Rivera*, 71 NY2d 705, 709 [1988])." Order affirmed.

Evidence (Sufficiency) EVI; 155(130)

Rape (Evidence) RAP; 320(20)

People v McDade, No. 89, 2/23/2010

Holding: Legally sufficient evidence supports the defendant's second-degree rape conviction. "Forensic DNA testing of a penile swab from the victim, a severely mentally disabled 17-year-old boy, revealed the existence of significant amounts of defendant's DNA, which established that defendant had extended, non-casual contact with the victim's penis. Eyewitness evidence established that both the victim and defendant were naked. Moreover, the People elicited additional evidence that "showed that" the victim, who had the cognitive abilities of a toddler, did not understand sex and was not known to masturbate or ejaculate. This evidence provided a valid line of reasoning and permissible inferences that could lead a rational jury to conclude that the contact between defendant and L.R. was sexual intercourse, rather than oral sex or hand-to-penis contact, neither of which would require defendant to be completely naked and which would have resulted in sexual gratification to an individual who could not have understood. The fact that other inferences could

NY Court of Appeals *continued*

have been drawn by the jury does not render the evidence legally insufficient.” Order affirmed.

Double Jeopardy (General) (Punishment) **DBJ; 125(7) (30)**

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

People v Williams, Nos. 11, 12, 13, 14 & 15, 2/23/2010

The five appellants were originally sentenced to determinate terms of incarceration, but their sentences did not include mandatory terms of post-release supervision (PRS). Sometime after they completed their prison terms, the New York State Department of Correctional Services (DOCS) notified the sentencing courts that PRS was not properly imposed. Four of the appellants were resentenced to PRS and the Appellate Divisions affirmed. The fifth appellant, Echevarria, commenced a CPLR article 78 proceeding seeking to prohibit the sentencing court from resentencing him. The Appellate Division dismissed the petition.

Holding: “[O]nce a defendant is released from custody and returns to the community after serving the period of incarceration that was ordered by the sentencing court, and the time to appeal the sentence has expired or the appeal has been finally determined, there is a legitimate expectation that the sentence, although illegal under the Penal Law, is final and the Double Jeopardy Clause prevents a court from modifying the sentence to include a period of postrelease supervision.” The Supreme Court has construed the Double Jeopardy Clause of the Fifth Amendment as covering “the right not to be punished more than once for the same crime.” *See eg United States v DiFrancesco*, 449 US 117, 129 (1980). This protection prevents a court from increasing a sentence once the defendant has a legitimate expectation in the finality of the sentence, *ie*, after the government’s appeal is concluded or the time to appeal has expired. Courts have the inherent authority to correct illegal sentences (*see eg People v Richardson*, 100 NY2d 847, 852-853), and CPL 440.40 does not prevent a court from correcting an illegal sentence after one year. *See People v Wright*, 56 NY2d 613, 615. The appellants are presumed to know that their sentences were illegal and could be corrected at some point in the future. *See gen People v Sparber*, 10 NY3d 457, 471. But “there must be a temporal limitation on a court’s ability to resentence a defendant (*see generally DeWitt v Ventetoulo*, 6 F3d [32] at 34-35 [(1st Cir 1993) *cert den* 511 US 1032 (1994)]) since criminal courts do not have perpetual jurisdiction over all persons who were once sentenced for criminal acts.” It is irrelevant that the appellants were

released from prison after serving less than the full term of the determinate sentences and that some of them signed documents related to PRS before their release. DOCS’ improper imposition of PRS did not negate their reasonable expectation that, once completed, their imposed sentences would not be increased. Because the appellants’ constitutional rights were violated, the courts did not have jurisdiction to modify the original judgments. Since this implicates a fundamental mode of proceedings, the double jeopardy argument did not need to be preserved. *See eg People v Biggs*, 1 NY3d 225, 231. The appellants’ statutory arguments, however, are rejected. When the case is returned under Correction Law 601-d, the court can decline to impose PRS only with the consent of the prosecutor. *See Penal Law 70.85*. And assuming that CPL 380.30(1) applies in these cases, the court resentenced the appellants within a reasonable time after receiving notification from DOCS. In *Echevarria*, the court properly dismissed the article 78 petition because the record does not show that the court had considered whether it was appropriate to impose a term of PRS; instead, the court had scheduled the matter for consideration of whether the appellant should be resentenced. Order reversed in *Williams, Hernandez, Lewis, and Rodriguez*, resentences vacated, and original sentences reinstated, and judgment in *Matter of Echevarria* affirmed.

Dissent in Part, Concurrence In Part: [Smith, J] The appellants’ double jeopardy rights under the state and federal constitution were not violated. “[D]ue process, not double jeopardy, sets limits—though not narrow or rigid ones—on courts’ resentencing power.” And the appellants’ due process rights were not violated; “there is nothing fundamentally unfair about what happened to these defendants.”

Dissent in Part, Concurrence In Part: [Pigott, J] The appellants did not have a legitimate expectation of finality. Since they are all presumed to know that their sentences were illegal, they did not have an objective reason to believe that their sentences would not be changed or corrected. “A defendant cannot acquire a legitimate expectation of finality from the mere fact that he has been released from prison.”

First Department

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

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

People v Sene, 66 AD3d 427, 887 NYS2d 8 (1st Dept 2009)

The defendant was convicted of first-degree sexual abuse; he stripped naked, climbed onto a sleeping person, and licked her neck.

First Department *continued*

Holding: The defendant's conduct fell within the definition of first-degree sexual abuse. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person . . . for the purpose of gratifying sexual desire of either party." Penal Law 130.00(3). The neck is an intimate part "because it is sufficiently personal or private that it would not be touched in the absence of a close relationship between the parties. Moreover, since 'intimacy is a function of behavior and not merely anatomy,' the manner and circumstances of the touching should also be considered (*People v Graydon*, 129 Misc 2d 265, 268 [Crim Ct, NY County 1985]), and we reject defendant's argument that to do so would conflate the sexual gratification element with the issue of whether a body part is an intimate part." The court properly charged that a sleeping person can be considered to be physically helpless and incapable of consenting to sexual contact. *See eg People v Bush*, 57 AD3d 1119 *lv den* 12 NY3d 756. When read as a whole, the charge conveyed that the jury must decide whether the accuser, who was asleep, was physically helpless within the meaning of Penal Law 130.00(7). Judgment affirmed. (Supreme Ct, New York Co [Bartley, JJ])

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

People v Cortez, 66 AD3d 431, 886 NYS2d 402 (1st Dept 2009)

Holding: The prosecution's predicate felony statement was defective. The statement indicated that the ten-year time limit in Penal Law 70.06(1)(b)(v) was tolled because the defendant was incarcerated in a state correctional facility and the Office of Mental Health and Hygiene from September 22, 1994 and June 20, 2001. But the statement failed to indicate what portion of that time was actual incarceration and what portion may have been psychiatric treatment that does not necessarily qualify as incarceration. The defendant is not required to provide proof that he was not incarcerated during some portion of that time period. Judgment modified by vacating the persistent violent felony offender adjudication and sentence and remanding for resentencing, including the filing by the prosecution of a proper predicate felony statement, and judgment otherwise affirmed. (Supreme Ct, New York Co [Stolz, JJ])

Discovery (Matters Discoverable) (Procedure [Motions] [Subpoena Duces Tecum]) **DSC; 110(20) (30)[j] [t]**

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

People v Credle, 66 AD3d 572, 887 NYS2d 90 (1st Dept 2009)

Holding: The prosecution did not need court permission to re-present the defendant's case to a second grand jury. The first grand jury's inability to agree on an indictment or dismissal does not constitute a dismissal and thus, leave to re-present was not required. *See People v Aarons*, 2 NY3d 547, 549. Unlike in *People v Wilkins* (68 NY2d 269), the prosecution did not withdraw the case from the grand jury without taking a vote and then re-present it to a second grand jury. "Re-presenting a case to a second grand jury after what could be described as a 'hung grand jury' does not involve forum shopping." The court properly denied the defendant's request to compel the prosecution to produce arrest reports regarding people arrested on unrelated charges at the same time and place as the defendant. These documents were not *Brady* or *Rosario* material and did not fall within CPL article 240. The defendant failed to preserve for review his claim that the documents were the proper subjects of a subpoena duces tecum. The defendant did not ask the court for a subpoena, did not prepare a subpoena, and did not comply with the requirements of CPLR 2307 for obtaining government records. *See* CPL 610.20(3). And the defendant did not preserve his claim that the court should have issued the subpoena by merely alluding to it as a possible remedy. *See People v Borrello*, 52 NY2d 952. The defendant also failed to show that it was reasonably likely that the documents would bear relevant and exculpatory evidence. *See Matter of Constantine v Leto*, 157 AD2d 376, 378 *affd* 77 NY2d 975. Judgment affirmed. (Supreme Ct, New York Co [Soloff, J (dismissal motion); Padro, J (trial and sentence)])

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

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

People v Brunson, 66 AD3d 594, 888 NYS2d 22 (1st Dept 2009)

Holding: The evidence was legally insufficient to establish that the defendant had the intent to defraud, deceive, or injure another, which is an element of second-degree criminal possession of a forged instrument. *See* Penal Law 170.25. This unpreserved issue is reached in the interest of justice. While the defendant was shoplifting, he had an altered state identity card. He did not use the card, which the store security guards found when they searched him. "Defendant's knowing possession of the forged card was not sufficient to prove intent, and he engaged in no conduct evincing an intent to use it (*see People v Bailey*, 13 NY3d 67, 72)." The prosecution's theo-

First Department *continued*

ry that the defendant intended to use the card to misrepresent his identity if he was arrested was too speculative to establish the intent element. The court properly denied the defendant's motion to set aside the verdict on the ground of juror misconduct. Two days after the verdict, a juror told a court officer that the other jurors unfairly coerced him into voting guilty. In support of his motion, the defendant presented an unsworn note from the court officer reciting his conversation with the juror. "[E]ven when a defendant asserts a cognizable type of jury misconduct, a motion to set aside the verdict must be based on sworn allegations of fact (CPL 330.40[2][e][ii])." Defense counsel must investigate the allegations (*see People v Brown*, 57 AD3d 238, 239 *lv den* 12 NY3d 781), and the defendant is not entitled to a hearing based on an expectation that the hearing might uncover the necessary facts. *See People v Johnson*, 54 A3d 636, 636 *lv den* 11 NY3d 898. Judgment modified by vacating the forged instrument conviction and dismissing that count of the indictment and judgment otherwise affirmed. (Supreme Ct, New York Co [Kahn, JJ])

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

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

Matter of Charisma D. v Sandra R., 67 AD3d 404, 889 NYS2d 13 (1st Dept 2009)

Holding: The evidence was legally insufficient to establish neglect. *See* Family Court Act 1012(f)(i)(B). During a search of the apartment in which the respondent lived with her children and her mother, the police found one glassine envelope each of heroin and cocaine and a digital scale, none of it in plain view. The respondent, one of her children, the respondent's sister, her mother, and her mother's boyfriend were present during the search. The heroin was found in a dining room cabinet, the cocaine was in the respondent's mother's bedroom, and the scale was in a dresser drawer in the respondent's bedroom. The respondent's mother told the police that the drugs were hers, and the respondent told the officers that her mother used drugs and that any drugs found in the apartment belonged to her mother. The respondent told the officers about the scale and said that it belonged to her son's father, who no longer lived in the apartment. A subsequent order discharged the children to the respondent's custody. Orders of disposition reversed insofar as they bring up for review the fact-finding determination, petition dismissed, and the portion of the appeal related to the terms of the placement is dismissed as academic. (Family Ct, New York Co [Schechter, JJ])

Witnesses (Interpreters) (Police) **WIT; 390(35) (40)**

People v Quan Hong Ye, 67 AD3d 473, 889 NYS2d 556 (1st Dept 2009)

Holding: "The court properly admitted the testimony of a police officer concerning defendant's admissions, which were translated to him by another officer acting as an interpreter. Since the record presents no motive for the translator to mislead, nor any reason to question the accuracy of his translations, the testimony was admissible under the agency exception to the hearsay rule (*see People v Romero*, 78 NY2d 355, 362 [1991]). The agency exception applies even though the interpreter was a law enforcement officer primarily acting on behalf of the Police Department (*see United States v Da Silva*, 725 F2d 828, 831-832 [2d Cir 1983]). Although defendant did not choose the interpreter, he accepted him as his agent for the purpose of translating his words into English (*see People v Morel*, 8 Misc 3d 67, 69-70 [App Term, 2d Dept 2005], *lv denied* 5 NY3d 808 [2005])." The interpreting officer testified that his translation was truthful and accurate and gave testimony regarding the substance of the defendant's admissions that essentially matched the interrogating officer's testimony. Judgment affirmed. (Supreme Ct, New York Co [Bradley, JJ])

Juveniles (Hearing) (Parental Rights) **JUV; 230(60) (90)**

Prisoners (Access to Courts and Counsel) (Family Relationships) **PRS I; 300(2) (16)**

Matter of Karla V. v Angel L., 68 AD3d 443, 888 NYS2d 880 (1st Dept 2009)

Holding: The court improperly denied the respondent an opportunity to be heard. *See* Family Court Act (FCA) 433(a). Although the respondent informed the court in writing that he was incarcerated and that he wanted to participate in the hearing, the court did not make any effort to produce him for the hearing or allow him to testify by phone or other electronic means, as permitted by FCA 433(c)(ii). "[E]ven an incarcerated parent has a right to be heard on matters concerning [his] child, where there is neither a willful refusal to appear nor a waiver of appearance" (*Matter of Tristram K.*, 25 AD3d 222, 226 [2005]; *see Matter of Jung* [State Commn. on Jud. Conduct], 11 NY3d 365, 373 [2008])." Order reversed, objection sustained, and matter remanded for a new hearing on the petition. (Family Ct, Bronx Co [Stokinger, JJ])

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

Matter of State of New York v Rashid, 68 AD3d 615, 892 NYS2d 76 (1st Dept 2009)

First Department *continued*

Holding: “Respondent was not subject to civil management pursuant to Mental Hygiene Law article 10 where he had served his sentence for a 1988 rape and sodomy and was on parole for a nonsexual offense and, in September 2008, the Division of Parole gave notice identifying him as a possible ‘detained sex offender’ nearing release from custody. The different consequences of a Sexual Offender Registration Act determination and the possibility of involuntary civil commitment under Mental Hygiene Law article 10 (*compare People v Knox*, 12 NY3d 60 [2009], *with Mental Hygiene Legal Serv. v Spitzer*, 2007 WL 4115936, 2007 US Dist LEXIS 85163 [SDNY 2007], *aff’d* 2009 WL 579445, 2009 US App LEXIS 4942 [2d Cir 2009]), as well as the specific definition in the latter regarding which sentences other than those for sex offenses may be considered in determining an offender’s eligibility for civil management (*see generally People v Finley*, 10 NY3d 647, 655 [2008]), render Penal Law § 70.30 inapplicable for the purpose of merging the sentence for the rape into respondent’s subsequent sentence for the nonsexual offense (*cf. People v Buss*, 11 NY3d 553 [2008]). Contrary to the State’s contention, Penal Law § 70.30 and Mental Hygiene Law article 10 are not so related that they must be harmonized (*cf. Rector, Church Wardens & Vestrymen of St. Bartholomew’s Church v Committee to Preserve St. Bartholomew’s Church*, 84 AD2d 309, 313 [1982], *appeal dismissed* 56 NY2d 645 [1982]).” Order affirmed. (Supreme Ct, New York Co [Conviser, JJ])

Narcotics (Possession) **NAR; 265(57)**

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

People v Diaz, 68 AD3d 642, 894 NYS2d 1
(1st Dept 2009)

The defendant was in the driver’s seat of a minivan that was double-parked in a known drug-prone area. After seeing the defendant get out of the van to remove a parking-violation sticker, a police officer approached and asked why he was double-parked. The defendant said that he was waiting for a friend who was in a nearby store. When the friend did not appear, the officer asked to see the paperwork for the van. While the defendant was getting the paperwork, the officer leaned partially into the van and used a flashlight to watch the defendant’s hands to ensure his safety. The officer saw two \$100 bills and a small bag that was empty, but seemed to contain green particles he believed were marijuana. Although he did not smell marijuana, the officer asked the defendant to step

out of the van. After confirming that the bag had contained marijuana, the officer searched the glove compartment and found nine crack pipes. The officer also found crack cocaine hidden in the passenger air bag compartment. The defendant was convicted of second-degree criminal possession of a controlled substance.

Holding: The evidence was legally sufficient to establish that the defendant had constructive possession of the cocaine. The defendant had actual possession of the van and keys and he was the sole occupant and driver. The defendant’s dominion and control over the van was demonstrated by his removal of the parking-violation sticker and his friend’s failure to return to the van, which contained \$200 and a significant amount of drugs. The defendant’s calm demeanor does not preclude a finding of guilt. *See United States v Ortega Reyna*, 148 F3d 540, 544 (5th Cir 1998). “[T]he facts that defendant was not the owner of the minivan and that the crack cocaine was hidden would require this Court to accept the absurd conclusion that the owner of a minivan that held \$3,000 worth of crack cocaine casually loaned the vehicle to defendant so he could drive two blocks to buy marijuana. The jury correctly rejected such an absurdity.” *See People v Caba*, 23 AD3d 291, 292 *lv den* 6 NY3d 810. The court properly denied the defendant’s motion to suppress. Based on the totality of the circumstances, the officer’s limited intrusion into the van was justified since he was trying to ensure his own safety. *See Coolidge v New Hampshire*, 403 US 443, 461 n18 (1971); *People v Desir*, 138 AD2d 236, 237. Judgment affirmed. (Supreme Ct, New York Co [Stone, JJ])

Dissent: [Renwick, JJ] The defendant’s ability to exercise control over the van and his brief presence in the van were insufficient to establish constructive possession of the hidden cocaine. The officer testified that it was expertly hidden in the air bag compartment and there was no bulge, discoloration, or smell that would raise one’s suspicion that there were drugs in the compartment.

**Search and Seizure (Arrest/
Scene of the Crime Searches
[Probable Cause] [Scope])
(Stop and Frisk Suppression)** **SEA; 335(10 [g] [m]) (75)**

People v Mendez, 68 AD3d 662, 894 NYS2d 9
(1st Dept 2009)

Holding: “The arresting officer’s observations warranted a common-law inquiry into whether defendant was carrying an illegal gravity knife, but they did not provide reasonable suspicion of criminality warranting a seizure. The officer testified that he saw a portion of a knife handle and a clip on defendant’s pocket, leading him to believe that it was a folding knife. When the officer asked defendant ‘if he had anything on him that he shouldn’t have’ such as a ‘knife or a gun,’ defendant, who was not engaged in any suspicious behavior, said he had

First Department *continued*

a knife. The officer did not see any characteristics of an illegal type of knife, and testified, in essence, that the only reason he suspected the knife might be a gravity knife is that any folding knife could, upon inspection, turn out to be a gravity knife. While the officer could have lawfully asked to see the knife, he lacked reasonable suspicion justifying a seizure (*compare People v Fernandez*, 60 AD3d 549, 549 [2009] [officer had reasonable suspicion where observed item was ‘at least likely to be a gravity knife’]).” Judgment reversed, motion to suppress granted, and indictment dismissed. (Supreme Ct, New York Co [Farber, JJ])

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

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

People v Rodriguez, 68 AD3d 676, 892 NYS2d 356 (1st Dept 2009)

Holding: “Defendant is not eligible to be resentenced under the 2004 Drug Law Reform Act (L 2004, ch 738, § 23). That act ‘was not intended to apply to those offenders who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration’ (*People v Bagby*, 11 Misc 3d 882, 887 [2006]; *see also People v Mills*, 11 NY3d 527, 537 [2008]). If defendant had not violated his parole conditions, he would not have been in the custody of the Department of Correctional Service when he moved to be resentenced, and he would therefore have been ineligible for resentencing (*see Mills*, 11 NY3d at 537). ‘Surely the Legislature did not intend fresh crimes to trigger resentencing opportunities.’ (*id.*)” Order affirmed. (Supreme Ct, New York Co [Stolz, JJ])

Second Department

Prisoners (Disciplinary Infractions and/or Proceedings) **PRS I; 300(13)**

Matter of Stallone v Fischer, 67 AD3d 125, 889 NYS2d 589 (2nd Dept 2009)

A prison hearing officer’s determination that the appellant had violated institutional rules was reversed on administrative appeal. Upon rehearing, the appellant was again found to have violated institutional rules. He filed a petition under CPLR article 78 for review after the rehearing but before a decision on his administrative appeal of the rehearing determination. His petition was denied, as was his motion to reargue.

Holding: The rule that administrative remedies must be exhausted before an agency’s actions can be litigated in court does not apply where, among other things “an

agency’s action is challenged as either unconstitutional or wholly beyond its grant of power” *Matter of Laureiro v New York City Dept of Consumer Affairs*, 41 AD3d 717, 719. Among the minimum due process rights held by a prisoner charged with violations of prison rules that could result in the loss of good time is “a conditional right to call witnesses.” Regulations require that if an accused is denied a witness request, written reasons must be provided. *See* 7 NYCRR 254.5[a]. Failure to provide written reasons is a regulatory but not constitutional violation, but “denial of a request to call a witness without any stated good-faith reason is a constitutional violation that requires expungement (*see Matter of Alvarez v Goord*, 30 AD3d [118,] 119-120)” unless the prisoner requests a rehearing. *See Matter of Dawes v Coughlin*, 83 NY2d 597. The appellant sought either expungement or a rehearing, so the rehearing was proper. The appellant alleged in an affidavit that he was given no reason for denial of his request for witnesses, so he need not have exhausted administrative remedies before commencing this action. DOCS has not provided a transcript of either hearing, as is required by CPLR 7804(e). On the record here, it cannot be determined if any basis for the denial of witnesses was provided, and therefore whether a constitutional violation occurred at the rehearing. Judgment reversed, matter remitted to Supreme Court for filing of a transcript and a determination of whether a constitutional violation occurred at the rehearing. (Supreme Ct, Westchester Co [Adler, JJ])

Evidence (Prejudicial) **EVI; 155(106)**

People v Thomas, 65 AD3d 1170, 885 NYS2d 344 (2nd Dept 2009)

The defendant was convicted of second-degree murder, attempted second-degree murder, and assault and weapons charges.

Holding: The court improvidently exercised its discretion by admitting the defendant’s Rikers Island visitors’ log into evidence. This informed the jurors of the defendant’s incarceration before and during trial. *See People v Randolph*, 18 AD3d 1013, 1015. The danger that this would unfairly prejudice the defendant or mislead the jury substantially outweighed whatever probative value the log had. *Cf People v Jenkins*, 88 NY2d 948, 951. However, the evidence of guilt, including eyewitnesses’ identification of the defendant, was overwhelming and the error was harmless. To the extent that a constitutional claim is raised as to the log’s admission, that claim is unpreserved for review. *See People v Grant*, 7 NY3d 421, 424. The defendant’s other contentions are rejected. Judgment affirmed. (Supreme Ct, Kings Co [Del Giudice, JJ])

Juveniles (Custody) **JUV; 230(10) (70) (80) (90)**

Second Department *continued***(Jurisdiction) (Neglect)**
(Parental Rights)**Matter of Tumari W., 65 AD3d 1357, 885 NYS2d 753**
(2nd Dept 2009)

The subject child, after an emergency removal from his mother's custody, was placed with the Administration for Children's Services (ACS), which placed the child in kinship care with an older sister. The mother wanted to explore the possibility of placing the child with the child's father, a nonparty. She reserved her right to a hearing for return of the child to her. The father said he would relocate with the child to his house in the U.S. Virgin Islands. During another court appearance, ACS recommended release of the child to the father during pendency of neglect proceedings; the record does not reflect the basis for that recommendation. The mother objected that the father's home in St. Thomas was not suitable. The attorney for the child was not present. The court, without a hearing, authorized ACS to release the subject child to his father. When the mother asked the court to order the father not to remove the child from the state, the court said it had no authority to do so. The court stayed its order pending appellate review.

Holding: ACS concedes that the court erred in authorizing the child's release under the circumstances, without conditions or investigation of the father's home under the Interstate Compact for Placement of Children (ICPC). *See* Social Services Law 374-a(1). ACS, not the child's father, had custody. While a provision of the ICPS allows a court to hold the ICPC requirements inapplicable to parents, it does not so require. The court was not authorized to relinquish jurisdiction, nor did it. If that occurred, respondent parents would lose any potential right to the return of their children. New Family Court amendments effective after the instant order was issued do not require respondent parents to cross-petition for custody to preserve the right to contest abuse or neglect allegations. Order reversed, matter remitted for further proceedings consistent herewith. (Family Ct, Richmond Co [McElrath, JJ])

Dissent: [Spolzino, JP] The father had a superior right to the care and custody of the child absent a showing of abandonment or similar extraordinary circumstances. *See Matter of Alfredo S. v Nassau County Dept of Social Servs*, 172 AD2 528, 529. The ICPC does not apply.

Accomplices (Corroboration) ACC; 10(20)**Robbery (Defenses) (Evidence)** ROB; 330(5) (20) (25)
(Instructions)**People v McRae, 65 AD3d 1382, 886 NYS2d 220**
(2nd Dept 2009)

The defendant was convicted of two counts of first-degree robbery, second-degree robbery, fourth-degree possession of a weapon, and second-degree menacing.

Holding: The court erred in refusing to instruct the jury on the statutory affirmative defense to first-degree robbery that is set forth in Penal Law 160.15(4). The accuser testified that he heard a click and felt a cold, hard object against his neck that he thought was a gun, but did not say he saw one. The accomplices said a knife had been used. The jury could have found that what the accuser felt was not a loaded gun, satisfying the elements of the affirmative defense. The defendant's contention that the accomplice testimony was insufficiently corroborated is without merit. *See* Criminal Procedure Law 60.22(1); *People v Breland*, 83 NY2d 286. Judgment modified, count one and the sentence thereon vacated, judgment otherwise affirmed, and matter remitted for a new trial on count one. (County Ct, Orange Co [Berry, JJ])

Dissent: [Eng, JJ] The accuser never saw the faces of the two men who approached him from the rear, or a knife. The defendant's conviction rested almost entirely on the testimony of two women involved in the scheme. While some details provided by the accomplices were confirmed, the prosecution did not "come forward with independent evidence tending to connect the defendant to the offense rather than merely bolstering the credibility of the accomplices."

Discovery (Matters Discoverable) DSC; 110(20) (30[a])
(Procedure [Enforcement])**People v Clarke, 66 AD3d 693, 885 NYS2d 629**
(2nd Dept 2009)

The defendant was convicted of third-degree possession of a weapon (two counts) and second-degree possession of marijuana.

Holding: The defendant showed that a detective's memo book should have been disclosed. *See* Criminal Procedure Law 240.45(1)(a); *People v Rosario*, 9 NY2d 286. The court erred by denying the defense request for an adverse inference charge as to the prosecution's failure to disclose it; the instruction was an appropriate sanction under the circumstances (*see People v Wallace*, 76 NY2d 953, 955) and there was a reasonable possibility that non-disclosure materially contributed to the verdict. *See* Criminal Procedure Law 240.75; *People v Joseph*, 86 NY2d 565, 570. The detective's testimony related only to the marijuana charge; therefore, a new trial is required as to that count. The defendant's other contentions are unpreserved or without merit. Judgment modified, possession of marijuana charge and sentence thereon vacated, new trial ordered on that count, and as modified, affirmed. (Supreme Ct, Kings Co [Mullen, JJ])

Second Department *continued*

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

People v Clarke, 66 AD3d 694, 886 NYS2d 753 (2nd Dept 2009)

The defendant appealed his conviction of attempted murder and other offenses for the shooting of his ex-girlfriend’s friend, and the denial of his subsequent 440 motion.

Holding: Claims of ineffective assistance of counsel must include the absence of strategic or other bases for counsel’s alleged shortcomings. *See People v Rivera*, 71 NY2d 705, 709. The record shows that counsel made “meager efforts and unsuccessful attempts to cross-examine witnesses” about identification discrepancies and events leading to the shooting. The police report reflected the accuser’s description of the assailant as a black male, named “UNK, Andrew”, who followed him from an ATM to his driveway and shot him. At a hearing, the accuser said the assailant was interracial, and identified the defendant. At trial, under questioning by the court, the accuser struggled in trying to attribute a racial or ethnic category to the assailant. But defense counsel abandoned this topic. The accuser testified at trial that he went directly home from work and was approached in his driveway. Defense counsel did not cross-examine him about the police report that he was followed from an ATM. Counsel did not object to the belated introduction of the former girlfriend’s written statement to police containing prejudicial and inflammatory remarks about the defendant, or even seek redaction of objectionable portions. He objected only five times over the course of a five-day trial despite prejudicial or otherwise inadmissible proof. This was not objectively reasonable and legitimate, or even misguided, strategy. The case hinged on sharp issues of credibility; counsel’s “inexplicably prejudicial course’ of conduct” deprived the defendant of the effective assistance of counsel and a fair trial. *People v Zaborski*, 59 NY2d 863, 865. Judgment reversed and matter remitted for new trial. (Supreme Ct, Queens Co [Kron, JJ])

Assault (Defenses) (Instructions) **ASS; 45(20) (45)**

Defenses (Justification) **DEF; 105(37)**

People v Moore, 66 AD3d 707, 886 NYS2d 468 (2nd Dept 2009)

The defendant was convicted of second-degree assault. His girlfriend, the accuser, sustained injuries when the defendant was driving the accuser’s truck while she was hanging on the outside of it on the driver’s side. At trial, they gave very different accounts of the incident.

The defendant said he believed the accuser was still in the convenience store they had stopped at when he was robbed by a man who entered on the passenger side. Fearing the robber would shoot him, the defendant ducked down, put the truck in gear, and accelerated without realizing that the accuser had reached in the driver’s side window and grabbed the steering wheel. The truck swerved and hit a car, then a tree. The jury was instructed in the alternative on first-degree intentional assault and the lesser included offense of second-degree reckless assault.

Holding: The court properly submitted the lesser-included offense. A reasonable view of the evidence would support a finding that the defendant’s objective was not to injure the accuser but to shake her off by operating the vehicle recklessly, constituting the lesser offense but not the greater. *See Criminal Procedure Law 300.50(1)*. The contention that the court should have given a justification instruction was not preserved and the court was under no obligation under the circumstances of this case to give it sua sponte. *See People v Castano*, 236 AD2d 215. The “distinct ‘choice of evils’ justification defense set forth in Penal Law § 35.05(2)” is inapplicable and was not preserved or properly raised. Other issues raised were unpreserved or without merit. Judgment affirmed (Supreme Ct, Kings Co [Marrus, JJ])

Dissent: [Belen, JJ] The failure to instruct the jury on justification deprived the defendant of a fair trial.

[*Ed. note: Justice Belen granted leave to appeal to the Court of Appeals on 2/22/2010.*]

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

Juveniles (Paternity) **JUV; 230(100)**

Matter of Suffolk County Dept. of Social Servs. o/b/o Tara K. v Anthony R., 66 AD3d 790, 887 NYS2d 188 (2nd Dept 2009)

Holding: The court improvidently exercised its discretion by denying the appellant father’s objection to the denial of his motion to vacate an order of filiation that had been entered upon his default. The rule that a party moving to vacate a default must establish both a reasonable cause for the default and a meritorious defense (*see Matter of Helen T. v Roosevelt B.*, 256 AD2d 583, 584) is not applied with equal rigor in filiation and support matters where merits determinations are favored. *See Matter of Gabriel v Cooper*, 26 AD3d 493, 494. The defendant had appeared on various adjourned dates and the transcripts demonstrate that the last adjourned date was changed numerous times by the court, which was trying to accommodate all parties. It is reasonable to believe that the appellant was mistaken about the date on which to appear. He also presented an arguably meritorious defense. *See Schorr v Schorr*, 213 AD2d 621. Order reversed, objection granted, prior

Second Department *continued*

order vacated, and matter remitted for further proceedings on the petitions. (Family Ct, Nassau Co [Greenberg, JJ])

Motions (Suppression) MOT; 255(40)

Police (General) (Peace Officer) POL; 287(20) (45)

People v Acosta, 66 AD3d 792, 887 NYS2d 187
(2nd Dept 2009)

The defendant was convicted of robbery, grand larceny, possession of stolen property, possession of a weapon, and unauthorized use of a vehicle.

Holding: “The defendant’s motion to suppress merchandise recovered from his possession by store security guards was improperly denied without a hearing.” He was entitled to a hearing on the purely factual issue of whether the guards were “‘peace officers . . . or persons acting as agents of the police’ (see *People v Mendoza*, 82 NY2d 415, 433-434).” The licensing status of a guard is not something a defendant could be expected to know and allege with particularity. See *People v Green*, 33 AD3d 452. Matter remitted for the court to hear and report on the branch of the defendant’s omnibus motion to suppress physical evidence and the appeal held in abeyance in the interim. (Supreme Ct, Queens Co [Latella, JJ])

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

People v Rodriguez, 69 AD3d 143, 887 NYS2d 196
(2nd Dept 2009)

The defendant was charged with depraved indifference murder (Penal Law 125.25[4]) and first-degree manslaughter (Penal Law 125.20[4]) for the death of her infant. She was convicted of criminally negligent homicide (Penal Law 125.10), as a lesser included offense of depraved indifference murder, and of first-degree manslaughter.

Holding: The defendant’s contention on appeal that the jury verdict was inconsistent was not preserved but is reached in the exercise of the court’s interest of justice jurisdiction. See Criminal Procedure Law 470.15(3)(c). Where two counts are predicated on a certain act or omission, and on a particular result of that act or omission, convictions on both counts are inconsistent where one count alleged a given culpable mental state as to the result and the other alleged a different culpably mental state as to the same result. In such a situation, “it would be ‘impossible to determine what if anything the jury decided on the issue of [the] defendant’s mental state at the time of the offense’ (*People v Gallagher*, 69 NY2d [525,] 530).” Here, the jury necessarily found in convicting the defendant of criminally negligent homicide that, acting

with criminal negligence, she caused the baby’s death. By convicting her of first-degree manslaughter, the jury necessarily found that the defendant recklessly engaged in conduct that resulted in the creation of a grave risk of serious physical injury to the baby and that by recklessly engaging in that conduct, she caused the baby’s death. This involves a different and more culpable mental state than the criminal negligence necessary for the other count. The verdict was inconsistent. Cf *People v Helliger*, 96 NY2d 462, 467. Judgment reversed and new trial ordered as to first-degree manslaughter. (County Ct, Suffolk Co [Hinrichs, JJ])

Juveniles (Paternity) JUV; 230(100)

Matter of Santos Ernesto R. v Maria S. C, 66 AD3d 910,
887 NYS2d 265 (2nd Dept 2009)

The petitioner avers he is the biological father of the subject child. The mother joins him in seeking an order declaring his paternity. Nonparty Cruz Y. P. moved to vacate an acknowledgment of paternity executed in 1998, on the day after the child’s birth, by the mother and him. All parties and the attorney for the child joined that motion. The court denied the motion to vacate and dismissed the paternity petition with prejudice.

Holding: An acknowledgement of paternity cannot be vacated after more than 60 days unless the acknowledgment was obtained by fraud, duress, or material mistake of fact. See Family Court Act 516-a(b). In that case, the court may order biological testing unless doing so would not be in the best interests of the child. A day after the court dismissed this proceeding, however, an amendment to the statute took effect that requires no biological test should be ordered if there is a written finding by the court that “‘it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman.’ (L 2007, ch 462).” Here, the court erred in summarily denying Cruz Y. P.’s motion in which he asserted that when he executed the acknowledgment he believed he was the father. If Cruz Y. P. shows the existence of a material mistake of fact, the court must hold a further hearing on whether testing would be contrary to the best interests of the child either because he held himself out as the child’s father long after he knew otherwise or because the petitioner delayed seeking an order of filiation long after he knew he was the father. Dismissal order reversed, denial of motion vacated, and matter remitted for further proceedings. (Family Ct, Nassau Co [Lawrence, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Smith, 66 AD3d 981, 889 NYS2d 464
(2nd Dept 2009)

Second Department *continued*

The Board of Examiners of Sex Offenders (Board) prepared a Risk Assessment Instrument (RAI) as required by the Sex Offender Registration Act (SORA) (Correction Law article 6-C). The defendant was assessed a total of 100 points. He was notified that the prosecution would seek to have 140 points assessed. The court noted at the SORA hearing that 90 points were not in dispute, and the only risk factors in contention were risk factor one (armed with a dangerous weapon) and seven (relationship with the accusers). After review of grand jury minutes, the court assessed 30 points for the dangerous weapon factor. This number plus the 90 uncontested points rendered the defendant a presumptive level three offender. Therefore, the dispute as to points under risk factor seven was not resolved.

Holding: The prosecution concedes on appeal that, contrary to the assertion of the hearing prosecutor, a weapons charge had been submitted to the grand jury based on one accuser’s testimony that the defendant had a knife. The grand jury returned a no true bill finding on that charge, showing that the accuser’s testimony did not establish reasonable cause as to the weapons charge. The defendant’s presentence report, case summary, and the Board’s RAI are silent as to any weapon. The prosecution has not established by clear and convincing evidence that a weapon was used in the underlying offenses. *Cf People v Collins*, 57 AD3d 865. The contested points under risk factor seven must therefore be resolved. Order reversed and matter remitted for a new hearing and determination. (Supreme Ct, Richmond Co [Rienzi, JJ])

Contempt (Elements) (General) CNT; 85(7) (8)

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

People v Mingo, 66 AD3d 1043, 887 NYS2d 666 (2nd Dept 2009)

The defendant was convicted of first- and second-degree criminal contempt and other charges. The defendant contends on appeal that the second-degree contempt charge must be dismissed because it is a lesser included offense of the first-degree charge.

Holding: Contrary to the position of the prosecution, the defendant’s claim may be reached although it is unreserved. *See People v Manuel*, 237 AD2d 307. The second-degree criminal contempt statute includes a provision not found in the first-degree criminal contempt statute, *ie*, that the conduct in question did not involve or grow out of a labor dispute. Penal Law 215.50(3). But the Court of Appeals has held that this “labor disputes” clause is something the accused may raise in defense of the charge and it not an exception that must be pleaded by the prosecution. *See People v Santana*, 7 NY3d 234, 237.

Therefore, the provision is not a material element of second-degree criminal contempt and this charge is a lesser-included offense of first-degree criminal contempt. *See People v Lubrano*, 43 AD3d 829. Judgment modified by reversing the second-degree criminal contempt conviction and sentence, dismissing that count, and judgment affirmed as modified. (Supreme Ct, Queens Co [Erlbaum, JJ])

Evidence (Weight) EVI; 155(135)

People v Piggott, 66 AD3d 1045, 891 NYS2d 78 (2nd Dept 2009)

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

Holding: The verdict was against the weight of the evidence. *See People v Danielson*, 9 NY3d 342, 348. A detective and a sergeant saw the defendant smoking marijuana in an apartment building hallway. As they approached, the defendant ran and was caught on the stairs. The sergeant patted him down, and police proceeded to a basement apartment where a co-defendant allegedly consented to their entry. Detecting an odor of marijuana, the police obtained a warrant and eventually recovered 75 pounds of marijuana. The defendant and co-defendant were arrested. The detective claimed to have found sets of keys on each of them during searches incident to the arrests, one key of each set fitting the apartment door lock and one of each set fitting a locked canister containing marijuana. The detective’s claims about the keys found on the defendant were contradicted by the voucher sheet listing property taken from the defendant, which did not list keys; the sheet for the co-defendant did. The claims were further contradicted by the detective’s own grand jury testimony; he said he found one set of keys in the apartment, which the co-defendant claimed were his. At trial the detective said he had no recollection of so testifying. A detective who testified at trial that he had found keys on both defendants acknowledged he was mistaken when shown his own grand jury testimony that the arresting detective had given him two sets of keys. Finally, the sergeant had found no keys during a thorough pat-down of the defendant prior to arrest. Judgment reversed, indictment dismissed, and matter remitted for entry of an order in the court’s discretion under CPL 160.50. (Supreme Ct, Kings Co [Ingram, JJ])

Sentencing (General) SEN; 345(37)

People v Young, 66 AD3d 1049, 887 NYS2d 645 (2nd Dept 2009)

The defendant appealed from his sentence of two and a half years’ imprisonment and five years postrelease supervision (PRS), imposed upon his plea of guilty to attempted third-degree possession of a weapon.

Second Department *continued*

Holding: The defendant's appellate waiver does not preclude review of the legality of his sentence. *See People v Seaberg*, 74 NY2d 1, 9. While the presentence report indicated that the defendant had previously been convicted of a nonviolent felony, he was never arraigned as a predicate felon or adjudicated a second felony offender. Thus, the court could not properly sentence him to five years' PRS as a second felony offender. *See People v Cole*, 31 AD3d 1190. As a first violent felony offender, convicted of attempted third-degree criminal possession of a weapon, the defendant was subject to a mandatory period of PRS of not more than three or less than one and a half years. *See Penal Law 70.02(3)(d), 70.45(2)(e)*. The five-year period imposed is improper. Sentence modified, PRS vacated, judgment affirmed as modified, and matter remitted for imposition of an appropriate period of PRS. (Supreme Ct, Suffolk Co [Doyle, JJ])

Search and Seizure (General) SEA; 335(42)**People v Lopez**, 67 AD3d 708, 886 NYS2d 894 (2nd Dept 2009)

The prosecution appealed from an order granting the defendant's motion to suppress physical evidence.

Holding: The defendant was "standing on the pegs on the rear of a bicycle ridden by another" going the wrong way on a one-way street. One of three officers in a police car got out, showed his shield, and said, "Police, don't move." The defendant fled with the officers in pursuit. He was apprehended and a gun that he discarded as he ran was recovered. The officer's order not to move was unlawful and the defendant's discarding of the gun was precipitated by that illegality and not attenuated from it. *Cf People v Boodle*, 47 NY2d 398 *cert den* 444 US 969. Suppression was proper. Order affirmed. (Supreme Ct, Kings Co [Reichbach, JJ])

Sentencing (General) (Resentencing) SEN; 345(37) (70.5)**People v Charles**, 67 AD3d 698, 888 NYS2d 157 (2nd Dept 2009)

The defendant appeals from the sentence imposed following his plea of guilty to first-degree robbery and other charges. The prosecution had recommended a 20-year prison term. The court noted various mitigating factors and an outpouring of community support for the defendant, illustrated by letters received by the court and the number of spectators who appeared in court. The court indicated that the minimum permissible term for the robbery charge was 10 years, which is the sentence that was imposed along with other concurrent terms "for a net determinate sentence of 10 years."

Holding: The defendant's valid waiver of appeal did not foreclose review of his contention that the court did not recognize or exercise the full scope of its sentencing discretion. *See People v Nolcox*, 40 AD3d 1128. The court "repeatedly and mistakenly indicated that the minimum permissible term of imprisonment for the defendant's conviction of [first-degree] robbery . . . was 10 years, rather than 5 years (*see Penal Law § 70.02(3)*) . . ." The court expressed reservation about the fairness of the sentence. *See People v Barzge*, 244 AD2d 213, 214. The court at resentencing "is free to impose the lawful sentences which it deems appropriate, including a 10-year net determinate term . . . [if] it finds such a term to be warranted." Sentence reversed and matter remitted for resentencing. (County Ct, Nassau Co [Donnino, JJ])

Evidence (Sufficiency)

EVI; 155(130)

Robbery (Evidence)

ROB; 330(20)

Matter of Robert C., 67 AD3d 790, 888 NYS2d 192 (2nd Dept 2009)

The appellant was found to have committed acts that if committed by an adult would constitute first- and second-degree robbery, second-degree felony assault, and other charges. A group of over twelve boys assaulted the accuser in retaliation for an earlier one-on-one fight between the accuser and the appellant. No one demanded or mentioned the accuser's cell phone. After the altercation ended and others had dispersed, the appellant picked up the phone from where it had fallen early in the attack.

Holding: The evidence was not sufficient to establish any of the robbery counts. Taking the cell phone appeared to be an afterthought, which would not constitute robbery. *See Matter of Niazia F.*, 40 AD3d 292, 293. The presentment agency failed to show that the appellant assaulted or stabbed the accuser during or in flight from a robbery for the purpose of making the accuser to give up property or of overcoming resistance to the taking. *See People v Miller*, 87 NY2d 211, 214. Further, second-degree felony assault was not sufficiently proved as it was not established that the appellant or other participants caused serious physical injury in the course of and in furtherance of, or in flight from, a robbery. *See Penal Law 120.05(6)*. There are sufficient grounds to find the appellant committed second-degree assault as well as three misdemeanors, for which the period of probation imposed is appropriate. Order modified, provisions adjudicating the appellant a juvenile delinquent with regard to robbery and second-degree felony assault deleted and dismissed, a provision added adjudicating him a juvenile delinquent for petit larceny, and order affirmed as modified. (Family Ct, Kings Co [Freeman, JJ])

Second Department *continued*

Contempt (General) CNT; 85(8)

Juveniles (Support Proceedings) JUV; 230(135)

**Matter of Probert v Probert, 67 AD3d 806,
888 NYS2d 181 (2nd Dept 2009)**

The appellant was committed to jail for six months for contempt after he failed to pay child support, with the opportunity to purge the contempt by paying \$50,000.

Holding: The determination that the father had willfully violated an order of child support was proper; he failed to sustain his burden of showing his inability to make the payments as ordered. *See Matter of Powers v Powers*, 86 NY2d 63, 69-70. However, the court improvidently exercised its discretion in offering the father the opportunity to purge his contempt by paying \$50,000 because the record did not show the father had the ability to pay that amount. *See Matter of Victorio v McBratney*, 32 AD3d 962, 963. Under the circumstances of this case, a shorter sentence is more appropriate. *See Matter of Wolski v Carlson*, 309 AD2d 759, 759. Order modified, provision committing the appellant for six months with the opportunity to purge contempt deleted, a provision substituted therefore committing the appellant for a period of 30 days, and order affirmed as modified. (Family Ct, Nassau Co [Greenberg, JJ])

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

**People v Wright, 67 AD3d 830, 887 NYS2d 867
(2nd Dept 2009)**

The defendant pleaded guilty to three counts of third-degree grand larceny and was sentenced to consecutive indeterminate terms of two to four years in prison on each count.

Holding: “The defendant was sentenced as a second felony offender. However, there is no indication in the record that he was given an opportunity to controvert that status.” As the prosecution concedes, the matter must be remitted for “a proper adjudication of the defendant’s status and resentencing thereafter (*see People v Horsley*, 251 AD2d 427 . . .).” Sentences reversed and matter remitted for further proceedings. (Supreme Ct, Kings Co [DiMango, JJ])

Juveniles (Custody) JUV; 230(10)

**Matter of Vialardi v Vialardi, 67 AD3d 921,
888 NYS2d 419 (2nd Dept 2009)**

In child custody proceedings, the father appeals from the court’s order awarding final decision-making authority to the mother.

Holding: A custody award is within the trial court’s discretion, and the court’s determination is entitled to great weight on appellate review. *See Eschbach v Eschbach*, 56 NY2d 167, 173. However, here, “the court should have directed that the mother consult with the father with respect to any issues involving the child’s health, medical care, education, religion, and general welfare prior to exercising her final decision-making authority for the subject child.” Order modified by adding a provision that the mother must consult with the father before exercising her final decision-making authority, and order affirmed as modified. (Family Ct, Westchester Co [Klein, JJ])

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

**People v White, 67 AD3d 933, 889 NYS2d 236
(2nd Dept 2009)**

The defendant was convicted by guilty plea of fifth-degree drug possession. He later moved to withdraw his plea.

Holding: A defendant who receives an advantageous plea has received the effective assistance of counsel in the guilty plea context when nothing in the record casts doubt on counsel’s apparent effectiveness. *See People v Ford*, 86 NY2d 397, 404. Erroneous advice by counsel about what is considered a collateral consequence may support an ineffective assistance of counsel claim if the defendant can show that but for the incorrect advice it is reasonably probable that the defendant would not have pleaded guilty. *See People v McDonald*, 1 NY3d 109, 114-115. The record developed in connection with the defendant’s motion to withdraw his plea shows that the effect of the plea on his parole was an important factor in his decision whether to plead guilty. Counsel incorrectly told him that the plea would not result in an automatic revocation of parole, as shown by several letters he received from the lawyer prior to taking the plea. The record shows that the prosecutor was aware that the defendant was concerned about parole. As the prosecution correctly concedes, “the defendant did not receive the effective assistance of counsel in deciding to plead guilty.” Judgment reversed, plea vacated, and matter remitted for further proceedings on the indictment. (Supreme Ct, Kings Co [Walsh, JJ])

Accusatory Instruments (General) ACI; 11(10)

**People v Morson, 67 AD3d 1026, 889 NYS2d 644
(2nd Dept 2009)**

Based on the theft of a car, the defendant was charged by felony complaint with the class D felony of third-degree criminal possession of stolen property. *See Penal Law 165.50*. He pleaded guilty to a superior court information charging him with fourth-degree criminal posses-

Second Department *continued*

sion of stolen property (see Penal Law 165.45[5]) and third-degree unauthorized use of a motor vehicle. See Penal Law 165.05(1).

Holding: It is possible to knowingly possess stolen property worth more than \$3,000 without possessing a stolen motor vehicle worth more than \$100. Thus, fourth-degree possession of stolen property under Penal Law 165.45(5) is not a lesser-included offense of third-degree possession of stolen property. The superior court information here therefore “did not ‘include at least one offense that was contained in the felony complaint’ (*People v Zanghi*, 79 NY2d 815, 818).” As the prosecution concedes, the superior court information was jurisdictionally defective. See *People v Menchetti*, 76 NY2d 473, 477. Judgment reversed, plea vacated, superior court information dismissed, and matter remitted for further proceedings on the felony complaint. (County Ct, Westchester Co [Cacace, JJ])

Alibi (Definition) (General) ALI; 20(10) (22)

Defenses (Affirmative Defenses Generally) (Notice of Defense) DEF; 105(2) (43.5)

People v Green, 70 AD3d 39, 890 NYS2d 65 (2nd Dept 2009)

Before trial, defense counsel gave the prosecution a list of potential defense witnesses. In court, the prosecutor said the testimony of one person on the list might support an alibi and that no alibi notice had been given. Defense counsel said the prosecution knew of the witness’s connection to the case and, in any event, he was not an alibi witness. The court cautioned defense counsel not to refer in opening statement to evidence she might not be able to present. Two days later the court ruled that the expected testimony could be considered “a partial alibi” and so was precluded for lack of notice. The court rejected a proposal to give the prosecutor time to interview the witness. Defense counsel argued that the ruling violated the defendant’s constitutional right to present a defense. The defendant was convicted of possession of a weapon.

Holding: The court precluded the testimony of a witness the defense intended to call to contradict a portion of the account of a central prosecution witness “but whose testimony might also have been taken as circumstantial evidence that the defendant was not present at the scene of the crime at the time of its commission.” The defense sought to use the witness to impeach another witness’s account of what happened in and around a van 40 minutes before that van was stopped in a different location by police. The court erred in holding that an alibi notice was required. Cf *People v Evans*, 289 AD2d 417. If the testimony could be considered alibi evidence, preclusion was inappropriate under the circumstances. See *People v*

Cuevas, 67 AD2d 219, 226. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Guzman, JJ])

Juveniles (Adoption)

JUV; 230(5)

Matter of Geneva A., 68 AD3d 858, 889 NYS2d 484 (2nd Dept 2009)

The subject child was placed with the petitioner by Community Counseling and Mediation (CCM) when the child was six days old. The biological parents’ parental rights were terminated in 2005. In 2007 the petitioner filed a petition to adopt the child, for whom she had continuously cared. Among materials in support of her petition was a favorable report by an investigator for the Administration for Children’s Services. The petitioner sought to finalize the adoption. The court urged her to first seek a more substantial adoption subsidy based on the child’s special needs. At that time, “the petitioner criticized CCM for failing to address [the child’s] needs at an earlier stage.” After that, CCM consistently found fault with the petitioner’s behavior. At a 2008 permanency hearing, CCM told the court it planned to remove the child from the petitioner’s home. An Independent Review Officer (IHO) subsequently issued a decision directing CCM to consider providing additional services to the petitioner, in whose home the child should remain. The attorney for the child wrote two letters to the court opposing the petitioner’s adoption of the child. The adoption petition was dismissed.

Holding: It is not clear whether the court had access to the IHO’s decision before dismissing the adoption petition. While the record reflects some parenting missteps by the petitioner, courts “‘have not demanded perfection in adoptive parents’ (*Matter of George L. v Commissioner of Fulton County Dept. of Social Servs.*, 194 AD2d 955, 956).” Under the circumstances, the court erred in dismissing the petition without a hearing. See *Matter of Omar*, 277 AD2d 387. Order reversed, petition reinstated, and matter remitted for a hearing and new determination. (Family Ct, Kings Co [Greenbaum, JHO])

Due Process (Prisoners)

DUP; 135(25)

Prisoners (Disciplinary Infractions and/or Proceedings)

PRS I; 300(13)

Matter of Tolliver v Fischer, 68 AD3d 884, 892 NYS2d 112 (2nd Dept 2009)

At a Tier III disciplinary hearing, the petitioner was found guilty of violating prison disciplinary rules including conspiracy to introduce narcotics into a prison. After the prison superintendent confirmed the determination on administrative appeal, the petitioner commenced this CPLR Article 78 proceeding. The Supreme Court transferred the proceeding to the Appellate Division.

Second Department *continued*

Holding: The Supreme Court should have addressed the argument that the determination was rendered in violation of due process. See CPLR 7804(g); *Matter of Tartaglione v Board of Commrs of Police Dept of Vil of Briarcliff Manor*, 301 AD2d 655, 657. This Court will decide it in the interest of judicial economy. At the disciplinary hearing, a prison investigator produced recordings of phone conversations, allegedly showing coordination of drug smuggling into the prison. The investigator said that coded language was used. The hearing officer said he did not understand much of the conversations, but had received a confidential explanation from the investigator, which was written by an unnamed third person. The hearing officer declined to give a copy of the explanation to the petitioner; no reason was given for withholding it. The explanation was relevant to the petitioner’s contention that the recordings did not show involvement in drug-related activity. Withholding it without a stated reason violated the applicable minimum due process protections. See *Matter of Stallone v Fischer*, 67 AD3d 125, 128. At a new hearing, either the explanation must be provided to the petitioner or, if it is deemed too sensitive to reveal, a determination must be rendered without consideration of or reference thereto. Petition granted, determination annulled, and matter remitted for a new hearing and determination. (Supreme Court, Dutchess Co)

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

People v Santos, 68 AD3d 899, 891 NYS2d 121 (2nd Dept 2009)

At trial, the accuser testified during cross-examination about a related civil action involving the safety of the building in which the accuser resided and which the defendant was alleged to have burglarized. The accuser gave the name of the firm he had contacted about the action; the trial judge made no comment. After a guilty verdict, but before sentencing, the trial judge held a recusal hearing. The judge said he had just been told by the prosecution that the judge’s wife was a partner in the law firm representing the accuser in the related civil action.

Holding: When the trial judge heard his wife’s law firm mentioned, he should have inquired further and, upon further inquiry, immediately recused himself. Judges shall disqualify themselves when they know or should know that they have “an economic interest in the subject matter in controversy or in a party to the proceeding” 22 NYCRR 100.3(E)(1)(c); see 22 NYCRR 100.3(E)(1)(d)(iii). Since the judge here did not recuse himself at trial, the conviction must be vacated. See *People v Alomar*, 93 NY2d 239; see also Judiciary Law 14. Judgment

reversed and new trial ordered. (County Ct, Orange Co [De Rosa, J (trial); Freehill, J (sentencing)])

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

People v Reynolds, 68 AD3d 955, 891 NYS2d 451 (2nd Dept 2009)

The defendant was convicted of first-degree sexual abuse. After a hearing pursuant to Correction Law article 6-C, the court designated him a level three sex offender.

Holding: The court incorrectly concluded that the application of a presumptive override based on the defendant’s prior conviction of a felony sex offence was mandatory. The defendant clearly sought a downward departure, but his attorney said on the record that the attorney had explained that a level three designation was required. “It’s mandatory, required by law; that we can’t get level two even if we want to.” The defendant’s prior conviction did raise his presumptive risk level from two to three. See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 3-4 (2006 ed). However, a court may impose a lower risk level if it concludes that the factors in the Risk Assessment Instrument (RAI) do not result in an appropriate designation. See *People v Mingo*, 12 NY3d 563. Allowing no departure from the RAI-suggested level would preclude the exercise of sound judgment; no objective instrument, regardless of its design, can capture the nuances of every case. The court must examine all relevant evidence, not merely adopt the RAI recommendation. See *People v Sanchez*, 20 AD3d 693, 694. The court’s actions here “deprived the defendant of the opportunity to present mitigating circumstances in support of his application for a downward departure” Order reversed and matter remitted for a new hearing and determination. (County Ct, Nassau Co [Calabrese, JJ])

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

Juveniles (Custody) (Visitation) **JUV; 230(10) (145)**

Matter of Norton o/b/o Norton v Szewczyk, 68 AD3d 994, 893 NYS2d 75 (2nd Dept 2009)

In 2006, the Suffolk County Family Court entered an order upon stipulation of the parties giving the mother sole custody of the parties’ child and giving the father liberal visitation rights. The mother later moved with the child to Vermont and remarried, where she and her husband initiated an adoption proceeding in 2008. The father objected and filed a violation petition in Suffolk County claiming that the out-of-state move deprived him of his visitation rights. He also filed a habeas corpus petition. The petitions were, in effect, dismissed on the ground that Vermont would be a better forum.

Holding: The family court erred by, in effect, dismissing the father’s petitions without first determining

Second Department *continued*

whether the court “had exclusive, continuing jurisdiction over the visitation issue pursuant to Domestic Relations Law § 76-a(1) (see *Matter of Recard v Polite*, 21 AD3d 379 . . .).” The court must consider whether the child and mother lack significant connection with New York, or whether substantial evidence about the child’s “care, protection, training, and personal relationships” was no longer available in New York. See Domestic Relations Law 76-a(1)(a). The parties are entitled to an opportunity to submit evidence on the issue of jurisdiction. Order reversed, petitions reinstated, and matter remitted for further proceedings. (Family Ct, Suffolk Co [Tarantino, JJ])

Juries and Jury Trials (Deliberation) (General) **JRY; 225(25) (37)**
People v Smith, 68 AD3d 1021, 892 NYS2d 135 (2nd Dept 2009)

A jury convicted the defendant of fourth-degree criminal possession of a controlled substance.

Holding: The “trial court failed to meaningfully respond to a jury note seeking the testimony of two of the police officers who testified at the trial.” The jury wanted to know how long the two had been together before their encounter with an unidentified person who reportedly said the defendant had cocaine. The trial judge, over defense objection, found that only one of the two officers had testified regarding what the jury wanted to know. However, the arresting officer “had testified that he was ‘by [him]self’ prior to the encounter with the unidentified woman.” Under the circumstances of this case, failure to provide the jury with this testimony during the readback seriously prejudiced the defendant, warranting reversal. See Criminal Procedure Law 310.30; *People v Kisoon*, 8 NY3d 129, 134. Although the defendant failed to object to the court’s complete failure to respond to another jury note, leaving the error unpreserved (see Criminal Procedure Law 470.05(2); *People v Baldwin*, 272 AD2d 476), that error also requires reversal. The jury asked for readback of the cross-examination of the arresting officer regarding whether he planted evidence; the court’s failure to respond seriously prejudiced the defense. See *People v Lourido*, 70 NY2d 428, 435. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Carroll, JJ])

Discrimination (Race) **DCM; 110.5(50)**
People v Minucci, 68 AD3d 1017, 891 NYS2d 436 (2nd Dept 2009)

The defendant was convicted of several offenses found to be hate crimes, including robbery and assault, as well as possession of stolen property and of a weapon.

Holding: The court refused to permit one of the defendant’s character witnesses “to testify that the defendant did not have a reputation in the community for being biased and prejudiced against black people.” This reputation evidence was relevant to the defendant’s guilt or innocence. See *People v Chisolm*, 7 AD3d 728, 729. However, the error was harmless in view of overwhelming evidence that the charged offenses “were motivated in substantial part by the defendant’s belief and perception regarding race or color (see Penal Law § 485.05[1]), and the fact that the defendant’s two character witnesses were permitted to testify as to the defendant’s reputation in the community for lack of bias in general” The defendant’s other contentions are without merit. Judgment and amended judgment affirmed. (Supreme Ct, Queens Co [Buchter, JJ])

Evidence (Weight) **EVI; 155(135)**
Sex Offenses (General) **SEX; 350(4)**
Matter of Christian E., 68 AD3d 1109, 891 NYS2d 461 (2nd Dept 2009)

The appellant was determined to have committed acts that, if committed by an adult, would constitute second- and third-degree sexual abuse. The alleged acts occurred during a seventh-grade shop class.

Holding: An element of sexual abuse is subjecting another to “sexual contact.” See Penal Law 130.55, 130.60. “‘Sexual contact’ is defined as ‘any touching of the sexual or intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party’ (Penal Law § 130.00[3]).” A classmate testified that no part of the appellant’s body touched the accuser’s body during the incident and the accuser testified that the appellant did not put pressure on her body during the incident. “[T]he credible evidence did not support a finding that the appellant touched the complainant’s sexual or intimate parts.” The determination was against the weight of the evidence. See *Matter of Anthony W.*, 51 AD3d 808, 810. Order of disposition reversed as far as reviewed, fact-finding order vacated, petition dismissed, and matter remitted for further proceedings. (Family Ct, Queens Co [Lubow, JJ])

Motions (Adjournment) **MOT; 255(3)**
Sentencing (Enhancement) (General) **SEN; 345(32) (37)**
People v Darkel C., 68 AD3d 1129, 890 NYS2d 342 (2nd Dept 2009)

After the defendant’s guilty plea, but before sentencing, he was assigned new counsel. A question was raised at sentencing about whether the defendant should receive an enhanced sentence for allegedly violating a condition

Second Department *continued*

of his plea agreement. Defense counsel requested an adjournment to obtain a copy of the plea minutes. The court denied the adjournment, determined that the defendant had violated the plea condition in question, and imposed an enhanced sentence.

Holding: Counsel, who had not represented the defendant during plea proceedings, apparently had no opportunity to review the plea minutes. The court, which has discretion whether to grant or deny adjournments (*see People v Singleton*, 41 NY2d 402, 405), improvidently exercised that discretion here. *See gen People v Spears*, 64 NY2d 698, 700. Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing. (Supreme Ct, Queens Co [Mullin, JJ])

Discrimination (Race) DCM; 110.5(50)

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

People v Gray, 68 AD3d 1131, 892 NYS2d 455 (2nd Dept 2009)

The defendant was convicted of murder. During the first round of jury selection, the prosecutor struck the only black venireperson from a panel of 18 prospective jurors by using a peremptory challenge. The excused potential juror, employed as head of a retail store chain, considered himself to be a member of law enforcement. The defense challenged the strike under *Batson v Kentucky* (476 US 79 [1986]). The court held that the defendant did not meet the first step of *Batson's* test because he failed to show a pattern of discrimination.

Holding: To establish a prima facie case of discrimination in jury selection, the moving party must show that "one or more members of a cognizable racial group" have been removed from the venire by peremptory challenge and also show that facts and relevant circumstances support a finding that the challenges were used to exclude potential jurors based on race. *People v Brown*, 97 NY2d 500, 507. The defense here met that burden by establishing objective facts indicating that the prosecutor excused a person who might be expected to favor the prosecution, and that person was member of a particular racial group. *See People v Bolling*, 79 NY2d 317, 324. The defendant was not required to show a pattern of discrimination to meet the initial burden, and the court should have moved on to the second and third *Batson* steps. Matter remitted for the court to hear and report with all convenient speed on the defendant's *Batson* challenge and appeal held in abeyance in the interim. (County Ct, Suffolk Co [Crecca, JJ])

Evidence (Sufficiency) EVI; 155(130)

Trial (Verdicts [Repugnant Verdicts]) TRI; 375(70[c])

People v Phillips, 68 AD3d 1137; 892 NYS2d 157 (2nd Dept 2009)

The defendant was convicted in December 2006 of robbery and possessing stolen property, and in January 2008 of burglary and robbery.

Holding: The evidence was legally insufficient to sustain the charge of fifth-degree possession of stolen property. There was no legally sufficient proof that any of the personal property found in the defendant's possession belonged to the accuser Michelle Bottoms. Nor was there sufficient evidence to establish that accuser Clarence Washington sustained "a 'physical injury' within the meaning of Penal Law § 10.00(9)." There was not sufficient evidence of the extent of the accuser's injuries or sufficient evidence from which the jury could have inferred that the accuser suffered substantial pain. *See People v Pierrot*, 31 AD3d 582. The convictions for first-degree burglary (*see* Penal Law 140.30[2]) and second-degree robbery (*see* Penal Law 160.10[2][a]) and the sentences thereon must be vacated. The defendant only partially preserved his contention that the jury verdict in the first trial was repugnant. He timely claimed that the conviction of first-degree robbery and acquittal of second- and third-degree possession of a weapon constituted a repugnant verdict. He did not raise at the trial level his claim that the conviction of first-degree robbery and acquittal of second-degree robbery were also repugnant. The verdict timely complained of was not repugnant. *See People v Mabry*, 288 AD2d 326. Judgment of December 20, 2006 modified, conviction and sentence on count 24 vacated, that count dismissed, and judgment affirmed as modified; judgment of January 17, 2008 reversed, convictions and sentences on counts 2 and 17 vacated, and those counts dismissed. (Supreme Ct, Queens Co [Spires, J (2006); Gavrin, J, (2008)])

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

Sentencing (General) SEN; 345(37)

People v Ramdass, 68 AD3d 1139, 890 NYS2d 338 (2nd Dept 2009)

The defendant was convicted by guilty plea of attempted second-degree murder and second-degree possession of a weapon.

Holding: "The defendant pleaded guilty in exchange for the court's promise that he would be sentenced to two concurrent determinate prison terms of six and one-half years . . . and a five year period of postrelease supervision." The prosecution did not object to the plea but said the promised sentence was too lenient. Sentencing was

Second Department *continued*

held before a different justice. The accuser and her father asked that a more lenient sentence than agreed to be imposed. The court repeatedly “expressed the erroneous belief that it was bound by the promise made by the justice who presided over the plea proceeding.” As the prosecution concedes, the court “was required to determine an appropriate sentence in light of all the circumstances (*see People v Farrar*, 52 NY2d 302, 305-306 . . .).” Sentence reversed, matter remitted for resentencing. (Supreme Ct, Kings Co [Leventhal, J (plea); D’Emic, J (sentencing)])

Witnesses (Credibility) (General) WIT; 390(10) (22)**People v Thomas**, 68 AD3d 1141, 892 NYS2d 461 (2nd Dept 2009)

The defendant was convicted of first-degree criminal sexual act and endangering the welfare of a child.

Holding: The court improperly admitted into evidence a statement given by the accuser to police about the events of July 30, 2006. The content of the accuser’s statement did not fall within either of the two exceptions to the prohibition against bolstering a witness’s testimony with pretrial statements. Evidence of prompt outcry is limited to the fact, not the details, of a complaint. And to be admissible to rebut a cross-examination challenge to the accuser’s testimony as a recent fabrication, “[t]he prior consistent statement must have been given before the alleged motive to fabricate arose (*see People v McDaniel*, 81 NY2d 10, 16-18 . . .).” Admission of the statement constituted improper bolstering and, under the circumstances, it was not harmless error. *See People v Crimmins*, 36 NY2d 230, 242. Judgment reversed and matter remitted for a new trial. (County Ct, Suffolk Co [Doyle, JJ])

Third Department**Due Process (Fair Trial) DUP; 135(5)****Evidence (General) (Hearsay) (Objections) EVI; 155(60) (75) (90)****People v Oxley**, 64 AD3d 1078, 883 NYS2d 385 (3rd Dept 2009)

The defendant was convicted of murdering the decedent by blunt force. A baseball bat seized in the defendant’s home had biological evidence on it found to be from the decedent and DNA consistent with the defendant’s. Outside the jury’s presence, the defense made a proffer regarding evidence inculcating a man named Chase. One proposed witness would testify Chase threatened the decedent a few hours before the killing and later admitted the murder. Two men who had been incarcerated

with Chase would say that he admitted the killing. A woman would testify that at the decedent’s house a few nights before the death, Chase showed up and told the decedent, who threatened Chase with a baseball bat, that he would get hurt. A cab driver would say he drove someone of Chase’s description to that address, and heard yelling, including a statement that an occupant of the house would get “beat.” Chase testified at the hearing, denying both the murder and the statements. The evidence was disallowed.

Holding: The court followed the proper procedure but abused its discretion in denying the defendant the opportunity to present evidence that specifically connected Chase to the case in a way clearly tending to point to the guilt of a third party. *See People v Schulz*, 4 NY3d 521, 529. The court usurped the jury’s role by evaluating the prosecution’s potential rebuttal and Chase’s denial. *See Holmes v South Carolina*, 547 US 319, 330-331 (2006). The proffered hearsay evidence supported by relevant non-hearsay carried persuasive assurances of trustworthiness and was critical to the defense. *See Chambers v Mississippi*, 410 US 284, 302 (1973). Judgment reversed and matter remitted for a new trial. (County Ct, St. Lawrence Co [Richards, JJ])

Counsel (Competence/Effective Assistance/Adequacy) COU; 95(15)**Juveniles (Right to Counsel) JUV; 230(130)****Matter of Mark T. v Joyanna U.**, 64 AD3d 1092, 882 NYS2d 773 (3rd Dept 2009)

The mother of the subject child had sexual relationships with two men in 1996. She later married one of them and the child was born in 1997. After a divorce in 2007, the other man sought to prove paternity. The court granted the mother’s motion to dismiss based on equitable estoppel. The child had different lawyers in the trial court and on appeal. Appellate counsel filed a brief supporting affirmance, contrary to the child’s position below. The lawyer said at oral argument that he had not met or spoken with his client.

Holding: Among the primary obligations of Attorneys for Children is to help clients articulate their positions to the court. *See Family Court Act* 241. The Rules of the Chief Judge require counsel for children in proceedings such as this to advocate the child’s position (22 NYCRR 7.2), which requires consulting with and advising the child in a way consistent with the child’s capacities. *See* 22 NYCRR 7.2(d)(1). An attorney may advocate for a position contrary to the child’s wishes if the attorney is convinced the child lacks capacity to make judgments or that the child’s position would likely result in substantial risk of imminent serious harm to the child but the attorney must still tell the court of the child’s wishes if the

Third Department *continued*

child wants the attorney to do so. *See* 22 NYCRR 7.2(d)(3); *Matter of Carballeira v Shumway*, 273 AD2d 753, 754-757 *lo den* 95 NY2d 764. Other standards and policies offer similar guidance. The child here was denied meaningful assistance where the attorney proceeded without consulting and advising his client. Decision withheld, appellate counsel for the child relieved of assignment, and new counsel assigned to represent the child on appeal. (Family Ct, Broome Co [Pines, JJ])

Accusatory Instruments (General) ACI; 11(10)

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

People v Black, 65 AD3d 811, 884 NYS2d 292 (3rd Dept 2009)

The defendant was convicted of multiple sexual offenses. The court imposed maximum sentences to “run consecutively with each other to the full extent allowed by law.”

Holding: The accuser’s testimony rendered four of the eight counts of second-degree rape duplicitous because there was no way to match alleged acts during the period of time indicated with specific counts. *See People v Jones*, 165 AD2d 103, 108-109 *lo den* 77 NY2d 962. The court’s instructions compounded the problem by failing to link the testimony about intercourse to the different counts or require unanimity as to each count. *See People v First Meridian Planning Corp*, 86 NY2d 608, 616. Four counts charging endangering the welfare of a child were similarly duplicitous. Four counts charging third-degree sexual abuse were each split into one-month time frames, but the accuser’s testimony as to each time frame was that the abuse occurred “at least once.” This is not a continuing offense and so the counts were rendered duplicitous. Four counts charging endangering the welfare of a child based on continuing conduct were not duplicitous but were multiplicitous because “there was no interruption in the course of conduct such that numerous counts could be alleged (*see People v Moore*, 59 AD3d 809, 810-811. . .).” Judgment modified by reversing the convictions on four second-degree rape and four third-degree sexual abuse counts and seven counts of endangering the welfare of a child, those counts dismissed, and sentences imposed thereon vacated with leave to re-present to a new grand jury; judgment modified by directing the sentences for the non-dismissed endangering the welfare of a child counts to run concurrently with the sentences for non-dismissed second-degree rape counts; and judgment affirmed as modified. (County Ct, Sullivan Co [LaBuda, JJ])

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

Matter of Reginald Q. v Richard Q., 65 AD3d 1396, 884 NYS2d 659 (3rd Dept 2009)

The petitioners, paternal grandparents of the respondent who reside in North Carolina, sought custody of the respondent’s daughters. The respondent father supported the application for permanent custody but requested reasonable visitation. The court modified a prior visitation order to permit the father four hours of visitation a day and to have the petitioners rather than program employees supervise the visits.

Holding: The change in custody and the children’s relocation to North Carolina made the prior visitation order unworkable. The court properly found modifications were required. *See Matter of Wisloh-Silverman v Dono*, 39 AD3d 555, 556-557. The court was fully familiar with the long history of this case. There was no evidence of a change in the circumstances that were the basis for the original limits on supervision. There is no ground for disturbing the court’s determination. *See Matter of Rebecca KK.*, 55 AD3d 984, 985-986. The respondent was represented by counsel and did not request a separate hearing on visitation or seek to submit further proof or have witnesses examined as to visitation. The proper remedy for dissatisfaction with the continuing limits on visitation is to apply for modification and offer adequate proof that modification is in the best interest of the children. Order affirmed. (Family Ct, Clinton Co [Lawliss, JJ])

Dissent: [Malone, JJ] Visitation was not discussed at the custody hearing until the court sua sponte raised it. The court did not explain how the imposed visitation requirements were in the best interests of the children.

Burglary (Sentence) BUR; 65(35)

Sentencing (Appellate Review) (Excessiveness) SEN; 345(8) (33)

People v Kearns, 66 AD3d 1084, 886 NYS2d 779 (3rd Dept 2009)

The defendant pleaded guilty to eight counts of burglary. He received an aggregate sentence of 14 years’ imprisonment plus five years postrelease supervision.

Holding: The sentences were harsh and excessive. The offenses were not part of an ongoing course of criminal conduct but rather appear fueled by the addicted defendant’s need for drugs. He entered the same residence on eight different occasions to take money, using a key he had obtained when working for the people living there. He carried no weapon and exhibited no violent behavior, slipping in at night when the residents were asleep. The defendant had only a minimal criminal history, having been convicted of a few minor drug and weapons charges. In exercise of this court’s interest of justice jurisdiction, the sentences are reduced accordingly. *See Criminal Procedure Law 470.15(6)(b); see eg People v*

Third Department *continued*

Suhalla, 97 AD2d 857, 858; compare *People v Colantonio*, 277 AD2d 498, 501 *lv den* 96 NY2d 781. Judgment modified by directing the second-degree burglary sentence under count 4 to run concurrently with the second-degree burglary sentences under counts 1, 2, and 3, so that the aggregate prison term is 10½ years, and judgment affirmed as modified. (County Ct, Columbia Co [Nichols, JJ])

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

Larceny (Bad Checks) (Elements) (Evidence) (Grand Larceny) (Value) LAR; 236(5) (17) (25) (40) (80)

People v Asai, 66 AD3d 1138, 888 NYS2d 617 (3rd Dept 2009)

The defendant was convicted of one count of third-degree grand larceny and 10 counts of second-degree possession of a forged instrument. Following his jury conviction on all counts, the court imposed 11 consecutive sentences of three and a half to seven years.

Holding: The evidence was insufficient as to the charges of possessing a forged instrument. In filling out multiple applications to receive supermarket cards allowing him to use checks in the chain's stores, the defendant used his own name, contact information, and date of birth, but different driver's license numbers. While clearly fraudulent, these acts did not result in forged instruments because the purported maker of the applications for the cards and the actual maker were the same. See Penal Law 170.00; *People v Cunningham*, 2 NY3d 593, 597. The defendant's claim that the prosecution improperly aggregated the amounts of several bad checks to support the grand larceny charge was not preserved for review. His remaining contentions are rejected. Judgment modified by reversing the ten second-degree criminal possession of a forged instrument convictions, counts dismissed and sentences imposed thereon vacated, and judgment affirmed as modified. (Supreme Ct, Albany Co [Lamont, JJ])

Misconduct (Prosecution) MIS; 250(15)

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

People v Caba, 66 AD3d 1121, 887 NYS2d 709 (3rd Dept 2009)

The defendant was convicted by a jury of second-degree criminal sexual act and was sentenced to a year in jail. His 14-year-old cousin claimed that the defendant asked her to perform an oral sex act on him, which she had done. The defendant testified that the incident did not occur.

Holding: Two unpreserved errors require reversal in the interest of justice. One, the accuser's statements were repeatedly and improperly bolstered by alleged statements she made well after the time that could be considered as a prompt outcry. See *People v McDaniel*, 81 NY2d 10, 16-17. Two, the prosecutor improperly cross-examined a defense fact witness as to whether the book used to administer his oath was not sacred to the witness's religion. Attempting to discredit witnesses on the basis of their religious beliefs or the exercise of their right to affirm the truth of their testimony is improper, with exceptions not applicable here. See *People v Wood*, 66 NY2d 374, 378. If the prosecutor was concerned that the oath administered was insufficient, the proper procedure was to seek questioning of the witness outside the jury's presence. See *United States v Kalaydjian*, 784 F2d 53, 55 (2nd Cir 1986). As the case turned on credibility, these errors cannot be deemed harmless. Judgment reversed and matter remitted for a new trial. (County Ct, Broome Co [Smith, JJ])

Accusatory Instruments (Amendment) (Sufficiency) ACI; 11(5) (15)

People v Casey, 66 AD3d 1128, 887 NYS2d 714 (3rd Dept 2009)

The accuser was attacked by several people outside a bar and sustained injuries. The defendant, originally charged with gang assault, admitted hitting the accuser earlier, inside the bar, but denied involvement in the later joint attack. The defendant moved to dismiss the indictment charging her with second-degree assault on the grounds that the grand jury evidence had not shown the requisite serious injury. The court agreed and reduced the charge to third-degree assault. The defendant pleaded guilty.

Holding: The claim that the court's procedure in reducing the charges deprived it of jurisdiction due to lack of compliance with statutory requirements was not precluded by the defendant's waiver of appeal. See *People v Bethea*, 61 AD3d 1016, 1017. Under Criminal Procedure Law 210.20(6), when a court reduces an indictment count due to insufficient evidence, the prosecution must proceed in one of three ways: file a prosecutor's information containing the reduced charge; re-present the matter to a grand jury; or appeal the order. Here, after the court changed the wording of the indictment by its own hand, the prosecutor did not follow any of the three options. Proceeding on the amended indictment did not fulfill the prosecution's statutory obligation to draft a sufficient accusatory instrument. Judgment reversed and indictment dismissed. (County Ct, St. Lawrence Co [Richards, JJ])

Discovery (Preservation of Materials) DSC; 110(25)

Third Department *continued*

People v Gomez-Kadawid, 66 AD3d 1124, 888 NYS2d 621 (3rd Dept 2009)

Three packs of heroin were found by correction officers in a hidden pocket of pants worn by the defendant, a prisoner. He was convicted of first-degree promoting prison contraband and seventh-degree possession of drugs.

Holding: The only issue at trial was whether the defendant knowing possessed the heroin. *See* Penal Law 205.25(2), 220.03. He testified that the pants were not his; he found them and wore them because he was denied access to his own clothing while in a hospital ward. Two other prisoners supported his statements. The correction officers testified that the defendant looked nervous and acted in a furtive manner just before they frisked him, detecting the heroin hidden in a slit in the material over the zipper. The prosecution acknowledges its failure to comply with discovery requirements by preserving the pants. *See* Criminal Procedure Law 240.20(1)(f). Some sanction short of dismissal is required, as less severe measures can rectify the harm caused by the loss of evidence. *See People v Kelly*, 62 NY2d 516, 521. Telling the jury that if the pants had been produced at trial, the defendant would have shown he was wearing someone else’s pants would establish what the failure to preserve evidence deprived the defense of presenting without unduly rewarding the defendant for the prosecution’s error. Judgment reversed and matter remitted for a new trial. (County Ct, Clinton Co [McGill, JJ])

Accusatory Instruments (Sufficiency) ACI; 11(15)

Narcotics (Marijuana) (Penalties) (Possession) NAR; 265(40) (55) (57)

People v Hurell-Harring, 66 AD3d 1126, 887 NYS2d 317 (3rd Dept 2009)

The defendant pleaded guilty to first-degree promoting prison contraband for bringing 21.1 grams of marijuana into a state prison to give to her husband, a prisoner. The plea followed the defendant’s waiver of indictment and agreement to proceed by superior court information (SCI). Sentenced to five years of probation including six months in jail, she filed a notice of appeal and later moved to vacate the judgment under Criminal Procedure Law 440.10. That motion was denied, and the defendant received permission to appeal; the appeals were consolidated.

Holding: The SCI set out the contraband that the defendant was alleged to have introduced into the prison as 21.1 grams of marijuana. While this appeal was pending, the Court of Appeals held that amounts of marijuana

under 25 grams are not “dangerous contraband” within the meaning of the applicable statute absent aggravating circumstances, which were not alleged here. *See People v Finley*, 10 NY3d 647, 654. *Finley*, which clarified the meaning of existing law, is applicable to this direct appeal. *See People v Jean-Baptiste*, 11 NY3d 539, 542. The amount of marijuana alleged in the SCI being insufficient to constitute a material element of the crime charged, the SCI is jurisdictionally defective. The defendant’s remaining contentions are rendered academic. Judgment reversed, plea vacated, SCI dismissed, and appeal from the order dismissed as academic. (County Ct, Washington Co [McKeighan, JJ])

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

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

People v Marshall, 66 AD3d 1115, 887 NYS2d 308 (3rd Dept 2009)

The defendant pleaded guilty to fourth-degree possession of drugs. He waived his right to appeal as part of the plea agreement. He failed to appear at sentencing and was later sentenced as a predicate felon. While his appeal was pending, he was notified by the federal government that deportation proceedings would be initiated as a result of his conviction. His conviction was affirmed. He filed a CPL 440.10 motion to vacate the conviction on the grounds that he had received ineffective assistance of counsel when his attorney assured him he would not be deported as a result of the plea. The motion was dismissed.

Holding: Because the defendant asserts he would not have pleaded guilty but for counsel’s erroneous advice, the ineffective assistance of counsel claim impacts on the voluntariness of his plea, surviving his waiver of the right to appeal. *See People v McDonald*, 1 NY3d 109, 114-115. The defendant says his lawyer told him he would not have to worry about being deported due to the guilty plea, but federal law requires removal of noncitizens who have been convicted of any drug offense other than a single offense involving possession for personal use of 30 grams or less of marijuana. *See* 8 USC 1227(a)(2)(B)(i). The court erred in denying the motion without a hearing. Order reversed and matter remitted for further proceedings. (County Ct, Albany Co [Herrick, JJ])

Evidence (Weight) EVI; 155(135)

Sex Offenses (General) SEX; 350(4)

Third Department *continued***People v O'Neil, 66 AD3d 1131, 887 NYS2d 705
(3rd Dept 2009)**

The defendant, a high school teacher, coached the accuser, a runner, for two years. Shortly after the accuser's family moved away, she claimed the defendant had raped her. Several of multiple counts of sexual offenses were dismissed at the end of the prosecution's case and others at the close of all proof. After four days of deliberation and an *Allen* charge, the defendant was acquitted of all but two of the remaining charges, third-degree sexual abuse and endangering the welfare of a child.

Holding: The verdict was against the weight of the evidence. *See People v Cahill, 2 NY3d 14, 58.* The accuser testified that the defendant rubbed her vagina through her clothing while they were alone in a car on the way to a race practice held at another school. The defendant denied that this occurred and said two other students were in the car on that trip. One of the students testified that he was in the car, that he saw no action such as the accuser alleged, and that the accuser did not complain of any improper acts by the defendant. That student initially told police that he had been driven by another student while the accuser was driven by her parents. He said at trial that the police had refused to accept an answer that he didn't know. The other student did not recall how she got to the practice, but said it was possible she was with the others. While a jury's determinations about credibility are entitled to great deference, the jury disbelieved much of what the accuser said and her testimony regarding the events underlying the conviction were contradictory. Judgment reversed and indictment dismissed. (County Ct, Washington Co [McKeighan, JJ])

Evidence (Chain of Custody) **EVI; 155(18) (60) (100)**
(General) (Photographs and Photography)

Videotapes (General) **VID; 382(10)**

**People v Roberts, 66 AD3d 1135, 887 NYS2d 326
(3rd Dept 2009)**

The defendant was convicted of first-degree sodomy and sexual abuse based on a videotape found by his housemate depicting the defendant performing oral sex on a person who appeared to be asleep or unconscious.

Holding: The prosecution failed to lay a proper foundation for admission of the videotape. There was no testimony that the tape fairly and accurately represented events that actually transpired. The court erred in admitting it over the defendant's strenuous objection. The chain of custody from the housemate to the police officer who received it from the housemate included nothing about

the making of the tape, where it had been kept, or who had access to it during the two years from the time of its making to its discovery. *See People v Patterson, 242 AD2d 740, 741 revd 93 NY2d 80.* The defendant's subsequent testimony that the conduct had occurred but was consensual did not satisfy the requirement that the fairness and accuracy of the whole tape be shown as a predicate to admission. The person depicted in the tape had no recollection of the depicted events. Under the circumstances, the error was not harmless. At a new trial, the prosecution will have an opportunity to remedy the foundational deficiencies. The court did not err in refusing to admit into evidence a printout of an instant message alleged to be between the person depicted in the tape and the defendant because it lacked sufficient authenticity and reliability. *See People v Givans, 45 AD3d 1460, 1461-1462.* Judgment reversed and matter remitted for a new trial. (County Ct, Saratoga Co [Scarano, JJ])

Assault (Serious Physical Injury)

ASS; 45(60)

Evidence (Sufficiency)

EVI; 155(130)

**People v Ham, 67 AD3d 1038, 889 NYS2d 110
(3rd Dept 2009)**

The accuser and the defendant argued. A mutual friend separated them before any blows were struck. The defendant left, returning with his brother. The accuser testified that the defendant asked to talk to him, then pulled out a gun and began firing at him. The accuser, who also had a gun, fled after an exchange of gunfire. The defendant's brother then shot the accuser in the leg with a rifle. Charged with multiple offenses including attempted second-degree murder, the defendant and his brother were convicted of first-degree assault, reckless endangerment, and possession of a weapon.

Holding: The evidence was legally insufficient to support the first-degree assault conviction. *See Penal Law 120.10(1).* The accuser's wound resulted in only a small amount of bleeding, did not cause a loss of consciousness, and appeared unremarkable in x-rays. While the accuser did receive pain medication, required physical therapy, and was unable to play sports for awhile afterward, there was no evidence as to how long he needed the medication or crutches, or of any protracted impairment. His aunt testified that the accuser had a life-long limp from having been born with a club foot. In the absence of evidence that the injuries were life-threatening, caused serious or protracted disfigurement, or protracted impairment of health or organ function, the definition of serious physical injury was not met. Judgment modified by reducing the first-degree assault conviction to the lesser included offense of attempted first-degree assault, sentence thereon vacated, matter remitted for resentencing, and judgment affirmed as modified. (County Ct, Schenectady Co [Hoye, JJ])

Third Department *continued*

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

Juveniles (Abuse) JUV; 230(3)

People v Lewie, 67 AD3d 1056, 889 NYS2d 265 (3rd Dept 2009)

The defendant’s infant died as a result of closed head injuries; autopsy evidence indicated that the child exhibited multiple bodily injuries sustained over several weeks. The defendant initially reported that she had fallen with the child in the shower. Later she said her boyfriend had told her he dropped the child in the shower. She first said the child had not appeared to need medical attention until a day later. After the child died, she told police her boyfriend had kept her from seeking medical help. She was convicted of multiple counts, including second-degree manslaughter.

Holding: Upon an emergency application to remove the child from the defendant’s care when he was hospitalized, counsel was appointed for the defendant as to removal. While the family court matter and the criminal investigation arose from the same situation, they had distinct purposes. *See People v Kent, 240 AD2d 772, 773 lv den 90 NY2d 1012, 91 NY2d 875.* Appointment of counsel for family court did not automatically trigger the defendant’s right to counsel as to the criminal investigation; suppression of the statements the defendant made to the police after she was assigned family court counsel was not required. As to the manslaughter count based on the defendant’s failure to seek medical attention when learning that the child had received the final injuries, the evidence was insufficient to show that she knew the injuries were grave. The fatal injuries were only detected upon examination of internal organs. As to the reckless manslaughter count concerning an ongoing course of conduct, there was evidence that the defendant knew her child was being battered. Judgment modified by reversing the second-degree manslaughter conviction (count 6), count and sentence imposed thereon dismissed, sentences on counts 7 and 8 shall run concurrently, and judgment affirmed as modified. (County Ct, Warren Co [Hall, Jr., JJ])

Defenses (Affirmative Defenses Generally) (General) DEF; 105(2) (31)

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

People v Perry, 67 AD3d 1046, 888 NYS2d 284 (3rd Dept 2009)

The defendant was convicted of first-degree promoting prison contraband. *See Penal Law 205.25(2).*

Holding: The defendant was not entitled to a jury instruction requiring a determination of whether he had temporarily and lawfully possessed razor blades that he said he found in the cell two months after being transferred there. He said that because he was having trouble with other prisoners, he had anonymously notified authorities about the blades so he would be transferred to a special housing unit. However, the defense of temporary lawful possession does not apply to promoting prison contraband. *See People v Legree, 176 AD2d 983, 983-984 lv den 80 NY2d 834; see also Penal Law 265.20.* Further, the defendant’s testimony does not establish that his possession of the razor blades was temporary or lawful. *See People v Williams, 50 NY2d 1043, 1045.* Nor was the defendant entitled to an instruction requiring the jury to determine whether possession of the blades was voluntary. Possession is voluntary where, as the defendant’s testimony here supported, the actor was aware of physical possession long enough to have been able to terminate it. *See Penal Law 15.00(2).* Judgment affirmed. (County Ct, Chemung Co [Buckley, JJ])

Fourth Department

Accusatory Instruments (Sufficiency) ACI; 11(15)

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

People v Muhina, 66 AD3d 1397, 885 NYS2d 809 (4th Dept 2009)

Holding: The court erred in dismissing the indictment as facially defective. “An indictment should not be dismissed as defective under CPL 200.25 if it provides ‘a reasonable approximation, under the circumstances of the individual case, of the date or dates involved’ ([*People v*] *Morris, 61 NY2d [290] at 292.*)” The defendant was charged with three continuing offenses: predatory sexual assault against a child, first-degree course of sexual conduct against a child, and endangering the welfare of a child. The usual requirements of specificity regarding time do not apply to continuing offenses. *See People v Green, 17 AD3d 1076, 1077 lv den 5 NY3d 789; People v Keindl, 68 NY2d 410, 421 rearg den 69 NY2d 823.* “‘The period of two years alleged in the indictment was sufficient to give defendant adequate notice of the charges to enable him to prepare a defense, to ensure that the crimes for which he was tried were in fact the crimes with which he was charged, and “to protect [his] right not to be twice placed in jeopardy for the same conduct”’ ([*People v*] *McLoud, 291 AD2d [867] at 868 [lv den 98 NY2d 678] . . .*)” Order reversed, motion to dismiss the indictment denied, indictment reinstated, and matter remitted for further proceedings. (County Ct, Onondaga Co [Walsh, JJ])

Fourth Department *continued***Juveniles (Hearings) (Paternity) JUV; 230(60) (100) (130)
(Right to Counsel)****Matter of Tracy C.O. v Douglas A.G., 66 AD3d 1390,
886 NYS2d 269 (4th Dept 2009)**

Holding: The court erred when it dismissed the respondent's objection and ordered a genetic marker test in the paternity proceeding. The respondent objected to genetic testing, arguing that it was not in the best interests of the child, based on the presumption of legitimacy and equitable estoppel. *See* Family Ct Act 532. The record shows that the petitioner was married to someone other than the respondent when the child was born. The respondent asserted that, from the time the child was born until almost eight years later, the petitioner and the child lived with another man with whom the child had a parent-child relationship. The court's belief that the child had a right to know the identity of his biological father is insufficient to overcome the benefits to the child by preserving his legitimacy (*see Matter of Greg S. v Keri C.*, 38 AD3d 905, 906), and the parent-child relationship the child has with his mother's paramour. The court should have conducted a hearing regarding the best interests of the child, based on the presumption of legitimacy and equitable estoppel, before ordering the genetic testing. *See Matter of Leon L. v Carole H.*, 210 AD2d 484, 484-485. And the court should have appointed an attorney for the child before the hearing. *See Matter of Troy D.B. v Jefferson County Dept of Social Servs*, 42 AD3d 964, 965. Order reversed and matter remitted for further proceedings on the petition. (Family Ct, Onondaga Co [Burke, JHO])

**New York State Agencies
(Parole, State Division of) NYA; 266.5(190)****Unlawful Imprisonment
(Elements) (General) UNI; 377(10) (17)****Collins v State of New York, 69 AD3d 46, 887 NYS2d 400
(4th Dept 2009)**

The claimants, a former state inmate and his wife, alleged that the Division of Parole improperly imposed a five-year period of post-release supervision (PRS) on the former inmate and that he was later incarcerated on a parole detainer warrant for a PRS violation. When he was originally sentenced, the court had failed to impose a mandatory five-year period of PRS. While incarcerated, the claimant filed a habeas corpus petition, which the court granted, and he was released from custody. Seven months later, the claimants sought permission to file a late notice of claim against the state for unlawful imprisonment. The court denied the motion and the claimant's renewal application.

Holding: The court did not abuse its discretion in adhering to its prior decision to deny the request for permission to file a late notice of claim. In deciding a late notice application, the court must consider six factors, one of which is whether the claim appears to be meritorious. *See* Court of Claims Act 10(6). The court correctly concluded that the proposed claim did not have merit. It makes no sense to permit a defective claim, even if the other factors supported granting the application. *See Matter of Martinez v State of New York*, 62 AD3d 1225 1226. The claimant cannot establish that his "'confinement was not otherwise privileged' (*Martinez v City of Schenectady*, 97 NY2d 78, 85 . . .)." Because the claimant's illegal confinement was based on a legal process that was valid on its face, the state cannot be held liable for damages unless the court issuing the process lacked personal or subject matter jurisdiction. *See Harty v State of New York*, 29 AD2d 243, 244 *affd* 27 NY2d 698. The Division of Parole did not lack jurisdiction to impose a period of PRS; it acted in excess of its jurisdiction. *See Matter of Garner v New York State Dept of Correctional Servs*, 10 NY3d 358, 362. When the Division imposed the period of PRS on the claimant, it was acting pursuant to case law holding that a period of PRS is automatically included in the sentence, even if the sentencing court did not pronounce it. *See eg People v DePugh*, 16 AD3d 1083. And the Court of Appeals has held that, in certain cases, the Department of Correctional Services has the power to calculate sentences in accordance with the relevant statutes, without direction from the sentencing court. *See People ex rel Gill v Greene*, 12 NY3d 1, 5-6. The unlawful imprisonment cause of action is also without merit because the claimants cannot show that the Division's alleged unlawful action caused them injury. *See* Corr Law 601-d; Penal Law 70.85; *People v Sparber*, 10 NY3d 457. At the time of sentencing, Penal Law 70.45 mandated that the court impose a five-year term of PRS. "Thus, if the sentencing court had been alerted to the fact that it failed to impose a period of PRS, the court would have imposed the same five-year period of PRS at the resentencing hearing that the Division itself imposed. While the procedure by which the period of PRS was imposed was improper, the actual imposition thereof was not." Order affirmed. (Court of Claims [Collins, JJ])

Evidence (Sufficiency) EVI; 155(130)**Larceny (Elements) (Evidence) LAR; 236(17) (25)****People v Abeel, 67 AD3d 1408, 888 NYS2d 696
(4th Dept 2009)**

The defendant was charged with third-degree grand larceny. Trial evidence showed that he was awarded a construction project, received the \$3,125 he had estimated for the cost of materials, and never began the project or returned the funds. The court issued a postverdict order

Fourth Department *continued*

granting the defendant’s motion to dismiss and the prosecution appealed.

Holding: The court erred in dismissing the indictment; the evidence was sufficient to support a conviction of larceny by false promise. *See* Penal Law 155.05(2)(d); *People v Barry*, 34 AD3d 1258 *lv den* 8 NY3d 919. The evidence showed that, after the defendant received the funds, he spent it all on overdue bills. He did not return the church’s phone calls, and upon questioning by the State Police, offered dubious excuses for failure to do the work. The prosecution submitted evidence that the defendant received money based on a promise to do work, but also argued in closing that the defendant promised to buy materials with the money and did not. There was no evidence that the defendant promised to use the money to buy the materials. However, the prosecutor did not change the theory of prosecution; neither the indictment nor bill of particulars specified a particular promise. The defendant received fair notice of the accusations against him. *See People v McCallar*, 53 AD3d 1063, 1065 *lv den* 11 NY3d 833. The closing addressed the promise to do the work, which was supported by the evidence. Order reversed, motion denied, indictment and verdict reinstated, and matter remitted for sentencing. (County Ct, Steuben Co [Furfure, JJ])

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

Homicide (Causation) (Negligent Homicide) **HMC; 185(10) (45)**

People v Bianco, 67 AD3d 1417, 890 NYS2d 751 (4th Dept 2009)

The court dismissed the indictment charging the defendant with criminally negligent homicide. The prosecution appealed.

Holding: The contention that the evidence before the grand jury was sufficient to support the charge is rejected. The defendant’s statement, presented to the grand jury, indicated that he and the decedent used heroin together the weekend before the decedent died. The day before the decedent’s death, the defendant observed the decedent to be “wasted” before they went to the defendant’s house, where the decedent passed out. The next day the defendant drove to work and left the decedent in the vehicle. After work, they drove to a store, which the defendant entered while the decedent remained in the car. Upon the defendant’s return, he thought the decedent appeared to be getting sick, so he drove to the decedent’s car, put the decedent in the passenger seat, and then drove that car to a restaurant parking lot. The defendant left the decedent in the car there, and threw a bottle containing methadone and some used needles from the decedent into a dump-

ster. The next day, the defendant saw the decedent’s car still in the lot but saw no one and did not stop, believing that the “decedent ‘would have gone with the police by [that time].’” The decedent died of mixed drug intoxication in the car. The defendant’s actions were not a “sufficiently direct cause” of death to warrant criminal liability where the decedent obtained and used the drugs outside the defendant’s presence. *Cf People v Galle*, 77 NY2d 953, 955-956. Order affirmed. (County Ct, Livingston Co [Wiggins, JJ])

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

Sentencing (Appellate Review) (Excessiveness) **SEN; 345(8) (33)**

People v Garcia-Gual, 67 AD3d 1356, 887 NYS2d 914 (4th Dept 2009)

The defendant pleaded guilty to first-degree manslaughter, among other charges. He appealed, contending his sentence was unduly harsh and severe.

Holding: The defendant rightly acknowledges that review of whether the court abused its sentencing discretion is inappropriate. *See gen People v Delgado*, 80 NY2d 780, 782. However, this court may reverse a judgment that is illegal (*see* Criminal Procedural Law 470.15[2][c]), or reverse and modify as matter of discretion in the interest of justice a legal sentence that is unduly harsh or severe. *See* Criminal Procedure Law 470.15(6)(b). That the defendant received the bargained-for sentence does not preclude such discretionary review. *See People v Smith*, 32 AD3d 553, 554. “To the extent that prior decisions of this Court, including *People v McGovern* (265 AD2d 881, *lv denied* 94 NY2d 882), suggest a rule to the contrary, those decisions are not to be followed.” A review of the defendant’s sentence shows that it was not unduly harsh or severe. Judgment affirmed. (County Ct, Monroe Co [Renzi, JJ])

Arrest (Custody) (Probable Cause) **ARR; 35(6) (35)**

Search and Seizure (Consent) **SEA; 335(20)**

People v Gayden, 67 AD3d 1389, 889 NYS2d 131 (4th Dept 2009)

The defendant, who was treated for a gunshot wound, told police the injury occurred when two people robbed him. At about the same time, a burglary victim arrived at the hospital, telling police that one burglar’s gun had accidentally gone off and hit another burglar. The defendant was not identified as the injured burglar at a showup. Two weeks later, police came to the defendant’s home and asked him to show them the location at which he had been shot. He went with them to an intersection

Fourth Department *continued*

two miles from where the alleged burglary had occurred. The police then drove him to the police station, where they told him they did not believe his version of how he was shot. He waived his *Miranda* rights and answered questions. His motion to suppress the resulting inculpatory statements was denied. A jury convicted him of robbery and burglary.

Holding: Even after according great weight to the suppression court's determination, the hearing evidence did not support a finding that the defendant voluntarily went with police to the station. To determine the scope of consent requires looking at both the request and the response and any attendant circumstances. *See People v Gomez*, 5 NY3d 416, 420. The defendant agreed to show the officers the location of the shooting, but the prosecution failed to show he also agreed to accompany them to the station. He had no other means of transportation back to his home. Absent consent, his detention was equivalent to arrest and there was no probable cause. Judgment reversed, motion to suppress statements made to investigating officers granted, and new trial granted on counts one, two, and three of the indictment. (Supreme Ct, Monroe Co [Valentino, JJ])

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

Traffic Infractions (General) TFI; 372(15)

People v Rose, 67 AD3d 1447, 889 NYS2d 789 (4th Dept 2009)

The defendant pleaded guilty to DWI and appealed the court's denial of his motion to suppress evidence resulting from the stop of his vehicle.

Holding: The prosecution mistakenly relies on *People v Ingle* (36 NY2d 413) to support the validity of the stop of defendant's vehicle. Since that decision, which held a vehicle stop is lawful so long as it is not based on "mere whim, caprice, or idle curiosity," the Court of Appeals has made clear that stops "are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations," or where there is at least a reasonable suspicion that a crime has been, is being, or is about to be committed by a vehicle occupant, or there is probable cause to believe a driver has committed a traffic violation. *People v Washburn*, 309 AD2d 1270, 1271; *see People v Robinson*, 97 NY2d 341, 348-349. The stop here was valid only if there was probable cause to believe the defendant committed a traffic violation. That an officer saw the defendant flash his lights when another car was approaching is not sufficient; the law prohibits only headlamps that interfere with the

driver of the other vehicle, not mere flashing of lights. *See People v Meola*, 7 NY2d 391, 397. Based on the officer's mistake of law, the stop was illegal at the outset. *See Matter of Byer v Jackson*, 241 AD2d 943, 944-945. Judgment reversed, plea vacated, motion to suppress granted, indictment dismissed, and matter remitted. (County Ct, Steuben Co [Bradstreet, JJ])

Driving While Intoxicated (Chemical Test [Blood or Urine]) DWI; 130(5)

Police (General) POL; 287(20)

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

People v Lerow, 70 AD3d 66, 889 NYS2d 813 (4th Dept 2009)

Following a single-vehicle accident, the defendant was taken to a local hospital and then was transferred to a medical center in Pennsylvania. At the request of a deputy county sheriff from New York, a registered nurse drew blood from the unconscious defendant using a kit provided by the deputy. A test performed in New York revealed a 0.12% blood alcohol content. Indicted for DWI, the defendant moved to suppress the test results. After denial of the motion, he moved for reconsideration and suppression was granted. The prosecution appealed.

Holding: The issue of first impression here is whether the deputy had the authority to direct the blood draw out of state. Police, while lacking arrest power out of state, can conduct investigations and collect evidence outside their jurisdiction. *See People v Neil*, 24 AD3d 893. Other states have found officers may direct a blood draw from a DWI suspect transported across state lines for treatment. *See Johnson v North Dakota Dept. of Transp.*, 683 NW2d 886, 890 (ND). Enforcement of New York's implied consent law (Vehicle and Traffic Law 1194[2][a][1]) did not infringe on the sovereignty of Pennsylvania, which has a similar statute. *See 75 Pa Cons Stat 1547(a)(1)*. The requirements of that statute were not violated, and the requirements of the New York statute, which applied as the law of the forum (*see People v Benson*, 88 AD2d 229, 231), were met. No search warrant was required given the exigent circumstances. Order reversed, suppression motion denied, and matter remitted. (County Ct, Chautauqua Co [Ward, JJ])

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

Weapons (Possession) WEA; 385(30)

People v Carmichael, 68 AD3d 1704, 891 NYS2d 574 (4th Dept 2009)

Fourth Department *continued*

The defendant was convicted of murder and two counts of possession of a weapon.

Holding: The evidence was not legally sufficient to support the defendant’s third-degree possession of a weapon conviction. At issue in that count was his alleged possession of a gun about four days after the murder. Following his arrest on that date, the defendant said in response to police questioning that the gun used in the crime was in a safe on a closet shelf in his mother’s bedroom. He said he lived in his mother’s house. He gave police an incorrect combination to the lock; police were able to open the safe only after the defendant’s mother took a slip of paper from her purse and provided the right combination. There was no valid line of reasoning and allowable inferences to support a conclusion that the defendant exercised dominion and control over the location of the gun or over his mother. Therefore, there was insufficient proof of his constructive possession of the gun on the day of his arrest. *See People v Manini*, 79 NY2d 561, 573-574. A juror’s internet research into whether a gunshot wound appeared to have been inflicted at close range does not require reversal; the juror said the results of his research were not helpful to him and he based his decision only on admitted evidence. The only other juror who was aware of the research likewise did not rely on it. Judgment modified by reversing the third-degree criminal possession of a weapon conviction and dismissing count seven of the indictment and judgment affirmed as modified. (Supreme Ct, Monroe Co [Affronti, JJ])

Grand Jury (General) (Selection) GRJ; 180(3) (10)

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

People v Davis, 68 AD3d 1653, 893 NYS2d 411 (4th Dept 2009)

A sitting Supreme Court justice acted as foreperson of the grand jury that indicted the defendant for murder and multiple counts of robbery. On appeal following conviction, he challenged among other things the County Court’s refusing to dismiss the indictment due to the justice’s role on the grand jury.

Holding: Not every Supreme Court justice can be said to be “a part of” every grand jury impaneled around the state. *See Criminal Procedure Law 190.05*. While a grand jury is impaneled by a superior court and constitutes a part of that court, a superior court is defined as the supreme court or a county court, not as “a single entity comprised of individual justices or judges (CPL 10.10[2]).” The justice who sat as foreperson was not required to recuse herself; she was not a part of the superior court that impaneled this grand jury. The Attorney General was not

given notice of the defendant’s challenge to the constitutionality of the repeal of the law that had barred judges from serving on jury duty, so the challenge may not be heard. *See Executive Law 71(1)*. Nor has the defendant articulated a cognizable basis for that challenge. As the foreperson was qualified to serve, the grand jury was not illegally constituted and was not defective pursuant to Criminal Procedure Law 210.35(1). The robbery counts must run concurrently with the murder count because the indictment did not specify which of the robbery counts served as the predicate for felony murder; further, the sentences on the robbery counts must run concurrently because the robberies were committed through the same act or omission. Judgment modified by directing that all sentences shall run concurrently with respect to each other and judgment affirmed as modified. (County Ct, Oneida Co [Dwyer, JJ])

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

Juveniles (Permanent Neglect) JUV; 230(105) (130)
(Right to Counsel)

Matter of Deon M., 68 AD3d 1740, 891 NYS2d 817 (4th Dept 2009)

The respondent father was alleged to have permanently neglected his son. On the date set for the fact-finding hearing, the father’s assigned attorney told the court that the father did not want the lawyer to proceed as his attorney. “The court responded, ‘[t]hen I hope he went to law school while he was locked up in jail because you have a trial today. . . .’” The court cut the father off when he attempted to speak, refused to adjourn the matter, granted counsel’s motion to withdraw, and said the father “could ‘retain himself.’” The fact-finding hearing proceeded and the parental rights of the father, who did not cross-examine the sole witness presented, were terminated.

Holding: A respondent in a Family Court Act article 6 proceeding has the right to counsel pursuant to Family Court Act 262(a)(iii). The deprivation of a party’s fundamental right to counsel requires reversal as a denial of due process without regard to the merits of that party’s underlying position. *See Matter of Eoan F.*, 29 AD3d 905, 906. A court’s decision to allow a party to proceed without counsel must be supported on the record by a showing of a knowing, voluntary, and intelligent waiver of the right to a lawyer. *See Matter of David VV.*, 25 AD3d 882, 884. Here, the court failed to conduct the required searching inquiry, so there was no showing that the father knew the dangers and disadvantages of self-representation. *See Matter of Casey N.*, 59 AD3d 625, 627. Order reversed and matter remitted for a new hearing. (Family Ct, Erie Co [Maxwell, JJ])

Fourth Department *continued***Sex Offenses (Sentencing)****SEX; 350(25)****People v Kearns, 68 AD3d 1713, 891 NYS2d 802
(4th Dept 2009)**

Holding: The court below properly determined that the defendant, a sex offender, was a presumptive level three risk for purposes of the Sex Offender Registration Act (SORA). *See* Correction Law 168 *et seq.* The court improvidently exercised its discretion by refusing to grant the defendant a downward departure. The SORA guidelines “do not contain exceptions with respect to a defendant’s reasons for refusing to participate in” sex offender treatment. *See* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 16 (2006). The defendant was awarded 15 points under risk factor 12, which deals with such refusal; he contends that he did so based on the advice of counsel because his appeal was pending when the treatment was offered. Participation in treatment would require making admissions against his interest in the event of a reversal and subsequent new trial. He therefore faced a “Hobson’s choice.” Further, the professionals who evaluated the defendant agreed he is not a sexual predator, has no abnormal sexual tendencies, and is not a threat. This court’s discretion is substituted for that of the trial court even in the absence of an abuse of discretion, because mitigating factors exist not otherwise adequately taken into account by the SORA guidelines. *See People v Santiago*, 20 AD3d 885, 886. The other contentions raised lack merit. Order modified by determining that the defendant is a level two risk and order affirmed as modified. (County Ct, Yates Co [Falvey, JJ])

Evidence (Prejudicial)**EVI: 155(106)****Narcotics (Evidence) (Sale)****NAR; 265(20) (59)****People v Sumter, 68 AD3d 1701, 891 NYS2d 794
(4th Dept 2009)**

A jury convicted the defendant of two counts of third-degree criminal sale of a controlled substance and third-degree criminal possession of a controlled substance.

Holding: The court erred by admitting into evidence the \$1,027 in cash taken from the defendant upon arrest and testimony about that seizure. The arrest occurred over a month after the drug sales of which the defendant was accused. The prosecution did not show a relationship between the seized cash and the charges. Possession of the cash was too remote for its introduction on the issue of intent to outweigh the potential for prejudice. *See People v Corbitt*, 221 AD2d 809, 810. However, the error was harmless. *See gen People v Crimmins*, 36 NY2d 230, 241-242. Judgment affirmed. (County Ct, Oneida Co [Dwyer, JJ]) ☞

Job Opportunities (continued from page 5)

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