



Public Defense Backup Center **REPORT**

Volume XVIII Number 4 July-August-September 2003

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

On the Phone, On Paper, and On the Web: NYSDA Provides Info On the Rate Hike, Case Law, and More

As counties and lawyers prepare for implementation of the legislation increasing assigned counsel fee rates (see Legislative Review, p. 8), they turn to NYSDA for information. Many have already called the Backup Center. Many more have visited the Assigned Counsel Rates pages under Hot Topics on our web site: www.nysda.org. Members and others who need a quick reference guide to how the statute works can now use the information from a PowerPoint presentation given at July Chief Defender Convening (p. 6).

2nd Department AC Lawyers Can't Be Retained

Besides information directly concerned with the rate hike, NYSDA provides information on related issues. For instance, the web site included in "Breaking News" the recent notice that a 2nd Department rule would issue prohibiting assigned counsel from continuing to represent clients who are determined, after initial representation, to be ineligible for public counsel. The change, which brings the 2nd Department into line with the three other Appellate Division departments, follows reports of assigned counsel attorneys telling clients that the lawyers would do a better job (such as going to the crime scene) if they were paid. This change may be seen as an example of closer scrutiny being paid to public defense funds in the wake of the rate increase or just information that clients and attorneys alike need to know.

Case Information Found Here and On the Web

The case summaries that appear in every issue of the *REPORT* (p. 18 *et seq.* in this issue) have long been compiled and made available by subscription. Periodically updated CD-ROMs have for several years made the digests available in searchable form dating back to 1987. Recently, that searchable database has been placed right on the NYSDA web site. See "NYSDA Resources" at www.nysda.org.

Table of Lesser Included Offenses, 13th Revision

Courtesy of the NY Defender Digest—
Inside at Center Insert
(Available in Printed Copies Only,
Not on the NYSDA Web Site)

Jefferson County Added to PDCMS Users

This month the Jefferson County Public Defender Office in Watertown began using NYSDA's Public Defense Case Management System (PDCMS). With the system, the office can easily track the progress of cases, identify potential conflicts of interest, better manage workload and improve the quality of client and case data. Public defender staff can spend less time running down information and more time serving clients. The office will use the PDCMS to track not only criminal cases, but Family Court matters and to automatically generate quarterly reports the office files with the State.

The Jefferson County PDCMS was implemented in two days. After installing and customizing the PDCMS to the needs of the office on the first day, Project Manager Darlene Dollard and NYSDA Managing Attorney Charlie O'Brien spent a day providing hands-on training to PD support staff. The system replaces the office's case tracking process, which was accomplished with a combination of a manual card system, and computerized list.

Jefferson is the thirteenth county to implement the PDCMS application in its defender office. The system continues to be the most widely use defense case management system in New York State.

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Jefferson County Public Defender staff quickly learn the ins and outs of the PDCMS in training session.

NYSDA Conference a Hit

Attendance at the 36th Annual Meeting and Conference in July was one of NYSDA's best-attended, and the CLE provided there got rave reviews. The CLE materials are available from the Backup Center for \$25. ♪

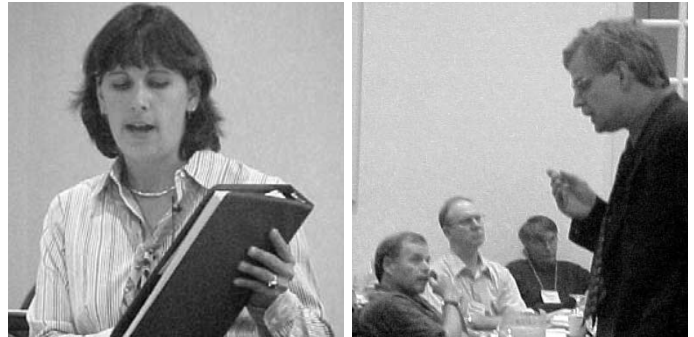
Back to the Gideon Putnam!

The 2003 NYSDA Meeting and Conference at the Gideon Putnam Hotel & Conference Center in Saratoga Springs was so successful that WE'RE GOING BACK! Join us there!
July 25-28, 2004

Representing Noncitizen Criminal Defendants in New York State

3rd Edition Now Available

By Manuel D. Vargas, New York State Defenders Association Immigrant Defense Project. The new edition of this indispensable manual provides comprehensive and practical guidance in plain language for criminal defense attorneys representing noncitizen clients. It describes the immigration consequences of specific New York criminal dispositions and strategies for dealing with them. This book is available for sale to the criminal defense community, immigrant advocates and noncitizens for \$75. Lawyers and advocates outside of New York will benefit from many of the manual's general resources, e.g., a detailed chart of "aggravated felony" case law decisions nationwide. Download an Order Form from www.nysda.org, or call the Backup Center at 518-465-3524. Credit card payments are accepted.



NYSDA Annual Meeting and Conference 2003. More photos p. 35.

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THE REPORT IS PRINTED ON RECYCLED PAPER

Invisible Punishment: The Collateral Consequences of Mass Imprisonment

By Marc Mauer and Meda Chesney-Lind, eds.
The New Press, 2002; 336 pages

By **Barbara DeMille***

To grasp the collective impact of this series of essays by sociologists and public policy and legal scholars, you need to know Lilly's story. Lilly is a fifty-one year old single mother of four children, one of whom, himself a father of three, has been in prison for ten years. Lilly's struggle to maintain contact with, and periodically visit, her son—taking along other family members if they will go—and to maintain her family with some degree of security and stability—taking the collect calls from the prison, sending her son money if she has it, sending the allowed twice-yearly care packages if she can—is done on an income of \$530 a month. That her son has been moved from the District of Columbia, where he was convicted, to a private prison facility in northeastern Ohio makes her struggle more difficult in both financial and human terms. Even for the faithful such as Lilly, there are limits to hope and endurance.

Lilly is both black and poor, uneducated, a product of low wages, poor schools, and a tradition of discrimination devaluing the worth of both the black and the poor. In our nation's capital at any time 10% of black men between the ages of 18 and 35 will be behind bars. For women imprisoned, the number of non-white is two-thirds. This leaves 1.5 million children overall with a parent in prison, 125,000 of them mothers. It would seem, as one essay in this book follows another with more grim figures of the very likely fate of those who are in a racial minority and severely lacking the money for private legal representation, that we as a nation are punishing these poor for being poor over and over again. Lengthy sentences for drug convictions are but the beginning.

The list of the burdens borne, especially by those convicted of drug-related felonies, and the consequent burdens on those that care about them, is long: denial of franchise, in some states for life, for a felony conviction; denial of access to public housing; denial of financial aid for education; denial of food stamps. For the family that attempts to sustain contact, more burdens: long journeys overnight on the bus; humiliating searches; exorbitant phone bills for taking collect calls from prison—expenses that strain already limited resources. And perhaps most limiting of all: shame. Even within families, the wife or lover or mother of one in prison will feel the need to keep this knowledge close, discussing it only with those who will feel compassion or attempt to understand.

** Barbara DeMille holds a PhD in English Literature, earned at SUNY at Buffalo. Her work was heard on Northeast Public Radio from 1993 to 1995. She has published numerous essays and articles.*

Much of this book is statistics: facts and figures, percentages of blacks incarcerated compared with whites; percentages of blacks convicted for drugs compared with whites against actual figures of use. There is an interesting chapter devoted to the small benefits reaped by rural communities who welcome prisons versus the advertised hype. There are the numbers of those dying from drug-resistant tuberculosis in prisons and a comparison of use and attitudes towards the death penalty in Europe and the United States.

Some of this book is devoted to solutions, to outrage, to pleas for reforms of the hardship and abuse resulting from the great growth in our prison industry over the past twenty-five years, both public and private. Since the 80s, "get tough on crime" drug laws mandating extended sentences for drug offenses have filled our prisons and seen to the profitability of building more. During the 90s, the federal prison population grew by 31%. For example, in 1980 there were 12,000 women incarcerated nationwide, by 1999 there were 90,000.

As shown by more figures, numbers representing human lives, we have condemned a segment of our population, via the myriad civil measures these essays deplore, beyond the sentencing of the court to a struggle that they seldom win. The idea of rehabilitative justice, which once flourished among the best of our legislators and policy makers at mid-twentieth century, is gone, replaced by a punitive system that extends far beyond mere time served. With severe criminal, civil, and social penalties, what we as a nation have achieved is not the return to the community of now-wiser, more sober, more productive men or women but social isolates. Unfortunately, in terms of creating recidivism, cycles of poverty, fractured families, and troubled children who themselves know too soon and first-hand our present system of retributive justice, we have succeeded beyond what we might have dreamed.

At the least, our policy is unproductive; in terms of further cycles of social disorganization, poverty, and crime, we have shot ourselves in our social-economic foot. At the most, it is inhumane. Living on \$530 a month, \$130 of it ear-marked for the collect calls from her son, Lilly endures where many of us would falter. And hers will be the final word: "That's the main thing; I have to make sure I keep going. t's for him and his kids to keep contact. That's why it's so hard for me. I have to pay for a three-way on the telephone so I can hook him up with the kids, hook him up with the lawyer. That's what I'm always doing, hooking him up."

In a profit-driven, punitive prison environment, where prisoners are civilly shortchanged and socially shunned, Lilly remains human and connected: a prime example of family values, if only those who purport to care about such things would see and hear. For Anthony is not only a convicted felon, he is her son. ♪

CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: 7th Annual DWI Meeting and Seminar
Dates: October 16-18, 2003
Place: Las Vegas, NV
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Everything You Ever Wanted to Know About the New York State Department of Correctional Services
Date: October 18, 2003
Place: Rochester, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nydsacdl@aol.com; website www.nysacdl.org

Sponsor: National Institute for Trial Advocacy
Theme: Representing the Accused in a Capital Trial
Dates: October 23-26, 2003
Place: Chapel Hill, NC
Contact: NITA: tel (800)225-6482; fax (574)271-8375; e-mail nita.1@nd.edu

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 24, 2003
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nydsacdl@aol.com; website www.nysacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: The Art of Effective Communication: Influencing Judges & Jurors
Dates: October 29-November 1, 2003
Place: New Orleans, LA
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Bar Association
Theme: New York Appellate Practice
Dates & Places: November 5, 2003 New York City
November 7, 2003 Hauppauge, LI
Contact: NYSBA CLE Registration Office: (800)582-2452 or (518)463-3200 x5600; e-mail cle@nysba.org

Sponsor: National Legal Aid and Defender Association
Theme: 2003 Annual Conference
Dates: November 12-15, 2003
Place: Seattle, WA
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; e-mail info@nlada.org; website www.nlada.org

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: December 4-7, 2003
Place: New Orleans, LA
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; e-mail info@nlada.org; website www.nlada.org

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance 2004
Dates: March 13-16, 2004
Place: Memphis, TN
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; e-mail info@nlada.org; web site www.nlada.org

Sponsor: National Criminal Defense College
Theme: Trial Practice Institute 2004
Dates: June 13-26, 2004
July 18-31, 2004
Place: Atlanta, GA
Contact: NCDC: tel (478)746-4151; fax (478)743-0160; e-mail office@NCDC.net

Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: June 11-18, 2004
Place: Dubois, WY
Contact: tel (760)322-3783; fax (760)322-3714; website www.triallawyerscollege.com. Also see the "Training Calendar" for new developments. ☪

Don't Miss the Training You Need!

Check our website for the latest Seminar Information
The *REPORT* is posted there long before the
printed issue is mailed!

Also see the "Training Calendar" for new developments.

Job Opportunities

The Oneida County Public Defender seeks a **Third Assistant Public Defender** for the Criminal Division. Candidates must be admitted or awaiting admission to the NYS bar. Starting salary (during first 18 months) \$31,922; excellent benefits including health and NYS Retirement System membership. Submit cover letter, writing sample, 3 references with addresses & phone numbers, copy of valid drivers license, complete resume including all educational institutions and employment with addresses and phone numbers, and Certificate of Good Standing or statement from the candidate indicating passage of the bar exam, where exam taken, and in which department admission is pending. Send to: Frank J. Nebush, Jr., Chief Public Defender, Oneida County Public Defender, Criminal Division, 250 Boehlert Center at Union Station, 321 Main Street, Utica NY 13501.

Senior Assistant Public Defender sought for Broome County Public Defender Office. This is not an entry-level position. Required: admitted in New York; significant felony trial and/or appellate experience. Starting salary \$63,416.00 plus benefits. Send resume to: Jay L. Wilber, Broome County Public Defender, 229-231 State Street, Binghamton, NY 13901.

The Hiscock Legal Aid Society in Syracuse seeks a **Staff Attorney** to represent persons unable to hire counsel in non-felony criminal matters. Required: ability to handle high volume caseload and a demonstrated commitment to public interest law and to serving the indigent. Admission to NYS bar preferred. Salary \$30,000+ DOE, generous benefits. EOE—persons of color and bilingual persons encouraged to apply. Send cover letter, resume, and three references to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202.

Associate needed. Must be admitted in NY, have interest and one year experience in family law and/or criminal defense and be willing to work as an

assistant public defender. Must consider moving to Washington County, NY. (About 45 minutes north of Albany and 20 minutes south of Lake George). Salary: DOE. Send resumes to: Joseph H. Oswald, Esq., Oswald & McMorris, PO Box 328, Fort Edward NY 12828; fax (518)747-5664; web site: www.oswaldmc-morris.net.

Don't Miss an Application deadline!

Check the *REPORT* as soon as it hits the web at www.nysda.org, and look at Job Opportunities (under NYSDA Resources) for notices received after the *REPORT* deadline.

The Louisiana Crisis Assistance Center, a leading trial office based in New Orleans, LA, specializing in the defense of indigent people charged with capital crimes, seeks an **experienced Trial Attorney**. Significant felony trial experience critical; capital defense experience important. Must be willing to sit the next Louisiana bar. Salary negotiable, but you won't ever get rich doing capital trial work in the Deep South. Benefits. EOE; LCAC recognizes the desperate need to attract more minorities and women to capital defense work in the South. Contact Clive Stafford Smith or Kim Watts at (504)558 9867; e-mail lcac@thejusticecenter.org.

Break The Chain Campaign (BTCC) of the Institute for Policy Studies seeks a **Legal Services Coordinator**. BTCC seeks to minimize the effects of human trafficking, modern-day slavery and worker exploitation through direct service, research, outreach, advocacy, training and technical assistance. The Legal Services Coordinator will be responsible for counseling and representing clients retained by BTCC as well as monitoring the legal case management of clients

referred to partner organizations. Required: 2 or more years prior experience in the practice of law, including competence in immigration, wage and hour employment law and/or federal criminal law and procedure; familiarity with working with low-income communities; experience in high-volume practice; active or pending membership in the DC Bar and preferably in the Maryland or Virginia bar as well (BTCC will pay for yearly bar dues and fees); apt at working with other organizations in a collaborative manner and working effectively and cooperatively with trafficked and exploited persons, legal organizations, community based organizations, volunteer lawyers, and government agencies; ability to develop and implement effective systems for managing own caseload, as well as supervising and monitoring legal caseloads handled by other attorneys or legal organizations; ability to work with staff to develop and implement documentation and legal case protocols.

- familiar with working in a multicultural setting and be linguistically and culturally sensitive. Preferred: knowledge of ethnic communities in the Washington, DC area;
- bi-lingual/bi-cultural (French, Amharic, Spanish, Indonesian, or Tagalog preferred);
- experience advocating for workers rights and trafficked persons human rights in governmental and non-governmental contexts.

Excellent benefits including generous vacation, 403B plan upon hire, fully paid dependent health insurance, fully paid life insurance, fully paid long-term disability, optional short-term disability, optional flexible spending cafeteria plan, direct deposit, and flex time. EOE. Fax resume, cover letter, and a writing sample to the attention of Dorian Lipscombe with the memo "BTCC - Legal Services Coordinator" to (202)-387-7915, e-mail dorian@igc.org, or mail to: Break The Chain Campaign, Institute for Policy Studies, ATTN: Dorian Lipscombe, 733 15th St. NW, #1020, Washington, DC 20005 ☪

Highlights of the 2003 Assigned Counsel Rate Increase Legislation

From PowerPoint Presentation at Chief Defender Convening, July 20, 2003

Held at NYSDA's 36th Annual Meeting and Conference, Saratoga Springs, NY

[Ed. Note: The following outline highlights major points of the new statute raising assigned counsel fees and establishing a state fund to provide money to counties and New York City for public defense. It does not include every detail of the new law, but stresses major factors, including one that some county officials have missed—that the state funding is not earmarked for assigned counsel fees, but can be used for any public defense program established pursuant to County Law Article 18-B, which includes public defender offices, legal aid societies, or bar association sponsored assigned counsel programs.]

Assigned Counsel Rate Increase and Revenue Sharing

Increases fees for experts/investigators pursuant to County Law § 722-c

Raises cap to **\$1000 Per Retainer**

EXTRAORDINARY CIRCUMSTANCES —
“A trial or appellate court may provide for compensation in excess of the foregoing limits.”

3

Assigned Counsel Rate Increase and Revenue Sharing

Chapter 62 (S.1406-B/A.2106-B) (Assigned Counsel Rate Increase — County Revenue Sharing)

\$75 — in and out-of-court for all matters governed by County Law § 722, **EXCEPT:**

\$60 — in and out-of-court “for representation of a person ... who is initially charged with a misdemeanor or lesser offense and no felony”

(Fee increase effective January 1, 2004)

1

Indigent Legal Services Fund Revenue Sharing

State Funds Not Just For Assigned Counsel Compensation

“State funds received by a county or city ... shall be used to supplement and not supplant any local funds which such county or city would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to article eighteen-b of the county law. All such state funds received by a county or city shall be used to improve the quality of services provided pursuant to article eighteen-b of the county law.”

“To assist counties and [the city of New York] in providing legal representation for persons who are financially unable to afford counsel pursuant to article 18-B of the County Law; and assist the state in funding representation provided by assigned counsel paid in accordance with section 35 of the Judiciary Law.”

4

Assigned Counsel Rate Increase and Revenue Sharing

\$75 Rate applies to:

- Felonies (except capital);
- Appeals (felonies, misdemeanors, violations);
- SORA hearings/appeals;
- Parole representation; Parole administrative appeals;
- Family Court representation; and
- Law Guardian representation
- Post-judgment motions, Writs of Habeas Corpus, Writs of Error Coram Nobis (where counsel is assigned).

CAPS: when \$60 Rate applies = **\$2400**
when \$75 Rate applies = **\$4400**

2

Indigent Legal Services Fund Revenue Sharing

Sources of State Funds:

- \$35 DMV fee for lifting of license suspension
- \$27 of \$52 fee to be charged by OCA for county-based criminal history checks
- \$50 increase in attorney registration fee
- \$10 increase in mandatory surcharges for parking violations

5

Indigent Legal Services Fund

Distribution

Beginning April 2005, distribution based on following formula:

- Total fund available minus up to \$25 million for state reimbursement of law guardian program
- To NYC and counties according to their percentage share of local funds expended statewide for indigent legal representation (as determined by Comptroller)
- To “supplement and not supplant any local funds which such county or city would otherwise have had to expend”

6

Indigent Legal Services Fund

Maintenance of Effort

Alternative showing where funds decreased:

—All state funds received during most recent fiscal year were used to “assure an improvement in the quality of services provided . . . and have not been used to supplant local funds.”

9

Indigent Legal Services Fund

Distribution

- Reporting Requirements — Local Funds Expended:
—Local Funds — *“All funds appropriated or allocated by a county (or NYC) for services and expenses in accordance with County Law Article 18-B other than funds received from – 1) the federal or state government, or 2) a private source, where the city or county does not have authority or control over the payment of such private sources.”*
- Annual reports – by March 1st covering previous calendar year

7

Indigent Legal Services Fund

Maintenance of Effort

Whether there has been an improvement in the quality of such services shall be determined by:

- Considering the expertise, training and resources made available to attorneys, experts and investigators providing such services;*
- The total caseload handled*
- The system by which attorneys were matched to cases;*
- The provision of timely and confidential access to such attorneys and expert and investigative services;*
- And any other similar factors related to the delivery of quality public defense services.*

10

Indigent Legal Services Fund

Maintenance of Effort

To be eligible for funding — county or city must demonstrate:

- Local funds expended *“did not decrease from amount expended during previous year”*
- For report filed in 2006 covering calendar year 2005 — that local funds did not decrease from amount expended during calendar year 2002

8

Seven Member Task Force to Review Sufficiency of Rates and Caps

- Four (4) members appointed by Governor from recommendations of NYSBA, ABCNY, NYCLA (1 member at large)
- One (1) member appointed Chief Judge Kaye
- One (1) member appointed by Senator Majority Leader Bruno
- One (1) member appointed by Assembly Speaker Silver
- At least two (2) public hearings; report due by January 15, 2006.
- *(Section repealed by June 30, 2006)*

11

Ky Al O'Connor*

Introduction

Proving there is a God, or maybe only that high-pressure tactics are effective in Albany, the Legislature raised 18-B rates for the first time since 1986. Beginning January 1, 2004, the new rates will be \$75 per hour for both in and out-of-court work, except for misdemeanors and violations, where the rate will be \$60. The change was enacted swiftly on the heels of Justice Lucindo Suarez's injunction in *NYCLA v Patkai* raising rates to \$90 per hour. The raise was included in a budget bill vetoed by the Governor and overridden by the Legislature on May 15th.

The Legislature also accomplished some modest Rockefeller Drug Law reform when it enacted a merit time allowance of 1/3 off the minimum term for A-I felony drug offenders. The campaign to bring about more comprehensive reform of the drug laws suffered its usual sisyphian fate. While advocates for reform urged the Legislature to "Drop the Rock," the effort came up frustratingly short in 2003. And so, the long uphill push begins again next year.

As part of the budget overrides, the Legislature also enacted a new system of presumptive parole release for non-violent offenders who have been granted a certificate of earned eligibility. Under the plan, such inmates may now be released by DOCS without approval from the Board of Parole. Whether this plan will actually boost release rates, or merely decrease the Board's parole release interview caseloads, remains to be seen.

Other noteworthy developments in the 2003 Regular session included an omnibus "clean-up" bill of the Sexual Assault Reform Act of 2000, an increase in sentencing for juvenile offenders convicted of murder in the second degree, and a video voyeurism bill dubbed "Stephanie's Law," after a Long Island woman whose landlord installed a hidden camera in her bedroom.

Summarized below are bills affecting public defense work that have been enacted into law by legislative override, or have been signed into law by Governor Pataki. Also included are bills that have passed both houses and will be presented to the Governor for his approval or veto. The complete text of all bills and chapter laws can be found on the New York State Senate and Assembly web sites (www.senate.state.ny.us and www.assembly.state.ny.us). These sites can be accessed on the Research Links page of NYSDA's web site (www.nysda.org).

* *Al O'Connor* is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.

Assigned Counsel Rate Increase and Revenue Sharing

Chapter 62 (S.1406-B/A.2106-B) (Assigned Counsel Rate Increase — County Revenue Sharing. Effective: January 1, 2004.

Governor Pataki included increases in assigned counsel rates in his budget submissions this year, but disapproved the increase as part of his overall veto of the budget in May. The increases were then enacted into law when the Senate and Assembly overrode the vetoes on May 15th. Beginning Jan. 1, 2004, rates will increase to \$75 per hour for both in-court and out-of-court work for all matters except misdemeanors and violations, which will pay \$60 per hour. The statutory caps have been raised to \$2400 in misdemeanor and violation cases and \$4,400 in all other cases. Fees for experts and investigators under County Law § 722-c have been increased from \$300 to \$1000 per retainer. For both attorney and expert fees, compensation in excess of these limits can be awarded in extraordinary circumstances.

The legislation includes a revenue sharing component that is designed to provide funds to counties according to their percentage share of the statewide total of local funds expended for mandated representation of indigent persons. The Indigent Legal Services Fund will be fed by four new revenue streams, including a \$35 fee for the lifting of a DMV license suspension, a portion of the \$52 fee to be charged by the Office of Court Administration for criminal history searches of county databases, an \$50 increase in the biennial attorney registration fee, and a \$10 increase in mandatory surcharges for parking violations. From this pool of money, the state will skim up to \$25 million to reimburse itself for the cost of the law guardian program, and the remaining pot will then be distributed to counties and the City of New York beginning in 2005. The legislation also establishes a seven-member task force, which is charged with reviewing the sufficiency of the rates and caps and issuing a single report by Jan. 15, 2006.

Merit Time for A-1 Felony Drug Offenders/ Presumptive Parole Release

Chap. 62 S.1406-B/A.2106-B (Budget Override- Merit time for A-I felony drug offenders — Presumptive parole release for holders of earned eligibility certificates). Effective: May 15, 2003

Merit Time

As part of the package of vetoed budget bills overridden by the Assembly and Senate, the Legislature extended merit time (Correction Law § 803) to inmates serving A-I felony drug sentences. While the regular merit time incentive is 1/6th off the minimum term, A-I felony drug

offenders (who were previously ineligible for merit time) will now be eligible for a 1/3 reduction. Thus, an inmate serving 15 years to life could become eligible for discretionary parole release consideration after 10 years.

The credit is unavailable to an inmate who is also serving a sentence for a violent felony, or for manslaughter in the second degree, vehicular manslaughter in the first or second degrees, criminally negligent homicide, incest, or any (non-violent) sex offense defined in Penal Law Article 130 or section 263. To earn a merit time reduction, an inmate must successfully participate in prison work and treatment programs, earn a GED, or an alcohol and substance abuse treatment certificate, or a vocational trade certificate, or perform 400 hours in a community work crew.

Presumptive Release

Inmates serving indeterminate sentences for non-violent felonies who have a minimum term of eight years or less may now be released to parole supervision without prior approval of the Board of Parole under a new system of "presumptive release" (new Correction Law § 806). To be eligible for presumptive release an inmate must obtain a certificate of earned eligibility through successful participation in assigned work and treatment programs (*see* Correction Law § 805), and serve the minimum term, or the minimum as reduced by merit time. Release to parole supervision will then be in the discretion of the commissioner of DOCS, who "may deny presumptive release to any inmate whenever the commissioner determines that such release may not be consistent with the safety of the community or the welfare of the inmate." Inmates denied presumptive release by the commissioner will be eligible to appear before the Board of Parole at the usual time for discretionary parole release consideration.

Presumptive release is unavailable to an inmate who is presently convicted, or who was ever previously convicted, of the following offenses: a Class A-I felony (drug or non-drug), a violent felony, manslaughter in the second degree, vehicular manslaughter in the first or second degrees, criminally negligent homicide, incest or any (non-violent) sex offense defined in Penal Law Article 130 or section 263.

Grounds for Denial of Merit Time and Presumptive Release

Merit time and presumptive release may be denied as a sanction for a "serious disciplinary infraction," which has been broadly defined by the Department of Correctional Services (DOCS) to mean a single guilt adjudication from among 18 categories of prison misbehavior, or cumulative receipt of disciplinary sanctions totaling 60 or more days of Special Housing Unit (SHU) or keeplock time, or any recommended loss of good time. *See* 7 NYCRR Part 280. Under the 1997 merit time law, DOCS has applied these disciplinary infraction exclusions

retroactively, a policy that may seriously affect the eligibility of A-I drug offenders who have been imprisoned for many years. Merit time and presumptive release can also be withheld as a sanction if an inmate files a civil lawsuit that is deemed frivolous by the court in which it was filed.

Sexual Assault Reform Act of 2000 Clean-up Bill

Chap. 264 (S.5690) (Sexual Assault Reform Act Clean-Up Bill). Effective: November 1, 2003.

This bill clears up many drafting errors and problems in the Sexual Assault Reform Act (SARA) of 2000, changes the nomenclature of some sex offenses, and makes a few substantive changes in the law. Surprisingly, not all of these changes are unfavorable to criminal defendants.

Nomenclature Changes

The Legislature has substituted the term "criminal sexual act" for the crime of sodomy. The term "deviate sexual intercourse" has been replaced with "oral sexual conduct" and "anal sexual conduct."

Persistent Sexual Abuse

The definition of persistent sexual abuse (Penal Law § 130.53) as drafted in the SARA was seriously flawed. It provided that a "person is guilty of persistent sexual abuse when he or she stands convicted of sexual abuse in the third degree . . . or sexual abuse in the second degree" and within a 10 year period was twice previously convicted of either of these crimes in separate criminal transactions for which sentence was imposed. It is doubtful that a valid charge could have been leveled under this definition because the crime, as drafted, literally required a finding of guilt as a predicate to the filing of the charge itself. The section has been amended to fix this drafting error and to add forcible touching to the list of offenses covered by the statute. The statute also expands the type of prior convictions that may support a charge of persistent sexual abuse by adding any Penal Law Article 130 felony conviction as a predicate offense. With changes noted in italics, the section now provides:

Penal Law § 130.53 — Persistent Sexual Abuse

A person is guilty of persistent sexual abuse when he or she *commits the crime of forcible touching, as defined in section 130.52 of this article, sexual abuse in the third degree, as defined in section 130.55 of this article, or sexual abuse in the second degree, as defined in section 130.60 of this article, and, within the previous ten year period, has been convicted two or more times, in separate criminal transactions for which sentence was imposed on separate occasions, of forcible touching, as defined in section 130.52 of this article, sexual abuse in the third degree as defined in section 130.55 of this article, sexual abuse in the second degree, as*

defined in section 130.60 of this article, or any offense defined in this article, of which the commission or attempted commission thereof is a felony.

Second Child Sexual Assault Sentencing

Changes were made in the second child sexual assault felony offender statute (Penal Law § 70.07). First, sentencing courts will now have discretion not to impose an enhanced sentence under this section when the defendant was under the age of 18 at the time of commission of the predicate offense. In such circumstances, the court may choose to sentence the defendant as a second violent felony offender pursuant to Penal Law § 70.04. However, the statute is less clear about the court's sentencing options when the instant offense is not a violent felony. Presumably, the court would have implicit authority to impose sentence under the second felony offender law (Penal Law § 70.06). Secondly, the Class E felony offense of persistent sexual abuse has been excluded from the definition of a "sexual assault against a child" [Penal Law § 70.07 (2)] and thus cannot serve as the basis for an enhanced sentence under the statute.

Persistent Felony Offender Sentencing

Penal Law § 70.10 (1) has been amended to exclude a prior conviction for persistent sexual abuse as a prior felony conviction within the meaning of the discretionary persistent felony offender law.

Bail restrictions eased for minor defendants

The SARA amended CPL sections 530.40 (3), 530.45 (1), and 530.50 to specify that a court cannot order bail or recognizance after a defendant's conviction of a Class B or C Article 130 sex offense committed or attempted to be committed against a person less than 18 years old (including bail pending appeal). The restriction has been eased by authorizing bail or recognizance in the court's discretion when the defendant was less than 18 at the time of the commission of the offense.

"Sexual Assault" defined

The SARA doubled the applicable periods of probation for a "sexual assault" [Penal Law § 65 (3)]. The statute now specifies that a "sexual assault" means "an offense defined in Penal Law Article 130, or 263 or incest or an attempt to commit any of the foregoing offenses.

Forcible Touching — Lack of Consent

The bill amends Penal Law § 130.05 (2)(c) to provide that lack of consent in a forcible touching prosecution can be established by "any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor's conduct." This change was enacted to allow circumstantial evidence of lack of consent in forcible touching prosecutions, and to countermand the holding in *People v Parbhu*, 191 Misc2d 473 (Crim Ct. New York Co.

2002); see also *People v Hernandez*, NYLJ, 9/27/02 at p. 19, col. 1. In *Parbhu*, a bystander on a subway platform witnessed the defendant rub against an unidentified woman, who screamed and ran away. The trial court dismissed the forcible touching charge for lack of a supporting deposition from the unidentified victim. Under the revised statute, lack of consent could be inferred in these circumstances.

Marriage defense reinstated for certain crimes

The SARA repealed the marriage exemption for all sex offenses, including those based on the age or mental capacity of the victim. Because 14, 15 and 16-year-olds can legally marry in New York State, this oversight exposed persons to possible criminal prosecution for otherwise lawful marital relations with an underage spouse, or with a spouse who is otherwise incapable of consent because of a mental disability. In addition, elimination of the marriage exemption had implications for marital relations between health care providers and their patient-spouses. The bill restores the marriage exemption as an ordinary defense in these situations. Penal Law §130.10 (4) now provides:

In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old, mentally disabled, or a client or patient and the actor is a health care provider, it shall be a defense that the defendant was married to the victim as defined in subdivision four of section 130.00 of this article.

Facilitating a sex offense with a controlled substance

The SARA established the crime of facilitating a sex offense with a controlled substance (Penal Law § 130.90), which is committed when a person "knowingly and unlawfully possesses a controlled substance and administers such substance to another person without such person's consent with the intent to commit against such person conduct constituting a felony defined in [Penal Law Article 130]." This bill adds to the list of substances covered by the statute "any preparation, compound, mixture, or substance that requires a prescription to obtain."

Finally, the bill adds gamma hydroxybutyric acid to the list of controlled substances listed in Penal Law § 220.06 (criminal possession of a controlled substance in the fifth degree); Penal Law § 220.09 (criminal possession of a controlled substance in the fourth degree) and Penal Law § 220.34 (criminal sale of a controlled substance in the fourth degree).

Sex Offender Registration Act

Chap. 62 (S.1406-B/A.2106-B) (Sex Offender Registration and Change of Address Fee). Effective: May 15, 2003.

Imposes a \$50 fee on any person convicted of a Sex Offender Registration Act (SORA) offense, in addition to the mandatory surcharge and crime victim assistance fee; imposes a \$10 fee any time a sex offender submits a change of address or change of status form to Division of Criminal Justice Services (DCJS); specifies that "any failure or omission to submit the required fee shall not affect the acceptance by the division of the change of address or change of status."

Chap. 10 (S.246) (Sex Offender Registration Act — Required Reporting of Place of Employment).

Effective: July 5, 2003

Amends the SORA to require persons designated Class 3 sex offenders to report their place of employment to the DCJS and authorizes the release of such information to the public.

Chap. 316 (A.707) (Sex Offender Registration Act — Release of Photographs). Effective: November 1, 2003.

Amends Correction Law § 168-1 to require police to release a photograph and description of a sex offender when community notification is undertaken with respect to Level 2 or 3 sex offenders (such action was previously discretionary).

Chap. 200 (S.948) (Sex Offender Registration Act — False Notice). Effective: November 1, 2003.

Makes it a crime to "knowingly simulate, or to cause or to permit to be disseminated" any SORA notification that "falsely suggests that an individual is a registered sex offender." (Class A misdemeanor) (New Correction Law § 168-v)

Penal Law

Chap. 174 (A.7482) (Juvenile Offenders — Increased Sentence for Murder 2nd degree). Effective: November 1, 2003

Increases the sentencing parameters for 14 and 15-year-olds convicted of intentional or depraved indifference murder to a minimum of 7½ years to life and a maximum of 15 years to life. For all 13-year-olds, and 14 and 15-year-old defendants convicted of felony murder, the sentencing range remains the same, *i.e.*, a minimum of 5 years to life and a maximum of 9 years to life.

Chap. 69 (S.3060-B) (Video Voyeurism—"Stephanie's Law"—as amended by Chap. 157 (S.5567) enacting technical corrections to such law). Effective: August 11, 2003

Enacts new provisions relating to the viewing, broadcasting or recording of images of the sexual or other intimate parts of another person without his or her consent.

Penal law § 250.45 Unlawful surveillance in the second degree

A person is guilty of unlawful surveillance in the second degree when:

1. For his or her own, or another person's amusement, entertainment, or profit, or for the purpose of degrading or abusing a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent; or
2. For his or her own, or another person's sexual arousal or sexual gratification, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent; or
3. (a) For no legitimate purpose, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn, without such person's knowledge or consent.

(b) For the purposes of this subdivision, when a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose; or
4. Without the knowledge or consent of a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person.

(Class E felony)

A conviction under subdivisions 2, 3 or 4 will subject the defendant to the Sex Offender Registration Act unless,

“upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate.

Penal Law § 250.50 Unlawful surveillance in the first degree

A person is guilty of unlawful surveillance in the first degree when he or she commits the crime of unlawful surveillance in the second degree and has been previously convicted within the past ten years of unlawful surveillance in the first or second degree.

(Class D felony)

Penal Law § 250.55 Dissemination of an unlawful surveillance image in the second degree

A person is guilty of dissemination of an unlawful surveillance image in the second degree when he or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, intentionally disseminates such image or images.

(Class A misdemeanor)

Penal Law § 250.60 Dissemination of an unlawful surveillance image in the first degree.

A person is guilty of dissemination of an unlawful surveillance image in the first degree when:

1. He or she, with knowledge of the unlawful conduct by which an image or images of the sexual or other intimate parts of another person or persons were obtained and such unlawful conduct would satisfy the essential elements of the crime of unlawful surveillance in the first or second degree, sells or publishes such image or images; or
2. Having created a surveillance image in violation of section 250.45 or 250.50 of this article, or in violation of the law in any other jurisdiction which includes all of the essential elements of either such crime, or having acted as an accomplice to such crime, or acting as an agent to the person who committed such crime, he or she intentionally disseminates such unlawfully created image; or

3. He or she commits the crime of dissemination of an unlawful surveillance image in the second degree and has been previously convicted within the past ten years of dissemination of an unlawful surveillance image in the first or second degree.

(Class E felony)

Penal Law § 250.40 unlawful surveillance; definitions

1. “Place and time when a person has a reasonable expectation of privacy” means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy.
2. “Imaging device” means any mechanical, digital or electronic viewing device, camera or any other instrument capable of recording, storing or transmitting visual images that can be utilized to observe a person.
3. “Sexual or other intimate parts” means the human male or female genitals, pubic area or buttocks, or the female breast below the top of the nipple, and shall include such part or parts which are covered only by an undergarment.
4. “Broadcast” means electronically transmitting a visual image with the intent that a person views it.
5. “Disseminate” means to give, provide, lend, deliver, mail, send, forward, transfer or transmit, electronically or otherwise to another person.
6. “Publish” means to (a) disseminate, as defined in subdivision five of this section, with the intent that such image or images be disseminated to ten or more persons; or (b) disseminate with the intent that such images be sold by another person; or (c) post, present, display, exhibit, circulate, advertise or allows access, electronically or otherwise, so as to make an image or images available to the public; or (d) disseminate with the intent that an image or images be posted, presented, displayed, exhibited, circulated, advertised or made accessible, electronically or otherwise and to make such image or images available to the public.
7. “Sell” means to disseminate to another person, as defined in subdivision five of this section, or to publish, as defined in subdivision six of this section, in exchange for something of value.

Penal Law §250.65 — Exclusions

1. The provisions of sections 250.45, 250.50, 250.55 and 250.60 of this article do not apply with

respect to any:

Law enforcement personnel engaged in the conduct of their authorized duties;

Security system wherein a written notice is conspicuously posted on the premises stating that a video surveillance system has been installed for the purpose of security; or

Video surveillance devices installed in such a manner that their presence is clearly and immediately obvious.

2. With respect to sections 250.55 and 250.60 of this article, the provisions of subdivision two of section 235.15 and subdivisions one and two of section 235.24 of this chapter shall apply.

Chap. 62 (S.1406-B/A.2106) (DNA databank fee). Effective: May 15, 2003

Enacts a new \$50 fee for defendants convicted of a DNA databank crime, to be paid in addition to the mandatory surcharge and crime victim assistance fee.

Chap. 331 (A.8999) (Criminal Contempt in the first degree as predicate conviction for offense level upgrade). Effective: November 1, 2003.

Elevates the crime of criminal contempt in the second degree (Penal Law § 215.50 — Class A misdemeanor) to criminal contempt in the first degree (Penal Law § 215.51 — Class E felony) when the defendant has a prior conviction for criminal contempt in the first or second degrees within the preceding five years. The former statute was limited to prior convictions for criminal contempt in the second degree only.

Chap. ___ (S.519) (Stalking — Ten or more persons). Effective: November 1, 2003

Adds a new subdivision to Penal Law § 120.55 to elevate conduct constituting stalking in the third degree (Class A misdemeanor) to stalking in the second degree (Class E felony) when 10 or more victims are involved.

Penal Law § 120.55

A person is guilty of stalking in the second degree when he or she:

(5) commits the crime of stalking in the third degree, as defined in subdivision three of section 120.50 of this article, against 10 or more persons, in ten or more separate transactions, for which the actor has not been previously convicted.

Chap. 276 (S.1437) (Criminal Mischief — Motor Vehicles — Offense Level Upgrade). Effective: November 1, 2003.

Elevates the crime of criminal mischief in the fourth degree (Class A misdemeanor) to criminal mischief in the third degree (Class E felony) under certain circumstances when the property damaged is a motor vehicle:

Penal Law § 145.05

A person is guilty of criminal mischief in the third degree when, with intent to damage property or another person, and having no right to do so nor any reasonable ground to believe that he or she has such right, he or she:

(1) damages the motor vehicle of another person, by breaking into such vehicle when it is locked with the intent of stealing property, and within the previous ten year period, has been convicted three or more times, in separate criminal transactions for which sentence was imposed on separate occasions, of criminal mischief in the fourth degree as defined in section 145.00, criminal mischief in the third degree as defined in this section, criminal mischief in the second degree as defined in section 145.10, or criminal mischief in the first degree as defined in section 145.12 of this article
...

Chap. ___ (S.1235) (Obstructing Emergency Medical Services). Effective: November 1, 2003.

Establishes the new offense of obstructing emergency medical services:

Penal Law § 195.16

A person is guilty of obstructing emergency medical services when he or she intentionally and unreasonably obstructs the efforts of any service, technician, personnel, system or unit specified in section three thousand one of the public health law in the performance of their duties.

(Class A misdemeanor)

Chap. ___ (S.3479) (Assault on station agent). Effective: November 1, 2003

In 2002 Penal Law § 120.05 was amended to elevate a simple assault on train and bus operators, ticket inspectors and conductors to assault in the second degree. This legislation adds "station agents" to the list of persons covered by the statute.

Chap. ___ (A.6893) (Unpermitted Use of Indoor Pyrotechnics). Effective: November 1, 2003.

In response to the tragic rock concert fire in Rhode Island in Feb. 2003 that claimed 100 lives, the Legislature has passed comprehensive amendments to Penal Law 405 governing permits for indoor pyrotechnic displays. The legislation includes four new criminal offenses: unpermitted

ted use of a indoor pyrotechnics in the second degree (Penal Law § 405.12), which is committed when a person responsible for obtaining a necessary permit “ignites or detonates pyrotechnics” in a building without a necessary permit, or knowingly permits another to do so (Class A misdemeanor). A person is guilty of unpermitted use of indoor pyrotechnics in the first degree (Penal law § 405.14) when he or she commits the second-degree crime and has a prior conviction for the 1st or 2nd degree crime within the past 5 years (Class E felony). The bill also includes two degrees of aggravated unpermitted use of indoor pyrotechnics, which applies when the defendant recklessly causes physical injury to another person or causes property damage of more than \$250 (2nd degree — Penal Law § 405.16 — Class E felony), or recklessly causes serious physical injury or death to another person (1st degree — Penal Law § 405.18 — Class D violent felony).

Chap. ___ (A.3936) (Slot Machines — Transportation and Repair). Effective: 30 days after Governor’s signature

Amends Penal Law § 225.30 to authorize possession of slot machines when necessary for the training of persons in the repair and reconditioning of such machines for operation in a casino.

Chap. 172 (A.7048) (Billies and Blackjacks — Exemption from Criminal Liability). Effective: Upon Governor’s signature.

Exempts persons involved in the manufacturing and transport of blackjacks and billies from criminal liability when possession of such weapons is pursuant to a sales contract with a government entity.

Criminal Procedure Law

Chap. ___ (S.2970) (Not Responsible Pleas or Verdicts — Order of Conditions). Effective: Upon Governor’s signature.

Expressly authorizes a court to issue an order of protection (stay-away order) in the context of an order of conditions issued to persons found not responsible by reason of mental disease or defect (Amends CPL § 330.20).

Chap. ___ (S.5414) (Payment of fines, fees and charges by credit card). Effective: Upon Governor’s signature.

Amends CPL § 420.05 to authorize the payment of a fine, mandatory surcharge or crime victim assistance fee by credit card upon conviction of any offense. The statute was previously limited to payment of fines in VTL matters.

Chap. 299 (S.3132) (Federal Law Enforcement officers). Effective: August 5, 2003.

Adds federal air marshal program special agents to the list of federal law enforcement officers in Criminal Procedure Law § 2.15.

Chap. 300 (S.3239) (Police officers — Power to arrest for petty offense). Effective: November 1, 2003

Amends CPL § 140.10 (2) to authorize a police officer to arrest a person for a petty offense committed within 100 yards of the geographical area of the officer’s employment.

Chaps. (various) (Peace office status). Effective: as indicated

Confers peace officer status on:

Chap. ___ (S.3090) — members of the security force employed by Erie County Medical Center. Effective: 180 days after Governor’s signature

Chap. ___ (S.3428) — Syracuse University peace officers. Effective: Upon Governor’s signature

Chap. ___ (S.4393) — public safety officers appointed by the commissioner of public safety of the town of Hempstead. Effective: Upon Governor’s signature.

Chap. ___ (A.1553) — Uniformed members of the fire marshal’s office in the town of Riverhead. Effective: Upon Governor’s signature.

Chap. ___ (A.1852) — Uniformed court officers of the village of Southampton. Effective: Upon Governor’s signature.

Chap. 121 (A.5422) — officers of the Buffalo Municipal Housing Authority who have achieved or been granted that status of a sworn police officer and have been certified by the Division of Criminal Justice Services as successfully completing an approved basic course for police officers. Effective: July 1, 2003.

Chap. ___ (A.6439) — Watershed protection and enforcement officers of the city of Peekskill. Effective: Upon Governor’s signature.

Chap. ___ (A.6430) — Animal control officers employed by the city of Peekskill. Effective: Upon Governor’s signature.

Chap. ___ (A.2902) — Security hospital treatment assistants in the office of mental health while performing duties in or arising out of the course of their employment. Effective: November 1, 2003.

Alcohol Related Offenses

Chap. 691 Laws of 2002 (DWI prior offenses — mandatory jail or community service — mandatory installation of ignition interlock devices). Effective: September 30, 2003

As part of a package of bills passed in December 2002 decreasing the BAC level for driving while intoxicated to

.08%, the Legislature also passed a bill mandating jail time or community service for defendants with prior DWI convictions within the preceding 5 years. The bill also includes a troublesome provision that seems to require a court to order the installation of ignition interlock device on any motor vehicle owned by a person so sentenced.

VTL § 1193 (1-a) and (1-b) will now require a mandatory jail sentence of 5 days, or, as an alternative, a 30 day community service sentence, on any defendant who commits the crime of DWI [VTL § 1192 (2) or (3)] who had a prior DWI conviction within the preceding 5 years, and a mandatory jail sentence of 10 days, or 60 days of community service, for defendants who have been convicted on "two or more occasions" of DWI within the preceding 5 years.

Chapter 691 (2002) also includes the following section concerning ignition interlock devices that may spell trouble for our indigent defendants inasmuch as the cost of such devices must be fully borne by the defendant [VTL § 1198 (5)]:

A court sentencing a person pursuant to paragraph (a) or (b) of this subdivision shall: i) order the installation of an ignition interlock device approved pursuant to section eleven hundred ninety eight of this article on each motor vehicle owned by the person so sentenced. Such devices shall remain installed during any period of license revocation required to be imposed pursuant to paragraph (b) of subdivision two of this section, and, upon the termination of such revocation period, for an additional period as determined by the court; and (ii) order that such person receive an assessment of the degree of their alcohol abuse. Where such assessment indicates the need for treatment, such court is authorized to impose treatment as a condition of such sentence.

Chap. 62 S.1406-B/A.2106-B (Budget Bill Override) (DWI — DWAI — \$25 additional surcharge). Effective: November 11, 2003.

Imposes an additional \$25 surcharge upon conviction of DWI or DWAI (New VTL § 1809-c).

Chap. 153 (S.5517) (DWAI — .07% or more — technical correction). Effective: (main bill) July 1, 2003 and (amendment) July 22, 2003.

Last December, the Legislature lowered the blood alcohol level threshold for driving while intoxicated to .08% and the prima facie evidence standard for driving while impaired to "more than .07% and less than .08%." Therefore, as enacted, a blood alcohol reading of .07% would not have constituted prima facie evidence of impairment. The statute has now been amended to provide that a blood alcohol level of .07% or more but less than .08% shall be prima facie evidence that a person was impaired by the consumption of alcohol.

Chap. 236 (S.4992) (DWI — BAC — Commercial Drivers). Effective: July 1, 2003 and November 1, 2003

As part of the legislation that lower the blood alcohol threshold for driving while intoxicated to .08%, the Legislature also lowered the level II standard for drivers of commercial motor vehicles, which previously ranged from .07% to .09% to .07% only [VTL § 1192 (6)]. This bill changes the standard to more than .06% but less than .08%. (Effective: July 1, 2003). The bill also establishes a new level I standard for drivers of commercial vehicles, which previously was set at .04% to .07%, to .04% or more but less than .06% (Effective: November 1, 2003).

Chap. ___ (S.4990-B) (Boating while intoxicated — .08% standard adopted). Effective: November 1, 2003

Amends Navigation Law § 49-a to establish a .08% threshold for boating while intoxicated; establishes a test result of .07% but less than .08% as prima facie evidence that a person was not intoxicated but was impaired by alcohol; and establishes a test results of more than .05% but less than .07% as prima facie evidence that a person was not intoxicated, but such a reading is considered relevant evidence in determining whether a person was impaired by alcohol.

Chap. ___ (S.4991) (Snowmobiling while intoxicated — .08 standard adopted). Effective: November 1, 2003

Amends Parks, Recreation and Historic Preservation Law § 25.24 to establish a .08% threshold for snowmobiling while intoxicated; establishes a test result of .07% but less than .08% as prima facie evidence that a person was not intoxicated but was impaired by alcohol; and establishes a test results of more than .05% but less than .07% as prima facie evidence that a person was not intoxicated, but such a reading is considered relevant evidence in determining whether a person was impaired by alcohol.

Family Court Practice

Chap. 75 (A.4095) (Family Court Hearing Officers — Term of Office Extended). Effective: June 18, 2003

Increases from 3 to 5 years the length of the term for which a Family Court Hearing Officer may be reappointed.

Chap. ___ (S.1022-A) (Social Services Law — Unauthorized Fees for Adoption). Effective: November 1, 2003.

Criminalizes the offering or acceptance of a fee of \$5000 or more for the placing out or adoption of a child, by other than an authorized agency, as a Class E felony, and provides that a repeat offense shall constitute a Class D felony.

Chap. ___ (S.3600) (Willful violation of support orders — Expedited procedures). Effective: Upon Governor's signature.

Enacts procedures designed to expedite court review of a hearing officer's finding that a person has willfully violated a support order.

Chap. ___ (S.5249) (Child Protective Reports). Effective: 90 days after Governor's signature

Amends Family Court Act § 1055 and Social Services Law § 392 to require reports to the court within 30 days of any change in a child protective or voluntary foster care placement of a child, as well as a statement detailing the reasons for such change and why it is in the best interests of the child.

Chap. 81 (A.7487) (Family Court hearing examiners — now support magistrates). Effective: June 18, 2003

Changes the designation of Family Court hearing examiners to "support magistrates."

Corrections

Chap. ___ (A.851) (Interstate Compact for Adult Offender Supervision). Effective: July 1, 2002, and when compact adopted by 35 total states.

Enacts the Interstate Compact for Adult Offender Supervision (Executive Law § 259-mm), which, when formally adopted by 35 signatory states, will replace the existing compact provisions (Executive Law § 259-m).

Chap. 135 (S.3414) (Yates County Jail). Effective: July 22, 2003

Amends Correction Law § 500-a to permit the Yates County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Chap. 171 (A.7024) (Cortland County Jail). Effective: July 22, 2003

Amends Correction Law § 500-a to permit the Cortland County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Chap. 189 (A.8798) (Monroe County Jail). Effective: July 22, 2003

Amends Correction Law § 500-a to permit the Monroe County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

Vehicle and Traffic Law

Chap. ___ (A.5418) (VTL — Local Vehicle Forfeiture Laws — Innocent Owners and Lienholders). Effective: Upon Governor's signature.

Adds a new section 432 to the Vehicle and Traffic Law

to require notice to owner of a motor vehicle and any lienholder of any forfeiture actions under a local law, and to preclude the forfeiture of a vehicle "to the extent of the interest of an owner or lienholder by reason of any act or omission which is established by such owner or lienholder to have committed without the knowledge of that owner or lienholder or without the consent of that owner or lienholder.

Chap. 231 (S.4179) (VTL — Posting of advertisements on windshields). Effective: September 1, 2003

Establishes a rebuttable presumption in New York City that the "person whose name, telephone number or other identifying information appears on any handbill or other form of advertisement attached to a windshield or windshield wipers of a motor vehicle shall be in violation" of VTL provisions prohibiting such attachments.

Miscellaneous

Chap. ___ (A.3039) (Parking Violations Bureau — Fine reimbursement upon reversal). Effective: 30 days after Governor's signature.

Amends VTL § 242 to provide a 30-day time frame for reimbursement of fines when a parking violation adjudication is reversed, and a late reimbursement penalty schedule equivalent to the schedule for late payment of the underlying fine.

Chap. ___ (A.3679) (Subpoena Duces Tecum — Service required on Parties). Effective: January 1, 2004.

Amends CPLR § 2303 (1) to provide that "a copy of any subpoena duces tecum served in a pending action shall also be served in the manner set forth in [CPLR § 2103] on each party who has appeared in the action so that it is received by such parties promptly after service on the witness and before the production of books, paper or other things."

Chap. ___ (A.7050) (Navigation Law — Leaving the Scene of an Accident). Effective: November 1, 2003.

Enacts provisions in the Navigation Law requiring operators of vessels (including rowboats and canoes) to promptly report accidents and provides penalties for violations thereof, *i.e.*, leaving the scene of an accident involving property damage (violation), personal injury (Class B misdemeanor), subsequent violation of personal injury provision within 5 years (Class A misdemeanor), and serious physical injury or disappearance of a person (Class E felony) [New Navigation Law § 47].

Chap. 391 (A.8136) (Crime Victims Board — Financial counseling costs compensable for certain crime victims). Effective: August 19, 2003

Amends Executive Law §§ 621 and 631 to provide that

the Crime Victims Board may compensate elderly and disabled crime victims for the cost of financial counseling commenced within one year of the date of the crime.

Sunset Clause Extended

Chap. 87 (S.1820) (Sunset Extended — VTL — suspension of driver's license for failure to pay child support). Sunset extended to June 30, 2005.

Legislation was enacted in 1995 to mandate suspension of a parent's driver's license for failure to pay four or more months of child support (L.1995, chap. 81). The sunset clause of this law has been extended from June 30, 2003 to June 30, 2005.

Chap. 303 (S.3999) (Family Protection and Domestic Violence Intervention Act of 1994). Sunset Clause Extended to September 1, 2005.

Extends the sunset clause of the Family Protection and Domestic Violence Intervention Act of 1994 (*e.g.*, mandatory arrest) from September 1, 2003 to September 1, 2005.

Chap. ___ (S.4873) (Sunset Extended — Driver's License Suspension after Drug Conviction). Sunset Extended to October 1, 2005.

In 1993 the Legislature passed a law requiring a 6-month suspension of the driver's license, or a 6-month delay in eligibility for a driver's license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, chap. 533). The sunset clause of this legislation has been extended from October 1, 2003 to October 1, 2005.

Chap. 388 (A.7972) (Sunset Extended – Closed-Circuit testimony of child witnesses). Sunset extended to September 1, 2005

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child witnesses from September 1, 2003 to September 1, 2005.

Chapter 16 (S.5544) (Omnibus Sunset Extender)

Extends the sunset clauses of the following programs and laws:

Correction Law Article 22-A (§ 630 et seq.) — Parole release from a definite sentence (Sept. 1, 2005)

Correction Law Article 26-A — SHOCK Incarceration Program (Sept. 1, 2005)

Correction Law § 805 — Earned Eligibility Program (Sept. 1, 2005)

Correction Law Article 26 (§ 851 et seq) — Temporary Release Programs (Sept. 1, 2005)

CPLR § 1101 (f) — Fees for inmate filings (Sept. 1, 2005)

Penal Law §§ 205.16, 205.17, 205.18, 205.19 — Absconding offenses (Sept. 1, 2005)

Penal Law § 60.35 — No waiver of mandatory surcharge (Sept. 1, 2005)

Executive Law § 259-r — Medical Parole (Sept. 1, 2005)

Correction Law § 189 — \$1 weekly incarceration fee (Sept. 1, 2005)

Correction Law § 2 (18) — ASAT (Sept. 1, 2005)

Executive Law § 259-a (9) — Parole supervision fee (Sept. 1, 2005)

Executive law § 259-c, Family Court Act § 252-a — Probation Fees (Sept. 1, 2005)

Public Health Law § 3381 — Sale and possession of hypodermic needles and syringes (Sept. 1, 2007)

VTL — Mandatory Surcharges (Sept. 1, 2005)

VTL § 1809 — Ignition Interlock Program (Sept. 1, 2005) ♪

Pro Bono Counsel Needed for Death Row Prisoners

Over 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The **ABA Death Penalty Representation Project** seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Robin M. Maher, Director, ABA Death Penalty Representation Project, 50 F Street NW, Suite 8250, Washington, DC 20001; e-mail: maherr@staff.abanet.org; 202-661-6820. For more information, also see the Project's web site: <http://www.probono.net> (Death Penalty Practice Area).

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

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

New York State Court of Appeals

Retroactivity (General) RTR; 329(10)

Sentencing (Ex Post Facto Punishment) (General) SEN; 234(35) (37)

Kellogg v Travis, No. 93, 7/1/2003

The appellant, convicted in 1994 of a the violent felony offense of second-degree assault, was released on parole in September 1999 to remain under supervision until the expiration of his sentence on Jan. 5, 2002. Parole required him to submit a DNA sample for the state databank in March 2000 or return to prison on a parole violation. The appellant complied and filed a written protest. The Appellate Division affirmed.

Holding: Applying New York's DNA indexing statute (Executive Law 995-c) to the appellant does not violate the prohibition on *ex post facto* punishment. See US Const art I, § 10; General Construction Law 93. Such prohibition affects laws that criminalize previously innocent behavior, increase punishments for past offenses, or eliminate defenses to charges for incidents before the effective date of the new law. See *Collins v Youngblood*, 497 US 37, 42-43, 52 (1990). The DNA indexing law is not penal in nature and does not impose a punishment. It was amended in 1999 to include violent felony offenders, and applies to anyone who was convicted before the amendment but had not completed their sentences as of Dec. 1, 1999. L 1999, ch 560, § 9. The purpose of the law was to provide information for *future* investigations, not punish past acts. See *Shaffer v Saffle*, 148 F3d 1180, 1182 (10th Cir) *cert den* 525 US 1005 (1998). The General Construction Law places no restraint on the legislature beyond constitutional restrictions. See *People v Roper*, 259 NY 635, 635. Order affirmed.

Constitutional Law (General) CON; 82(20)

Due Process (Vagueness) DUE; 135(35)

Speech, Freedom of (General) SFO; 353(10)

People v Mangano, No. 67, 7/2/2003

The defendant was charged with aggravated harassment (Penal Law 240.30[1]) for five vituperative phone messages left on the answering machine of the Village of Ossining Parking Violations Bureau complaining about

the performance of department officials. A jury convicted the defendant and the Appellate term affirmed, rejecting the defendant's constitutional challenge to the statute.

Holding: The aggravated harassment statute was unconstitutional as applied to the defendant who used crude and offensive language to complain about conduct of government officials on a phone messaging system set up to hear complaints. This is distinguishable from *People v Shack* (86 NY2d 529) where multiple calls by a mentally ill defendant to a cousin's home were punished not as speech but as harassing conduct. Order reversed, informations dismissed.

Constitutional Law (General) CON; 82(20)

Due Process (Vagueness) DUE; 135(35)

People v Smith, No. 73, 7/2/2003

The defendants were accused of accepting money to "swipe" a farecard allowing commuters through a turnstile into New York City's subway system in violation of a Transit Authority Rule. The rule (21 NYCRR 1050.4[c]) states in part, "no person shall sell, provide, copy, reproduce or produce, or create any version of fare media or otherwise authorize access to or use of the facilities, conveyances or services of the authority without the written permission of a representative of the authority duly authorized by the authority to grant such right to others." The defendants' motions to dismiss because the rule was unconstitutionally vague were granted. The Appellate Term reversed.

Holding: The Transit Authority Rule provided adequate notice of prohibited conduct and did not give police excessive authority. The defendants' conduct, allowing others to enter the subway system with defendants' cards, clearly violated the plain language and purpose of the rule, which is to prevent the loss of revenue. Judgment affirmed.

Constitutional Law (General) CON; 82(20)

Due Process (Vagueness) DUE; 135(35)

People v Stuart, No. 87, 7/2/2003

The complainant alleged that the defendant had followed her and made unwanted advances over the course of several weeks. The defendant was arrested and charged with fourth-degree stalking (Penal Law 120.45) and other offenses. He challenged the anti-stalking law as unconstitutionally vague both on its face and as applied to him. The trial court denied his motion. His conviction after a bench trial was affirmed on appeal.

Holding: Where an as-applied vagueness challenge is rejected, the facial validity of the statute in question is confirmed. The fourth-degree stalking statute is not

NY Court of Appeals *continued*

unconstitutionally vague. According to the statute: "A person is guilty of stalking in the fourth degree when he or she intentionally, and for *no legitimate purpose*, engages in a course of conduct directed at a specific person. . . ." The phrase "no legitimate purpose" is not vague. *People v Shack*, 86 NY2d 529. The statute's intent element focuses on a particular "course of conduct" directed toward a "specific person." The statute gives fair notice of the specific conduct being proscribed and it provides law enforcement with clear guidelines. *People v Nelson*, 69 NY2d 302, 307; *Papachristou v City of Jacksonville*, 405 US 156, 162 (1971). It is unnecessary for the statute to require the intent to achieve a specific result. The statute's additional requirements delineate specific acts that provide adequate notice of wrongful conduct. Since there was "one constitutional application of the statute, it is not invalid on its face." *Hoffman Estates v the Flipside*, 455 US 489, 499, 505 (1982). Judgment affirmed.

Concurring: [Kaye, JJ] Both the as-applied and facial challenges to the statute failed on the merits. Facial challenges should not hinge on the outcome of as-applied analysis without an independent examination of the merits.

First Department

Evidence (Weight) **EVI; 155(135)**

Narcotics (Evidence) (Sale) **NAR; 265(20) (59)**

People v Richardson, 301 AD2d 408, 752 NYS2d 867 (1st Dept 2003)

Holding: The defendant was convicted of, *inter alia*, selling drugs in or near school grounds. The defendant's investigator testified regarding measurements she had taken. The undercover officer testified that the sale occurred over two blocks from the school. This evidence should have been accorded more weight than the officer's conclusory assertion that the sale was within 1,000 feet of the school. Judgment modified by vacating conviction for drug sale in or near school grounds and dismissing that count, otherwise affirmed. (Supreme Ct, Bronx Co [Benitez, JJ])

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

People v Shabazz, 301 AD2d 412, 755 NYS2d 20 (1st Dept 2003)

Holding: The police recovered a bag thrown from the car the defendant was driving, and recognized that a cigar contained in it had been modified for purposes of smoking marijuana. What appeared to be loose tobacco or mar-

ijuana was observed from outside the car. The police had probable cause to believe the car's occupants had been smoking marijuana and that the car contained that substance. *See People v McRay*, 51 NY2d 594, 601-602. There was probable cause to search the car under the automobile exception to the constitutional requirement of a warrant. *See People v Blasich*, 73 NY2d 673, 678-679. Suspicious actions by the defendant such as pushing the officer's hand away from the seat area, and running away when ordered out of the car, reinforced the existing probable cause. At the very least the totality of circumstances provided a reasonable belief that a weapon might be present, justifying a limited protective search of the area. *See People v Mundo*, 99 NY2d 55. The officer's testimony that the car's occupants fit a description of perpetrators of an earlier armed robbery provided additional support for the court's refusal to suppress evidence found in the car. *See People v Dodt*, 61 NY2d 408, 415-416.

There is nothing in the record to indicate that the plea led to adverse consequences with regard to the defendant's federal probation status, or whether any such consequences would be "direct" or "collateral." *See People v Ford*, 86 NY2d 397, 403. The motion to vacate the judgment contained no factual allegations regarding this issue. Judgment affirmed. (Supreme Ct, New York Co [White, J, at suppression hearing, Visitacion-Lewis, J, at plea and sentence])

Insanity (General)

ISY; 200(27)

Cohen v Anne C., 301 AD2d 446, 753 NYS2d 500 (1st Dept 2003)

Holding: The petitioner sought to place the respondent in assisted outpatient treatment (AOT) under Kendra's Law. *See Mental Hygiene Law (MHL) 9.60*. After a hearing, the court found the respondent met the statutory criteria and directed on Feb. 24, 2000 that the respondent receive AOT for six months. On Aug. 31, 2000, another justice, after another hearing, extended AOT until Aug. 31, 2001. In September 2000, the respondent demanded review of the AOT pursuant to MHL 9.60(m). A jury heard evidence, not limited to that presented at the earlier hearings, and found on Mar. 8, 2001, that the respondent needed continued AOT. The respondent made an oral motion to vacate the verdict due to insufficient evidence. Decision was reserved pending motion papers, which were never filed. Six days after the August 2000 order expired, the court issued a decision and order purporting to deny the motion to set aside the verdict. The court engaged in a wide-ranging discussion of MHL 960(m), including issues the parties had not raised. All these issues were moot given the expiration of the underlying order. The order should be vacated in the exercise of discretion. *See Matter of Ruskin and Safir*, 257 AD2d 268, 271. It was an inappropriately rendered advisory opinion. *See T.D. v New York*

First Department *continued*

State Office of Mental Health, 91 NY2d 860, 862. The appellate exception to the mootness doctrine for issues likely to arise repeatedly and evade review does not generally apply to courts of first instance. Initial AOT orders may be in effect for six months, and extended for up to a year; trial courts will generally be able to rule on issues arising out of 9.60(m) proceedings before such an order expires.

Contrary to the court's opinion, a review proceeding under MHL 9.60(m) is *de novo*, open to new evidence not presented at any prior hearing. The only issue is whether the petitioner proved by clear and convincing evidence that the patient met the statutory criteria for AOT. The substantive issue of retention set out in MHL 9.35 is not incorporated by reference into MHL 9.60(m). Appeal dismissed, order vacated. (Supreme Ct, New York Co [Ryp, JJ])

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

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

People v Hyde, 302 AD2d 101, 754 NYS2d 11
(1st Dept 2003)

Holding: The court erred in dismissing the charges based on insufficiency of the grand jury testimony, finding that the prosecution had shown no more than that the defendant was present, naked, in the bedroom of an apartment where drugs and weapons were found, then coming into the hall putting on his pants. Constructive possession was shown by circumstantial evidence. *People v Torres*, 68 NY2d 677. The defendant had been in a private room where he was in close proximity to plainly exposed drugs, drug paraphernalia, and a loaded gun. While the "drug factory" presumption of Penal Law 220.25(2) was not charged, the defendant had free access to an apartment obviously used for such purpose. It strains credulity that the defendant would not have been aware of the contraband in plain view in the bedroom. Further, while he denied being in the bedroom, he said he could see the kitchen, from which drugs and paraphernalia were recovered. The defendant was charged with acting in concert with the codefendant who lived in the apartment. Complicity can be shown circumstantially. *See People v Rossey*, 89 NY2d 970, 971-972. The defendant's presence in a private part of the residence, his state of undress and that of his codefendant, and his admitted use of drugs at the scene give rise to an inference that he was more than a visitor. The prosecution may have a long way to go to convince a petit jury to convict, but sufficient evidence was adduced to sustain the indictment. Order reversed, motion denied, indictment reinstated. (Supreme Ct, Bronx Co [Bamberger, JJ])

Attorney-Client Relationship (General) **ACR; 51(20)**

Counsel (Attachment) (Right to Counsel) **COU; 95(9) (30)**

People v Felder, 301 AD2d 458, 754 NYS2d 18
(1st Dept 2003)

Holding: The prosecution conceded that the defendant's right to counsel indelibly attached in 1994 upon a lawyer's actual entry into the matter at issue, but argued that the attorney-client relationship had terminated by the time detectives questioned the defendant several years later. The prosecution failed to sustain the burden of establishing that termination. *People v West*, 81 NY2d 370, 379-381. The hearing evidence showed that police knew of the attorney's entrance into the case; he had given them his business card and said not to talk to the defendant without contacting him. Police made no effort to contact the lawyer, whose name was in the case file, when they reopened the investigation and questioned the defendant in 1999. This mere passage of time was insufficient to end the attorney client relationship. It was incumbent upon the police to contact the attorney if there was any uncertainty. *People v Marrero*, 51 NY2d 56, 59. During the intervening years, the attorney had not represented the defendant on any other matters once a pending, unrelated 1994 matter was concluded, but there was no reason for the defendant and the attorney to remain in contact when this investigation was dormant. That another lawyer represented the defendant on an unrelated Georgia matter, and that the lawyer from 1994 did not ultimately represent the defendant on the instant charge, did not establish termination of the attorney-client relationship at the time the defendant was questioned. Order granting suppression affirmed. (Supreme Ct, New York Co [Goodman, JJ])

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

Venue (Determination of) **VEN; 380(10)**

People v Wilson, 301 AD2d 483, 753 NYS2d 372
(1st Dept 2003)

Holding: The issue of venue was irrelevant to the defendant's conviction of second-degree criminal impersonation, a continuing offense that began in Kings County and continued into New York County. However, the court's refusal to submit the issue of venue to the jury as requested by the defendant was reversible error (*People v Greenberg*, 89 NY2d 553, 556) as to the conviction of second-degree possession of a forged instrument. As to this conviction, "it does not appear from the instructions or by necessary implication from the verdict that the jury made a finding of proper venue (*see People v Ribowsky*, 77 NY2d [284] at 292-294.)" Judgment modified, possession of a forged instrument conviction vacated and remanded for new trial. (Supreme Ct, New York Co [Irizarry, JJ])

First Department *continued***Counsel (Competence/Effective Assistance/Adequacy)** COU; 95(15)**Post-Judgment Relief (CPL §440 Motion)** PJR; 289(15)**People v Smith, 301 AD2d 471, 755 NYS2d 31 (1st Dept 2003)**

Holding: An issue of fact exists as to whether there was a reasonable and legitimate trial strategy underlying counsel's failure to call as a witness the psychiatrist who was prepared to testify that the defendant's conduct in the incident at issue had been due to psychotic delusions. The failure could alternatively have been the result of counsel's neglect, for which he now seeks to provide a rationalization after the fact. In support of a 440.10 motion to set aside the conviction, the defendant offered an affidavit by the psychiatrist. It contained a statement of what he had been prepared to say at trial and added that after discussing the substance of his report, defense counsel never informed him of the trial date or contacted him to prepare testimony or schedule his trial appearance. An affidavit by defense counsel, submitted by the prosecution in opposition to the motion to set aside, stated that the determination not to call the psychiatrist was based on the unexpected testimony of a surprise witness at trial who said that when the witness was holding the defendant until police arrived, the defendant had offered to split the stolen money with the witness in exchange for release. This could not be met by the psychiatrist's testimony as well as by the defendant's own, counsel had decided. The 440.10 court erred in accepting this explanation without a hearing. Order reversed and vacated, matter remanded for a hearing and decision *de novo*. (Supreme Ct, New York Co [Wetzel, JJ])

Lesser and Included Offenses (General) LOF; 240(7)**Weapons (Firearms) (Possession)** WEA; 385(21) (30)**Re Daniel A., 302 AD2d 208, 753 NYS2d 374 (1st Dept 2003)**

Holding: The two counts of fourth-degree possession of a weapon should be dismissed. As the presentment agency concedes, no evidence was introduced to meet the required proof that the appellant's weapon was operable. As also conceded, the counts of attempted second-degree robbery (Penal Law 110.00/160.15[4]), attempted third-degree robbery, and third-degree menacing should be dismissed as lesser included offences of attempted first-degree robbery and second-degree menacing. Order modified and otherwise affirmed. (Family Ct, New York Co [Sturm, J])

Juveniles (Custody) (Parental Rights) (Permanent Neglect) JUV; 230(10) (90) (105)**Re Guardianship, etc., Joseluis Juan M., et al, 302 AD2d 219, 755 NYS2d 41 (1st Dept 2003)**

Holding: The participation of the respondent in the proceedings by telephone from the federal facility in which he was incarcerated, with the assistance of counsel and an interpreter, satisfied due process. *See Matter of Ramon C.*, 261 AD2d 205. The petitioner tried to arrange visitation between the respondent and the children until notified that a temporary order of protection prevented this. The petitioner sent the respondent photos of the children, kept him informed of their progress, and informed him of necessary steps to regain custody. This record supports a finding that diligent efforts were made to strengthen the parent-child relationship and reunite the family, and also shows circumstances sufficient to excuse such efforts. *See Social Services Law 384-b(7)(a); Family Court Act 614(c); Matter of Sheila G.*, 61 NY2d 368, 383 n 5. Also excusing the agency from attempting to reunite the family were a prior family court finding that the respondent had abused the children, his conviction for assaulting his stepson, and orders of protection directing the respondent to stay away from one of the children. *See Matter of Kasey Marie M.*, 292 AD2d 190. The record establishes that the respondent permanently neglected the children by failing to plan for their future and supports the determination that the best interests of the children required termination of the respondent's parental rights. *See Family Court Act 631; Matter of Star Leslie W.*, 63 NY2d 136, 147-148. Orders affirmed. (Family Ct, Bronx Co [Richardson, JJ])

Prior Convictions (Collateral Consequences) PRC; 295(2)**Sentencing (General) (Restitution)** SEN; 345(37) (71)**Re Application of Gaudio v Kerik, 302 AD2d 225, 753 NYS2d 720 (1st Dept 2003)**

Holding: The petitioner pled guilty to second-degree offering a false instrument for filing. He was paying restitution in timely installments as required by his conditional discharge. The respondent at first refused to hold a hearing on the revocation of the petitioner's pistol license until full payment of the restitution, but scheduled one after the petitioner filed this article 78 proceeding, rendering the proceeding academic. "In any event, respondent's initial refusal to schedule a hearing until petitioner first fully satisfied the conditions of his plea agreement was not arbitrary and capricious and did not deprive petitioner of any constitutional right." Order affirmed. (Supreme Ct, New York Co [McCooe, JJ])

First Department *continued*

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

Evidence (Hearsay) EVI; 155(75)

People v Rosa, 302 AD2d 231, 754 NYS2d 279 (1st Dept 2003)

Holding: Suppression hearing testimony is not a category of prior testimony admissible under CPL 670.10 and so is barred as hearsay. *People v Ayala*, 75 NY2d 422, 428. The witness who testified at the hearing about the circumstances of police entry into an apartment only touched on the defendant’s guilt or innocence of the underlying charges; the prosecution had no reason to cross-examine the witness on this subject, which was completely peripheral to the suppression issue. Further, the witness’s testimony was more helpful than not to the prosecution on the suppression hearing, providing little incentive to impeach the witness’s credibility. The hearing testimony of the witness, who died before trial, was not critical to the defendant’s defense; exclusion of it at trial did not deprive the defendant of a fair trial. *See Chambers v Mississippi*, 410 US 284, 301 (1973). Judgment affirmed. (Supreme Ct, New York Co [Williams, JJ])

Civil Practice (General) CVP; 67.3(10)

Forfeiture (General) FFT; 174(10)

Property Clerk, NYC Police Department v Lizziano, 302 AD2d 235, 754 NYS2d 277 (1st Dept 2003)

Holding: After proceedings were begun seeking forfeiture of the defendant’s car for operating it while intoxicated (Vehicle and Traffic Law 1192.2 and 1192.3), the defendant wrote the Mayor and the Public Advocate saying that he had not been intoxicated but had turned the wrong way on a one-way street due to a “toxic combination” of prescribed Xanax and “a drink.” He noted that questionable blood alcohol tests had shown different levels, and that he had been under a great deal of stress due to impending surgery and the death of his father on the day of the incident. The plaintiff obtained the defendant’s sworn admission that the letter was genuine, then moved to amend the complaint to include forfeiture on the basis of operating the car while impaired by a drug. Vehicle and Traffic Law 1192.4. Summary judgment was properly granted on the basis of the defendant’s admissions in the letter making out all the elements of section 1192.4. *See People v Kahn*, 160 Misc2d 594, 598. Order affirmed. (Supreme Ct, New York Co [Shulman, JJ])

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

Family Court (General) FAM; 164(20)

Re Nilda S. v Dawn K., 302 AD2d 237, 754 NYS2d 281 (1st Dept 2003)

Holding: The petitioner sought to obtain custody of a child from its mother. The court’s denial of the petitioner’s request for appointed counsel was a proper exercise of discretion under Family Court Act 262(b). In any event, the petitioner failed to make the necessary full and timely disclosure to support a claim of indigency. The petitioner waived any argument that the court erred in referring the matter to a referee absent exceptional circumstances (*see* CPLR 4212), as she participated in the proceeding before the referee without objection. *See Matter of Wolf v Assessors of the Town of Hanover*, 308 NY 416, 420.

Counsel (Choice of Counsel) (Conflict of Interest) (Standby and Substitute Counsel) COU; 95(9.5) (10) (39)

People v Linares, 302 AD2d 256, 755 NYS2d 380 (1st Dept 2003)

Holding: The defendant failed to demonstrate good cause for substitution of counsel. *See People v Sides*, 75 NY2d 822, 824. His purported loss of confidence in, and ability to communicate with, fully competent assigned counsel stemmed from counsel’s recommendation that the defendant plead guilty and cooperate with the police, which did not constitute sufficient cause for substitution. *People v Schoian*, 272 AD2d 932, 933 *lv den* 95 NY2d 871. The asserted conflict of interest based on the defendant’s threat to injure his lawyer was of the defendant’s own making; he should not be permitted to circumvent the good cause requirement by creating a conflict. *See Mathis v Hood*, 937 F2d 790, 796. Counsel clearly indicated he could continue to represent the defendant, and there was no indication of any adverse affect due to the alleged conflict. *See Cuyler v Sullivan*, 446 US 335, 348-350 (1980). There was no deprivation of the defendant’s right to counsel when the court exercised its discretion to deny the requested substitution.

Discrimination (Age) DCM; 110.5(10)

People v Ortiz, No. 207 (1st Dept 2003)

Holding: Young persons do not constitute a cognizable group with respect to discrimination in jury selection. *See Johnson v McCaughtry*, 92 F3d 585, 590-595 *cert den* 519 US 1034. Therefore, the defendant could not have been deprived of the effective assistance of counsel by his lawyer’s failure to make seek a *Batson v Kentucky* (476 US

First Department *continued*

79 [1986]) ruling on age discrimination grounds. Judgment affirmed.

Juveniles (Custody) (Neglect) JUV; 230(10) (80)**Re H./R. Children, 302 AD2d 288, 756 NYS2d 166 (1st Dept 2003)**

The respondent mother had a seven-year relationship with the co-respondent, father of one of her children. She made four complaints to police about him from 1995 to 1999, but there is no indication that any of the incidents involved violence or threats thereof. In a 1997 application for an order of protection, she alleged that the co-respondent had been physically abusive and caused her fear for her safety; this was unsubstantiated by dates or descriptions of any specific incidents. Here, the mother testified that she filed the 1997 petition thinking it was a requirement for getting sole custody of the parties' son; she dropped it upon reaching an agreement on custody. The co-respondent has not lived with the mother or son since 1997. In 1999, when he returned the son after visitation, an argument broke out between co-respondent and another man there. The mother tried to separate them, and the co-respondent assaulted her, resulting in her hospitalization. At least one child saw the assault. Family Court subsequently found that the mother had neglected the children by not protecting them from domestic violence.

Holding: The record is bereft of any evidence of specific domestic violence incidents involving the co-respondent before the 1999 assault. That incident alone cannot support a finding of neglect. *See Matter of Kayla B.*, 262 AD2d 137. The mother's alleged refusal to cooperate with the Administration for Children's Services after the 1999 incident is also insufficient to support a finding of neglect. While the order of disposition has expired, the findings of neglect underlying it remain reviewable due to potential future effects. *See Matter of Danielle S.*, 282 AD2d 680, 681. Order reversed, findings vacated, petitions dismissed. (Family Ct, New York Co [Larabee, JJ])

Sentencing (Persistent Violent Felony Offender) SEN; 345(59)**People v Rodriguez, 302 AD2d 317, 754 NYS2d 874 (1st Dept 2003)**

Holding: The record shows that while the defendant was on medication at the time of his plea, "he was rational, coherent and unequivocal in assuring the court that he fully comprehended the meaning of his plea and that he was pleading guilty of his own free will." *See People v Bermudez*, 228 AD2d 237 *lv den* 89 NY2d 919. The prosecu-

tion concedes that the defendant was improperly adjudicated a persistent violent felony offender; the adjudication was based on predicates that did not meet the sequentiality requirement of the statute. Penal Law 70.08; *See People v Morse*, 62 NY2d 205. Under the circumstances, the prosecution is entitled to an opportunity to establish that the defendant is nonetheless a persistent violent felony offender based on a 1978 conviction. *See People v Sailor*, 65 NY2d 224 *cert den* 474 US 982. "The present record is insufficient to establish whether the 10-year period was tolled sufficiently to qualify the 1978 conviction as a predicate violent felony." Judgment modified, remanded for resentencing. (Supreme Ct, Bronx Co [Marcus, JJ])

Juveniles (Detention) (Disposition) JUV; 230(35) (40)**Sentencing (Credit for Time Served) SEN; 345(15)****Re Maurice P., 302 AD2d 319, 754 NYS2d 875 (1st Dept 2003)**

Holding: "As the presentment agency concedes, there was no finding by the court that crediting appellant with time spent in detention prior to the commencement of placement would not serve the needs and best interest of the appellant or the need for protection of the community. Therefore, appellant is entitled to credit for that time (Family Ct Act § 353.3[5]; *Matter of Dwayne R.*, 291 AD2d 325." Order modified and otherwise affirmed. (Family Ct, New York Co [Rand, JJ])

Appeals and Writs (Arguments of Counsel) (Counsel) APP; 25(5) (30)**Counsel (Anders Brief) COU; 95(7)****People v Reyes, 302 AD2d 322, 756 NYS2d 1 (1st Dept 2003)**

Holding: Appellate counsel's application to withdraw on the ground that the appeal is wholly frivolous is inadequate to demonstrate a conscientious examination of the record and applicable law. *See People v Reyes*, 231 AD2d 478. In a letter to the defendant saying no non-frivolous issues existed, counsel misinformed the defendant that he could not challenge the suppression ruling, and could not challenge his sentence as harsh and excessive, because he had pled guilty. These issues survive a guilty plea in the absence of a waiver of appeal. CPL 710.70(2); *People v Thompson*, 60 NY2d 513. The court's review "cannot substitute for the single-minded advocacy of appellate counsel (*People v Casiano*, 67 NY2d 906)" so appointment of new counsel is required. *See People v Moore*, 208 AD2d 357. No opinion about the merits or lack thereof is expressed. Appeal held in abeyance, new counsel assigned. (Supreme Ct, New York Co [White, JJ])

Second Department

Victims (Fair Treatment Standards) VIC; 381(5)

People v Zamorano, 301 AD2d 544, 754 NYS2d 645 (2nd Dept 2003)

The defendant was charged with attempted murder and other felonies. Defense counsel proposed a plea bargain that included an 8-year sentence and deportation to Mexico after its completion. The judge stated that the defendant “will be back the next day. Are you going to see the movie *Traffic?*” and expressed sympathy for the complainant who was the same age as his children. Trial proceeded based on the complainant’s wishes. The defendant was convicted of nearly all charges.

Holding: Right to proceed with trial belongs to the defendant, not the complainant. While under the Fair Treatment Standards for Crime Victims (*see* 22 NYCRR part 129) a complainant’s views should be taken into account, the burden of deciding whether to proceed to trial is not shifted. The court erred by allowing the complainant to decide (“if the complainant ‘wants her trial, she is going to get her trial’”). The court’s questioning of the defendant after the prosecution’s cross-examination took on the appearance of advocacy. *People v Arnold*, 98 NY2d 63, 67; 745 NYS2d 782. The defendant had a right to a trial before an unbiased court. *People v De Jesus*, 42 NY2d 519, 399 NYS2d 196. Letting the complainant determine that there would be a trial, appearing to become the complainant’s advocate, and repeatedly sympathizing with the complainant denied the defendant a fair trial. Judgment reversed. [Supreme Ct, Queens Co (Blumenfeld, J)]

Search and Seizure (Standing to Move to Suppress) SEA; 35(70)

In the Matter of Karif B., 301 AD2d 520, 753 NYS2d 521 (2nd Dept 2003)

The respondent was seated in a parked car that was searched by police. They found a handgun in a book bag, and ammunition in the pocket of a jacket belonging to another passenger. The respondent was charged with possession of both. His motion to suppress the evidence was granted.

Holding: The passenger of the vehicle had standing to challenge the search of a book bag in it which belonged either to the person charged or someone else in the car, based on the statutory presumption. Penal Law 265.15[3]; *People v Millan*, 69 NY2d 514, 519, 516 NYS2d 168. Once the occupants of the car were removed and patted down, there was no justification for removing and searching the book bag. Police had only a suspicion of the presence of a gun, and not “an actual and specific danger to the officers’ safety sufficient to justify a further intrusion.” *People v*

Torres, 74 NY2d 224, 231 n 4, 544 NYS2d 796. Order affirmed. [Family Ct, Kings Co (Hepner, J)]

Discovery (General) DSC; 110(12)

Misconduct (Prosecution) MIS; 250(15)

People v Crider, 301 AD2d 612, 756 NYS2d 223 (2nd Dept 2003)

The defendant was charged with drug and weapon possession.

Holding: As part of their open file discovery, prosecutors represented that the defendant made only exculpatory statements. A police witness then testified that the defendant said he could “get you more stuff like this.” The defendant took the stand and denied knowledge of the gun or drugs and denied offering to obtain more drugs and to reveal his source. In rebuttal, the prosecution called a police witness to prove that the alleged inculpatory statements were made. The prosecution had denied that any paperwork was generated as a result of the alleged statement, but after a weekend recess and a defense motion for mistrial, a detective’s notebook containing alleged recording of that conversation was produced in connection with the detective’s proposed rebuttal testimony. The defendant’s motion for a mistrial was denied. The delayed disclosure of the defendant’s inculpatory statements, following defense reliance on the earlier claim that only exculpatory statements had been made, violated due process. US Const Amend V; NY Const art I, § 6; *Smith v Phillips*, 455 US 209, 217, 71 LEd2d 78, 102 SCt 940 (1982). Before retrial, prosecutors are to reveal all statements of the defendant regardless of whether or how the prosecution intends to use them. CPL 240.20[1][a]. Judgment reversed, new trial ordered. [Supreme Ct, Kings Co (Juviler, J)]

Homicide (Manslaughter HMC; 185(30 [d] [j]) (40 [j] [m]) [Evidence] [Instructions]) (Murder [Evidence] [Instructions])

Lesser and Included Offenses (Instructions) LOF; 240(10)

People v Straker, 301 AD2d 667, 754 NYS2d 339 (2nd Dept 2003)

The defendant was charged with intentional murder, among other felonies. Over her objection, the court submitted the lesser-included offense of manslaughter because a self-defense claim had been raised. The defendant was convicted of manslaughter.

Holding: First-degree manslaughter was properly submitted as a lesser-included offense of intentional second-degree murder. The defendant’s testimony about a struggle with the decedent supported the jury’s belief that

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the defendant did not intend to kill, only to inflict serious injury on the decedent. *See People v Ford*, 62 NY2d 275, 476 NYS2d 783. Judgment affirmed. [Supreme Ct, Kings Co (Dabiri, J)]

Dissent: [O'Brien, J] Where the decedent was killed by a shot into her head from a distance of 12 to 18 inches, there is no reasonable view that the defendant intended to cause serious physical injury, not death. Including the first-degree manslaughter charge permitted the jury to reach a compromise verdict to avoid conviction on intentional murder. *People v Mussenden*, 308 NY 558, 563. Alternatively, the court should have given a charge for second-degree manslaughter (reckless manslaughter). *See CPL 300.50[1]*.

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

Sentencing (Concurrent/Consecutive) (Credit for Time Served) SEN; 345(10) (15)

People v Dawson, 301 AD2d 659, 753 NYS2d 879 (2nd Dept 2003)

Holding: The defendant pled guilty to second-degree assault and was sentenced to six months of shock incarceration and five years probation. The defendant had already spent 5½ months in prison. While credit was given on the shock sentence for time already served, the probation sentence was calculated to run from the date of sentencing. That was error, for the law requires that a sentence of incarceration and probation together cannot exceed the authorized sentence, and requires the two to run concurrently. Penal Law 60.01(2)(d). The probationary sentence should have included the prison time for which credit was given on the shock. *See People v Montgomery*, 115 AD2d 102, 494 NYS2d 913. Judgment modified and as modified affirmed. [Supreme Ct, Westchester Co (Perone, J)]

Double Jeopardy (Lesser Included and Related Offenses) DBJ; 125(15)

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

People v Baxton, 302 AD2d 401, 754 NYS2d 570 (2nd Dept 2003)

Holding: The defendant's convictions for fifth-degree criminal sale of a controlled substance and seventh-degree criminal possession of a controlled substance were lesser-included offenses of third-degree criminal sale of a controlled substance and third-degree criminal possession of a controlled substance. Since they concerned the same bag of cocaine, the lesser offense counts should have been

dismissed. *See CPL 300.40[3][b]; People v Excell*, 254 AD2d 370, 679 NYS2d 146. Judgment modified, counts dismissed. [Supreme Ct, Kings Co (Carroll, J)]

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

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

People v Layton, 302 AD2d 408, 754 NYS2d 552 (2nd Dept 2003)

The defendant was convicted of first and second-degree robbery based on acts performed with a BB gun.

Holding: A BB gun was not a firearm. The defendant established the affirmative defense that the weapon used was a BB gun; its use in the course of robbery was insufficient to sustain the first-degree charge. *See Penal Law 160.15[4]; People v Wilson*, 283 AD2d 339, 340, 727 NYS2d 62. Judgment modified. [County Ct, Suffolk Co (Weber, J)]

Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) JRY; 225(10) (50) (60)

People v Williams, 302 AD2d 412, 754 NYS2d 563 (2nd Dept 2003)

A potential juror in the defendant's case provided equivocal responses concerning the influence of her husband's position as a postal inspector on her ability to be fair and impartial. The court did not obtain a personal, unequivocal declaration or assurance of impartiality. The defendant's challenge for cause was denied; all of his peremptory challenges were exhausted.

Holding: The juror's possible predisposition against the defendant mandated court inquiry to elicit "a personal, unequivocal assurance that he or she will be able to render a verdict based solely on the evidence adduced at trial." *See People v Arnold*, 96 NY2d 358, 729 NYS2d 51. Since the defendant's peremptory challenges were exhausted, it was reversible error for the court to deny his challenge for cause. *See CPL 270.20[2]; People v Torpey*, 63 NY2d 361, 482 NYS2d 448. Judgment reversed. [Supreme Ct, Queens Co (Rosenzweig, J)]

Insanity (Civil Commitment) (General) ISY; 200(3) (27)

Matter of Kwang L., 302 AD2d 388, 755 NYS2d 93 (2nd Dept 2003)

The respondent challenged a petition filed under Kendra's Law, Mental Hygiene Law 9.60, requiring compliance with an assisted outpatient treatment (AOT) plan. Relying primarily on *Rivers v Katz* (67 NY2d 485, 504 NYS2d 74) he claimed that the statute was unconstitutional.

Holding: In contrast to the *parens patriae* case of *Rivers*, Kendra's Law is based on a legislative finding that some mentally-ill persons capable of living in the com-

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munity may, without care and treatment, relapse and become violent or suicidal, or need hospitalization. The law requires that assisted outpatients be invited to participate in their treatment plan. Any compulsion felt as a result of the law is justified by a court finding by clear and convincing evidence that without AOT, relapse or deterioration is likely to result in serious harm to the patient or others. Mental Hygiene Law 9.60(c) (6). A judicial finding of incapacity is not required under these circumstances. Brief detention of a noncompliant outpatient does not violate procedural due process. Time consuming judicial hearings divert resources from diagnosis and treatment of the mentally ill. *See Parham v JR*, 442 US 584, 61 LEd2d 101, 99 SCt 2493 (1979). Different treatment of outpatients compared to others in the criminal justice system did not violate equal protection. *See Matter of Francis S*, 87 NY2d 554, 640 NYS2d 840. No 4th Amendment violation occurred. No probable cause finding that an outpatient is a danger to him or herself or others is required; assisted outpatients have a documented history of noncompliance with treatment leading to hospitalization, and the clinical judgment of a treating physician is sufficient. *Monday v Oullette*, 118 F3d 1099. Although the original order had expired, the issues raised made it an exception to mootness doctrine. *See Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 683 NYS2d 150. Judgment affirmed. [Supreme Ct, Queens Co (Dye, J)]

Prisoners (Disciplinary Infractions) PRS I; 300(13)

Matter of Collins 302 AD2d 382, 756 NYS2d 582 (2nd Dept 2003)

Holding: A misbehavior report accused the petitioner, a prisoner, of receiving a package with legal documents belonging to another inmate at another facility, constituting failure to comply with facility mail procedures (*See* NYCRR 270.2[B][26][ii]) and unauthorized legal assistance to other inmates. *See* 7 NYCRR 270.2[B][26][vii]. At a Tier II disciplinary hearing, the petitioner denied the charges. The package was not introduced into evidence. The petitioner was found guilty based on the misbehavior report and sentenced to 30 days keeplock and loss of privileges. In an article 78 proceeding, he claimed that the decision was not based on substantial evidence.

Written misbehavior report had to be “sufficiently relevant and probative” to constitute substantial evidence. *Matter of Foster v Coughlin*, 76 NY2d 964, 966, 563 NYS2d 728. The report submitted at the hearing did not meet that criteria. *See Matter of Bryant v Coughlin*, 77 NY2d 642, 647, 569 NYS2d 582. Petition granted, determination annulled, charges dismissed, all references to the charges to be expunges from the petitioner’s files.

Identification (Suggestive Procedures) IDE; 190(50) (57) (Wade Hearing)

People v Brinson, 302 AD2d 471, 753 NYS2d 740 (2nd Dept 2003)

The complainant and a witness identified the defendant after police canvassed the neighborhood with them. The defendant was charged with robbery among other counts. The court denied his motion to suppress the identification without holding a *Wade* hearing.

Holding: A police patrol car tour of the crime scene neighborhood with witnesses was an identification procedure. *People v Dixon*, 85 NY2d 218, 223, 623 NYS2d 813. Therefore, a *Wade* hearing to inquire into the circumstances surrounding the identification was required. Appeal held in abeyance, matter remitted for a hearing. [Supreme Ct, Queens Co (Kohm, J)]

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

People v Eaddy, 302 AD2d 473, 753 NYS2d 742 (2nd Dept 2003)

The defendant was convicted of first-degree rape. The court issued an order of protection until 2010.

Holding: The time limit for an order of protection issued at sentencing should have taken into account the defendant’s jail-time credit. *See* CPL 530.13(4); *People v Holmes*, 294 AD2d 871, 740 NYS2d 919 *lv den* 98 NY2d 730. This error concerned the defendant’s right to be sentenced as provided by law; waiver of the right to appeal or failure to object did not prevent review. *See People v Samms*, 95 NY2d 52, 710 NYS2d 310. Judgment modified, matter remitted for a new determination of the order of protection’s duration, taking jail-time credit into account. [Supreme Ct, Queens Co (Buchter, J)]

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

Family Court (General) FAM; 164(20)

Matter of DuBova v Lekumovich, 302 AD2d 459, 754 NYS2d 583 (2nd Dept 2003)

The respondent was convicted of harassment. The court imposed an order of protection. Although the respondent was indigent, his request for appointment of counsel was never fulfilled, “purportedly due to the difficulty of obtaining counsel.”

Holding: An indigent party in a Family Court Act article 8 proceeding was entitled to assignment of an attorney. *See* Family Ct Act 262. Without a valid waiver of counsel, compelling the respondent to proceed without an attorney mandated reversal. *See Matter of Commissioner of Social Servs. v Rodriguez*, 284 AD2d 330, 331. Despite the expiration of the order of protection issued in the absence

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of counsel, the issue was important enough to merit review as exception to the mootness doctrine. *See Matter of O'Herron v O'Herron*, 751 NYS2d 594. Order reversed, matter remitted for new hearing. [Family Ct, Kings Co (Turbow, J)]

Discrimination (Race) DCM; 110.5(50)

Juries and Jury Trials (Challenges) (Voir Dire) JRY; 225(10) (60)

People v Berry, 302 AD2d 536, 755 NYS2d 264 (2nd Dept 2003)

Holding: The defendant's *Batson* objection to the prosecutor's peremptory exclusion of the only African-American venire person in the first rounds of *voir dire* was sufficient to raise a *Batson* (*Batson v Kentucky*, 476 US 79, 106 SCt 1712; 90 LEd2d 69 [1986]) challenge. *People v Brown*, 97 NY2d 500, 507, 743 NYS2d 374. Counsel argued that the prospective juror was similarly situated to potential jurors who were not challenged. The court should have required the prosecutor to provide a race-neutral reason for exclusion. *People v Guzman*, 251 AD2d 680, 681, 675 NYS2d 110. Appeal held in abeyance, matter remitted for a hearing on the peremptory challenge in question. [Supreme Ct, Queens Co (Erlbaum, J)]

Guilty Pleas (General) GYP; 181(25)

Juveniles (Delinquency – Procedural Law) JUV; 230(20)

In the Matter of Anthony S., 302 AD2d 531, 755 NYS2d 294 (2nd Dept 2003)

Holding: Family Court failed to inquire whether a juvenile making allocution was aware of "possible specific dispositional orders." *See* Family Ct Act 321.3[1][c]; *Matter of LeJuane S.*, 247 AD2d 481, 482, 668 NYS2d 708. Nor did the court confirm with the juvenile's mother that she understood the consequences of the juvenile's admission. *See Matter of Perry O.*, 232 AD2d 225, 647 NYS2d 785. Judgment reversed. [Family Ct, Suffolk Co (Freundlich, J)]

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

Weapons (Evidence) (General) (Possession) WEA; 385(20) (22) (30)

People v Sinatra, 302 AD2d 615, 755 NYS2d 312 (2nd Dept 2003)

Holding: First-degree attempted robbery and fourth-degree weapons possessions convictions were based on insufficient evidence. The prosecution failed to prove that

pepper spray used by the defendant was a "dangerous instrument." Penal Law 10.00[13]. There was no evidence that it was, in the circumstances used, or threatened or attempted to be used, readily capable of causing death or other serious physical injury. *See People v Ni*, 293 AD2d 552, 742 NYS2d 61. Judgment modified. [Supreme Ct, Queens Co (Rosengarten, J)]

Family Court (General)

FAM; 164(20)

In the Matter of Dorrión S., 302 AD2d 598, 757 NYS2d 49 (2nd Dept 2003)

Holding: Family Court erred by not considering restrictive placement for the respondent, convicted of a designated felony. Family Court Act 353.5(1). The presentment agency was not required by Family Court Act 351.1(1) to give notice of seeking restrictive placement before the court could exercise this option. The court "should have made specific written findings of fact as to each of the considerations set forth in Family Court Act § 353.5(2) (*see* Family Ct Act § 353.5[1]; *Matter of Kolongi R.*, 239 AD2d 349; *Matter of Anthony S.*, 67 AD2d 685)." Order reversed, matter remitted for consideration of restrictive placement. [Family Ct, Queens Co (Lubow, J)]

Search and Seizure (Standing to Move to Suppress)

SEA; 335(70)

People v Citriniti, 303 AD2d 419, 756 NYS2d 278 (2nd Dept 2003)

Holding: The defendant was charged with drug-related offenses. Police had taken a cellular phone from his person, which led them to drugs and a digital scale in the home of his girlfriend's parents. Denial of the defendant's motion to suppress evidence as fruit of illegal seizure of his phone without a hearing, on the grounds that he did not prove he had a legitimate expectation of privacy in the home, was error. The defendant needs only to establish an expectation of privacy in the cellular phone to have standing to question the fruits of a search of the phone. *See People v Curatolo*, 76 AD2d 524, 531, 431 NYS2d 713. A suppression hearing should have been held. Appeal held in abeyance, matter remitted to hear and decide the motion to suppress. [County Ct, Orange Co (Berry, J)]

Appeals and Writs (Scope and Extent of Review)

APP; 25(90)

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) (Standing to Move to Suppress)

SEA; 335(15 [p]) (70)

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People v Myers, 303 AD2d 139, 758 NYS2d 68 (2nd Dept 2003)

Holding: The decedent’s wallet and cocaine were found in the defendant’s jacket, which he had left in the decedent’s car. In ruling on the defendant’s suppression motion, the hearing court did not rule on whether the defendant had an expectation of privacy in the car, next to which he had been arrested, or the jacket. The defendant’s privacy interest was a necessary component of an adverse suppression ruling. *People v Ladson*, 236 AD2d 217, 654 NYS2d 115. When the defendant’s expectation of privacy was an issue, it must be considered on appeal, even where the hearing court did not make an adverse ruling on this point. *See* CPL 470.15[1]; *People v Scott*, 79 NY2d 474, 488, 583 NYS2d 920. Consideration of this threshold issue is not barred by CPL 470.15(1). Standing may be raised by the prosecution for first time on appeal. “[I]t is not reasonable to expect that a jacket and its contents left at the scene of a homicide inside the victim’s automobile would remain undisturbed out of respect for the privacy of the person who put it there (*see People v Ramirez-Portoreal*, [88 NY2d 99, 108, 643 NYS2d 502].)” The police had probable cause to search the entire car for drugs and evidence related to the homicide and under the automobile exception did not need to get a search warrant. Given the lack of a privacy expectation, the defendant cannot show any violation of the state constitution. Judgment affirmed. [Supreme Ct, Kings Co (Tomei, J)]

Identification (Show-ups) (Suggestive Procedures) IDE; 190(40) (50)

People v Francis, 303 AD2d 598, 756 NYS2d 627 (2nd Dept 2003)

Holding: Police found the defendant and his co-defendant in a stolen automobile. The arresting officer notified by radio another officer, waiting with the complainant, that the car had been recovered and two men were being held. The complainant, who had heard the radio report, was brought to the scene to make an identification, and viewed the defendants standing near the car, in handcuffs, surrounded by police. Suppression of the identification was improperly denied. The showup was unduly suggestive. *People v James*, 218 AD2d 709, 710, 630 NYS2d 368. An independent source hearing should have been held regarding the complainant’s in-court identification. The defendant’s fourth-degree grand larceny conviction must be vacated, but the convictions of fourth-degree possession of stolen property and third-degree unauthorized use of a vehicle need not be, given the strength of the evidence supporting them aside from the complainant’s identification. There is no reasonable possibility that the

trial court’s verdict on the tainted count influenced in a meaningful way its verdict on the other counts. Judgment modified, new trial ordered on the larceny charge, to be preceded by a hearing. [Supreme Ct, Queens Co (Rosengarten, J)]

Evidence (Uncharged Crimes)

EVI; 155(132)

People v Sanders, 303 AD2d 694, 756 NYS2d 780 (2nd Dept 2003)

Holding: The defendant was tried for sexually abusing his niece. In response to his claim that his niece lied, the prosecutors presented testimony, over defense objection, of another niece asserting similar sexual abuse. Allowing this testimony of another witness to unrelated acts of sexual abuse, *ie*, uncharged crimes, which was not needed to prove an element of the crime nor within a recognized exception to the prohibition of such evidence, was error. *See People v Beam*, 57 NY2d 241, 251-253, 455 NYS2d 575; *People v Molineux*, 168 NY 264, 293. The other witness’s testimony was improperly used as propensity evidence. *See People v Hudry*, 73 NY2d 40, 54-56, 538 NYS2d 197 *abrogated on other gnds Carmell v Texas*, 529 US 513, 120 S Ct 1620; 146 LEd2d 577. References to the testimony were highly prejudicial. Judgment reversed. [Supreme Ct, Kings Co (Knipel, J)]

Misconduct (Judicial)

MIS; 250(10)

Sentencing (General) (Hearing)

SEN; 345(37) (42)

People v Wilson, 303 AD2d 773, 757 NYS2d 446 (2nd Dept 2003)

Holding: A new sentencing proceeding is required because the court made remarks showing that it “improperly speculated and considered that the defendant had committed additional crimes.” *People v Naranjo*, 89 NY2d 1047, 659 NYS2d 826. Other comments suggested that it also considered the defendant’s decision not to testify at trial. Judgment modified, remitted for resentencing by a difference justice. [Supreme Ct, Queens Co (Rios, J)]

Identification (Show-ups)

IDE; 190(40)

Search and Seizure (Detention)

SEA; 335(25)

People v Hargroves, 303 AD2d 766, 757 NYS2d 325 (2nd Dept 2003)

Holding: The motion to suppress identification should have been granted, because police did not have reasonable suspicion to stop and detain the defendant for the purpose of showup identification. *See People v Riddick*, 269 AD2d 471, 704 NYS2d 270. The complainant was unable to identify any of the defendants at trial; the indictment must be dismissed. *See People v Rossi*, 80 NY2d 952,

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954, 590 NYS2d 872. Judgment reversed, matter remitted for entry of an order in the courts discretion under CPL 160.50. [Supreme Ct, Queens Co (Rotker, J)]

Weapons (Dangerous Weapons Control Law) **WEA; 385(7)****People v Zuniga, 303 AD2d 773, 759 NYS2d 86 (2nd Dept 2003)**

Holding: A butterfly knife did not fit within the statutory definition of gravity knife, and was insufficient to support conviction for fourth-degree weapons possession. See Penal Law 265.01[1]. "Gravity knife" is defined as a "knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." Penal Law 265.00(5). Butterfly knives required manual locking. This does not meet the requirement that the blade lock automatically. *People v Mott*, 137 Misc2d 757, 758. The defendant having been acquitted of other charges in the indictment, it must be dismissed. Judgment reversed. [Supreme Ct, Queens Co (Roman, J)]

Parole (Release [Consideration for]) **PRL; 276(35[b])****In the Matter of Edwards v Travis, 304 AD2d 576, 758 NYS2d 121 (2nd Dept 2003)**

Holding: In a decision to deny an inmate's release, the Parole Board failed to consider the sentencing minutes, which reveal the court's recommendation that the petitioner serve only the minimum sentence. See Executive Law 259-i[1][a][i], [2][c][A]. Therefore, a *de novo* release hearing was required, as the article 78 court ordered. Order affirmed. [Supreme Ct, Westchester Co (Adler, J)]

Burglary (Elements) (Evidence) **BUR; 65(15) (20)****People v Maisonet, 304 AD2d 674, 760 NYS2d 58 (2nd Dept 2003)**

The defendant was convicted of first-degree burglary and second-degree robbery.

Holding: The defendant's entrance into a hallway outside of the complainant's apartment, which was not a dwelling within the meaning of the statute, was insufficient to sustain a charge of burglary. Penal Law 140.00(3). No evidence had been presented to prove that the interior of the apartment building was restricted to tenants. See *People v Torres*, 162 AD2d 385, 556 NYS2d 920. Judgment modified, and as modified, affirmed. [Supreme Ct, Queens Co (Kron, J)]

Evidence (Presumptions) **EVI; 155(110)****Motor Vehicles (General)** **MVH; 260(17)****In the Matter of Joseph DePasquale, 304 AD2d 664, 759 NYS2d 97 (2nd Dept 2003)**

Holding: Two days after the petitioner bought a truck, the police seized it under Vehicle and Traffic Law 423-a, which deals with vehicles on which the vehicle identification number (VIN) has been removed or concealed. Supreme Court directed that the truck be returned. The police assert that the "public" (*ie* visible) VIN had been "altered" because it did not match the VIN hidden by the manufacturer. The evidence traced the truck's ownership under the public VIN to purchase from a salvage yard in 1988. It had been inspected by the Department of Motor Vehicles in 1989 before a salvage title was issued, and had undergone substantial repairs and improvements over the years. No vehicle with either the public or private VIN had been reported stolen. A detective acknowledged that the two VIN numbers could be mismatched where a vehicle had been rebuilt with used parts. The petitioner rebutted the presumption, arising from the alleged "alteration" of the public VIN, that the truck had been stolen. *Cf Carlone v Adduci*, 222 AD2d 754, 634 N.Y.S.2d 876. Judgment affirmed. (Supreme Ct, Suffolk Co [Underwood, J])

Third Department**Ethics (Judicial)** **ETH; 150(10)****Judges (Disqualification) (General)** **JGS; 215(8) (9)****People v Saunders, 301 AD2d 869, 753 NYS2d 620 (3rd Dept 2003)**

Holding: The defendant moved under CPL 440.10 and 440.20 to vacate his convictions (kidnapping, assault, escape, endangering a child, and first-degree imprisonment) or sentence. The issue of whether the defendant was denied his right to testify before the grand jury, raised on a direct appeal, is not subject to 440 review. Challenges to the prosecution's calling of the county court judge to establish the defendant's prior conviction and sentence as an element of the escape charge should also have been raised on appeal, and lack merit. The judge's failure to recuse himself because he was a witness is not shown to have constituted error. None of the statutory disqualifications of Judiciary Law 14 were applicable, leaving the judge the sole arbiter of recusal. *Matter of Stampfler v Snow*, 290 AD2d 595, 596. No "direct, personal, substantial or pecuniary interest in reaching a particular conclusion" exists here, nor did the judge's role conflict "impermissibly with the notion of fundamental fairness." *People v Alomar*, 93 NY2d 239, 246. The complainant's postjudg-

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ment affidavit amounted to a recantation, insufficient to set aside a judgment. *See People v Stamps*, 268 AD2d 886 *lv den* 94 NY2d 925. The written submissions and record were sufficient to permit a decision without a hearing on the motion to vacate. Even if deemed true, claims that counsel failed to consult with the defendant on more occasions, interview the complainant, challenge an alleged denial of the defendant’s right to testify at the grand jury, investigate mitigation, and consult with the defendant before sentencing were inadequate to establish ineffective assistance in the totality of circumstances. Order affirmed.

Driving While Intoxicated (Evidence) DWI; 130(15)

**People v Gallup, 302 AD2d 681, 755 NYS2d 498
(3rd Dept 2003)**

Holding: A 19-year veteran police officer testified that the defendant threw a beer can from the car when stopped, admitted having had a couple of beers, had problems producing his license, bloodshot, watery eyes, had alcohol on his breath, was unsteady and unbalanced, and refused to submit to a chemical test for blood alcohol levels (reflecting consciousness of guilt). This supported a finding of intoxication. *See Vehicle and Traffic Law 1194(2)(f); People v Ardila*, 85 NY2d 846, 847. The defendant’s lawyer did not provide less than meaningful representation. Counsel made persuasive opening and closing statements and effectively cross-examined the police witness. He presented a cogent defense theory that the five-minute period between the stop and arrest was insufficient opportunity to observe the defendant’s state and conclude he was intoxicated. He noted that innocuous explanations such as fatigue, nervousness, uncoordination, and the glare of police lights existed for the defendant’s behavior, and that confusion between DWI warnings and *Miranda* warnings could explain the refusal to take the blood test. Though not objecting to a horizontal-gaze nystagmus (HGN) field test, he elicited on cross-examination that HGN is an imperfect indicator of intoxication. The issue of the adequacy of the foundation laid for admitting the results of the HGN test is unpreserved. Had the issue been raised, the court could have denied a *Frye* (*Frye v US*, 293 F1013) hearing by taking judicial notice of the reliability of the HGN procedure and granting only a foundational inquiry into whether accepted techniques were employed and whether the tester was qualified. *See People v Wesley*, 83 NY2d 417, 536. Judgment affirmed. (County Ct, Schoharie Co [Bartlett, III, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

**People v Madlin, 302 AD2d 751, 755 NYS2d 121
(3rd Dept 2003)**

Holding: In deciding to deviate from the prosecutor’s recommendation that the defendant be classified as a risk level II sex offender under the Sex Offender Registration Act, the court relied on the complainant’s statements to police as set out in the presentence report. The court’s assessment of 20 additional points for “continuing course of sexual misconduct” because the statements indicated the defendant had engaged in multiple acts of sexual misconduct with a minor in one 24-hour period was contrary to the Risk Assessment Guidelines and Commentary, 1997 ed, at 10. The court also found attempted deviate intercourse should be treated as “sexual intercourse, deviate sexual intercourse or aggravated sexual abuse” rather than “contact under clothing.” This added 15 points in that category, and also was contrary to the Guidelines, at 8-9. While a court can deviate from the Guidelines for factors of a kind or degree not adequately taken into account by the Guidelines, no such finding was made here. The court simply misapplied the Guidelines, yielding an improper Risk Level III classification. Order reversed, defendant classified as a risk level II sex offender. (County Ct, Broome Co [Smith, JJ])

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

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

Sentencing (General) SEN; 345(37)

**People v Lindsey, 302 AD2d 128, 755 NYS2d 118
(3rd Dept 2003)**

The defendant appealed his conviction and sentence for second-degree burglary, contending that he should have been allowed to withdraw his guilty plea because it was a product of duress. His conviction was affirmed in May 2001.

Holding: In February 2002 the defendant moved *pro se* to vacate the convictions and set aside the sentence because his plea was not knowingly and intelligently entered where the court had not told him that a five-year period of post release supervision would follow incarceration under Penal Law 70.45. Had this issue been raised on direct appeal, review would have been required. *See People v Harler*, 296 AD2d 712, 713. However, a motion to vacate the conviction must be denied where the record would have permitted the issue to be raised on direct appeal and the defendant failed to raise it then. CPL 440.10(2)(c); *People v Cooks*, 67 NY2d 100, 104. The plea allocution complained of is contained in the record and (though not critical to this decision) the defendant was advised about post release supervision upon arrival in prison, well before his direct appeal was decided. As a

Third Department *continued*

footnote, this holding means that only a motion prior to sentencing can preserve for appeal the failure to advise of post release supervision. Order affirmed. (County Ct, Sullivan Co [La Buda, JJ])

Search and Seizure (Search Warrants [Affidavits, Sufficiency of] [Suppression] Standing to Move to Suppress) SEA; 335(65[a] [p]) (70)

People v Rodriguez, 303 AD2d 783, 758 NYS2d 172 (3rd Dept 2003)

Holding: Affidavits by police and a confidential informant were provided in support of a search warrant application nearly a month after the drug transaction they described. Phrases in the informant's affidavit giving the impression that illegal activity had been ongoing ("several young black males who are selling cocaine out of this location") are not supported by information about the source of such information or how it was acquired. See *People v Teribury*, 91 AD2d 815. Describing a single sale provided no reasonable assumption that additional cocaine was at the premises at the time of the warrant application. See *People v Acevedo*, 175 AD2d 323, 324. The warrant was issued without probable cause; the drugs seized pursuant to it must be suppressed as to the drug possession counts. Automatic standing to challenge the warrant as to those charges existed because they were premised upon the statutory presumption of Penal Law 220.25(2). The charges of criminal use of drug paraphernalia arose only from ordinary constructive possession, so the defendant had to establish standing as to those counts. He did not set out facts establishing a legitimate expectation of privacy in the searched premises, and so lacked standing. There was nothing in the defendant's plea allocution on in the grand jury minutes to show the defendant's "connectedness" to the premises; defense counsel's failure to include allegations supporting standing cannot be deemed ineffective assistance of counsel. The defendant received meaningful representation. See *People v Benevento*, 91 NY2d 708. Judgment modified and as modified, affirmed. (County Ct, Schenectady Co [Eidens, JJ])

Counsel (Right to Counsel) COU; 95

Matter of Ward, Jr. v Jones, 303 AD2d 844, 757 NYS2d 127 (3rd Dept 2003)

Holding: The petitioner father was convicted of weapons possession for trying to have a pipe bomb placed in the respondent mother's vehicle. The petitioner then sought visitation with their children. The petitioner

asked for assigned counsel, but did not fall into any of the enumerated subdivisions of Family Court Act 262(a). His assertion that he was entitled to an attorney under Family Court Act 262(b), allowing assignment of counsel if the court determines that the state or federal constitution mandate counsel, is rejected. Assuming without deciding that denial of an application for visitation triggers the presumption of a federal constitutional right to counsel that exists for deprivation of physical liberty (*Lassiter v Department of Social Servs.* 452 US 18, 26-27 [1981]), the failure to appoint counsel here did not deprive the petitioner of due process. He was afforded a hearing. The court permitted him to state his case for visitation, and tolerated what amounted to a collateral attack on the petitioner's conviction. The issue was not complicated, no expert testimony was required to resolve the application, and the respondent also was without counsel. Nor was the defendant entitled to assigned counsel under state constitutional law. "[W]e declined the invitation to equate 'fundamental fairness' with a constitutional right to the appointment of assigned counsel for all indigent parents seeking visitation with their children." The claim that family court filed to comply with CPLR 4517 is unpreserved; as a footnote, even if appointed counsel would have prevented introduction of the transcript of the underlying criminal proceeding, the conviction itself and the respondent's testimony about the conduct would have come in. Order affirmed. (Family Ct, Delaware Co [Estes, JJ])

Fourth Department

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

People v Hart, 300 AD2d 987, 751 NYS2d 339 (4th Dept 2002)

The defendant was tried for grand larceny on the theory that he took the complainant's property by false pretenses. Penal Law 155.05 [2] [a]. Allegedly, the defendant had obtained \$65,000 in a fraudulent business investment operation. At the close of the prosecution's case, the defendant moved to dismiss based on failure to produce sufficient evidence that he made a false representation concerning a past or present fact. After a hung jury, the defendant was convicted following a second trial.

Holding: There was not sufficient evidence at the first trial that the defendant had made a false representation to complainant about expanding his business or the existence of his business. See *gen People v Norman*, 85 NY2d 609, 619, 627 NYS2d 302. The complainant testified that she gave the defendant money to expand his business, and he promised to pay her back through his "power of attorney." Since the evidence at that trial was legally insufficient, the prosecution should have been barred by double jeopardy from retrying the case. US Const, Amend

Fourth Department *continued*

5; NY Const, art I, § 6; *People v Tingué*, 91 AD2d 166, 167-168, 458 NYS2d 429. Judgment reversed. [Supreme Ct, Onondaga Co (Brunetti, J)]

Speedy Trial (Cause for Delay) (Consent to Delay) (Statutory Limits) **SPX; 355(12) (15) (45)**

People v Soluri, 300 AD2d 988, 752 NYS2d 190 (4th Dept 2002)

Indicted on several felony counts, the defendant moved to dismiss based on speedy trial. The prosecution announced readiness for trial at arraignment, 201 days after the filing of a felony complaint. The court denied the motion to dismiss, excluding from consideration a period of 64 days based on the defendant’s consent to an adjournment. CPL 30.30(4)(b).

Holding: The prosecution’s failure to make a record establishing the defendant’s or defense counsel’s consent to a 64-day adjournment made it chargeable against them. A clear expression of consent by the defense was required. *People v Liotta*, 79 NY2d 841, 843, 580 NYS2d 184. The defendant’s expression of interest in speaking and cooperating with the Metro Jeff Task Force was not consent for an adjournment. That related to plea negotiations, which are chargeable to the prosecution. *People v Coxon*, 242 AD2d 962, 963, 662 NYS2d 659. Judgment reversed. [County Ct, Jefferson Co (Martusewicz, J)]

Evidence (Relevancy) Lesser and Included Offenses (Instructions) **EVI; 155(125) LOF; 240(10)**

People v Gross, 300 AD2d 1102, 751 NYS2d 814 (4th Dept 2002)

The defendant was tried for second-degree manslaughter (Penal Law 125.15 [1]), on the theory that she recklessly caused the death of her young daughter by not feeding her or getting medical treatment. The court refused to charge the lesser-included offense of criminally negligent homicide. Penal Law 125.10. A doctor testified that the defendant’s use of cocaine and alcohol while pregnant led to the child’s developmental problems.

Holding: A reasonable view of the evidence supported a finding of criminally negligent homicide. CPL 300.50 [1]; *People v Glover*, 57 NY2d 61, 63, 453 NYS2d 660. Criminally negligent homicide was a valid lesser included of second-degree manslaughter. *People v Heide*, 84 NY2d 943, 944, 620 NYS2d 814. The court erred by not instructing on this lesser offense.

The doctor’s testimony about the alleged cause of the

child’s developmental disabilities was highly prejudicial and not relevant. *People v Ventimiglia*, 52 NY2d 350, 358-359, 438 NYS2d 261. The child’s medical condition at the time of her death was relevant, not the defendant’s conduct during pregnancy. Admission of the testimony was error. The limiting instruction that the testimony was to assist the jury in understanding the “the physiological reasons contributing to the [the child’s medical condition], and really the broader expository context of her medical situation” was insufficient to cure the error. Judgment reversed. [County Ct, Monroe Co (Bristol, J)]

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) **APP; 25(45) (63)**

Guilty Pleas (Errors Waived By) (General) **GYP; 181(15) (25)**

People v Moore, 300 AD2d 1085, 751 NYS2d 900 (4th Dept 2002)

The defendant pled guilty to attempted first-degree burglary. Penal Law 110.00, 140.30 [4].

Holding: To preserve for review the court’s failure to advise the defendant about postrelease supervision at the time he entered his plea required moving to withdraw the plea or vacate the judgment. *People v White*, 296 AD2d 867, 744 NYS2d 924. The defendant did neither.

This is one of the rare cases in which preservation was not required to contest the plea, which must be vacated as not knowingly, voluntarily and intelligently entered. *People v Lopez*, 71 NY2d 662, 665-666, 529 NYS2d 465. It can also be considered despite the appeal waiver. *People v Seaberg*, 74 NY2d 1, 10, 543 NYS2d 968. Since the defendant’s recitation suggested a possible defense—an inoperable weapon (Penal Law 140.30 [4]), the trial court erred by not inquiring into the defendant’s awareness of the defense and his knowing and voluntary waiver of it. *People v Costanza*, 244 AD2d 988, 989, 665 NYS2d 487. Judgment reversed. [Supreme Ct, Erie Co (Rossetti, J)]

Accusatory Instruments (Variance of Proof) **ACI; 11(20)**

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

People v Watkins, 300 AD2d 1070, 752 NYS2d 500 (4th Dept 2002)

In the grand jury and at trial, the complainant testified that the defendant forced her into her house at knife-point, removed her clothes in the kitchen, raped her in another room, left the house briefly and returned, again inserting his penis into her vagina. The defendant was indicted on one count of rape. The defendant was convicted after a bench trial.

Fourth Department *continued*

Holding: The defendant's right to be tried on only those crimes and theories charged in the indictment was fundamental and nonwaivable, and did not require preservation. *People v Rubin*, 101 AD2d 71, 77, 474 NYS2d 348 *lv den* 63 NY2d 711. The briefly interrupted act of sexual intercourse "was part and parcel of the continuous conduct" constituting one act of rape. *See gen* Penal Law 130.00 [1]; *People v Grant*, 108 AD2d 823, 823, 485 NYS2d 299. The indictment provided sufficient notice of the charge. *People v Grega*, 72 NY2d 489, 496, 534 NYS2d 647. Judgment affirmed. [Supreme Ct, Erie Co (Rossetti, J)]

Sentencing (Credit for Time Served) (General) SEN; 345(15) (37)

Trespass (Elements) (Evidence) TSP; 374(10) (15)

**People v Grice, 300 AD2d 1005, 752 NYS2d 507
(4th Dept 2002)**

The defendant was convicted of weapons possession (Penal Law 265.02[1], 265.02[1]) and second-degree criminal trespass (Penal Law 140.15) for entering the complainant's apartment without permission.

Holding: The trespass verdict was against the weight of the evidence. The jury did not give proper weight to evidence concerning whether the defendant knew he had no permission to enter the apartment. *See People v Tennant*, 285 AD2d 817, 818- 819, 728 NYS2d 292. The trial court erred by failing to include the defendant's jail time credit in setting the duration of an order of protection. *People v Holmes*, 294 AD2d 871, 740 NYS2d 919. The termination date of a new order of protection must be three years from the expiration of the maximum sentence less the jail credit to which the defendant is entitled. Judgment modified, trespass conviction reversed, order of protection vacated, remanded for further proceedings. [County Ct, Genesee Co (Noonan, J)]

Guilty Pleas (General) GYP; 181(25)

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

**People v White, 300 AD2d 1100, 751 NYS2d
896 (4th Dept 2002)**

The defendant was convicted of first-degree robbery (Penal Law 160.15 [3]) and attempted second-degree robbery. Penal Law 110.00, 160.10. In exchange for his plea of guilty, the court promised a concurrent sentence with a maximum term of 15 years. The court sentenced the defendant to a 12-year term on the robbery count, to run consecutively to a 3-year term of imprisonment on the attempted robbery count.

Holding: The sentence as imposed did not conform to the trial court's promise of concurrent time. Judgment modified, sentence vacated, matter remitted for resentencing in accordance with the plea. [County Ct, Niagara Co (Sperrazza, J)]

Sex Offenders (Sentencing)

SEX; 350(25)

**People v Davis, 300 AD2d 1037, 751 NYS2d 922
(4th Dept 2002)**

Holding: At a hearing under the Sex Offender Registration Act (Correction Law art 6-C), the court did not allow the defendant to introduce evidence on whether "the risk of repeat offense is high and there exists a threat to the public safety," the statutory requirement for a level three designation of the offender. Correction Law 168-l [6] [c]. The defendant was classified a level three sex offender. Prohibiting him from introducing evidence was error; the court was required to review "any relevant materials and evidence submitted by the sex offender." Correction Law 168-n [3]. Judgment reversed. [County Ct, Onondaga Co (Fahey, J)]

Sentencing (General) (Pronouncement) SEN; 345(37) (70)

**People v Thweatt, 300 AD2d 1100, 751 NYS2d 892
(4th Dept 2002)**

The defendant pled guilty to attempted second-degree burglary. The court did not advise him at plea or sentencing about a specific period of postrelease supervision.

Holding: The court "was not required to specify a period of postrelease supervision at the time of the plea or at sentencing. . . ." *See People v Bloom*, 269 AD2d 838, 703 NYS2d 763 *lv den* 94 NY2d 945. If a shorter period was not specified, then the period for attempted second-degree burglary (Penal Law 110.00, 140.25 [2]), a class D violent felony (Penal Law 70.02 [1][c]), was three years. Penal Law 70.45 [2]; *People v Skye*, 747 NYS2d 837. Judgment affirmed. [County Ct, Genesee Co (Noonan, J)]

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

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

**People v Yon, 300 AD2d 1127, 754 NYS2d 128
(4th Dept 2002)**

The defendant was convicted of third-degree criminal sale of a controlled substance (Penal Law 220.39 [1]), third-degree criminal possession of a controlled substance (Penal Law 220.16 [1], and one count each of fourth-degree conspiracy (Penal Law 105.10 [1]) and petit larceny (Penal Law 155.25).

Fourth Department *continued*

Holding: The incarcerated defendant received on Jan. 2, 2001 a notice dated Dec. 20, 2000 about his right to testify at grand jury proceedings to be held on Jan. 9, 2001. His request to testify, dated Jan. 4, 2001 and placed in intercounty mail by a corrections officer, was received by the prosecutor on Jan. 10, 2001, after the indictment was filed. The requirement that a request to testify be served before the indictment is filed is strictly enforced. *People v Madsen*, 254 AD2d 152, 153, 681 NYS2d 6, 7 *lv den* 92 NY2d 1035. No reversal is required.

The conspiracy count was based on the theory that an undercover police officer conspired with the defendant to sell drugs. Conspiracy requires proof that the defendant had the intent to commit acts constituting a class B or class C felony and agreed with another person to do those acts. Penal Law 105.10 [1]. The prosecution failed to prove that the defendant entered into an agreement with the undercover officer to sell drugs; the officer was trying to buy, not sell. Judgment modified, conspiracy conviction reversed, that count dismissed. [County Ct, Wayne Co (Keenan, J)]

Guilty Pleas (General) (Vacatur) GYP; 181(25) (55)

People v Watkins, 300 AD2d 1074, 751 NYS2d 813 (4th Dept 2002)

In exchange for admitting violations of his probation, the defendant was promised a sentence of six months followed by inpatient treatment. At sentencing, the court claimed it had not committed to a sentence, and sentenced the defendant to 1-1/3 to 4 years in prison.

Holding: The defendant was entitled to the “benefit of his bargain,” without vacating his plea. He has served more time than the promised sentence. *People v Danny G.*, 61 NY2d 169, 175-176, 473 NYS2d 131. In the interests of justice, a six-month sentence is imposed. Judgment modified. [County Ct, Niagara Co (Broderick, Sr., J)]

Appeals and Writs (Record) APP; 25(80)

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

People v Pitsley, 300 AD2d 1010, 752 NYS2d 575 (4th Dept 2002)

Holding: A reconstruction hearing must be held to determine whether the defendant was able to hear a *Sandoval* conference held at the bench and off the record. *See gen People v Goodman*, 284 AD2d 928, 727 NYS2d 920. At the reconstruction hearing, the prosecution must meet their burden of proof by a preponderance of the evidence. *See People v Terry*, 225 AD2d 1058, 639 NYS2d 215 *lv den* 88 NY2d 886. Judgment reversed. [County Ct, Oswego Co (Elliott, J)]

Dissent: [Wisner, J] The defendant’s conclusory assertion without support in the record that he was not present at the *Sandoval* hearing, was insufficient. *People v Augustine*, 235 AD2d 915, 919, 654 NYS2d 179 *app dismsd* 89 NY2d 1072 *lv den* 89 NY2d 1088. The other Departments require more. The record here shows that a hearing was held in open court before prospective jurors entered the courtroom. Defense counsel requested that the matter be off record at the bench. The defendant should file a post-conviction motion to expand the record. CPL 440.10.

Evidence (Sufficiency) EVI; 155(130)

People v Lucarelli, 300 AD2d 1013, 753 NYS2d 638 (4th Dept 2002)

Holding: The court erred in dismissing the indictment charging the defendant with official misconduct. Penal Law 195.00(1). Grand jury evidence showed that two women reported to the defendant, a police officer working the desk, that one had purchased drugs from a suspect. The defendant called the suspect’s mother and said that the suspect had been named and should stay away from the scene of the alleged transaction. This was an unauthorized exercise of the defendant’s official function with the intent to benefit the suspect. The addition of an intent element to the official misconduct statute in 1965 was designed to limit to disciplinary measures or removal punishment for unauthorized conduct or neglect where automatic imposition of criminal sanctions would not seem fair. Here, the intent element was met. Order modified, count reinstated. (Supreme Ct, Erie Co [Rossetti, J])

Guilty Pleas (General) GYP; 181(25)

People v Sypnier, 300 AD2d 1061, 751 NYS2d 899 (4th Dept 2002)

Holding: The defendant, who was 90 years old, appeared confused when he pled guilty to first-degree rape. He stated, “not guilty. Guilty” when asked to enter the plea, and the court did not request a factual allocution. The plea was not knowingly and voluntarily entered. *See People v Lopez*, 71 NY2d 662, 666, 529 NYS2d 465. The defendant’s age and mental state imposed a duty on the court to ask for a factual colloquy (*People v Winbush*, 199 AD2d 447, 448, 605 NYS2d 385) and clarify ambiguities. *People v Serrano*, 15 NY2d 304, 309, 258 NYS2d 386. The presentence investigation report pointed out that a defense psychologist found him to be delusional, and the trial court observed that defendant appeared to have been “out of touch . . . with . . . reality.” The record does not assure that the “defendant received his just deserts.” *People v Lang*, 21 NY2d 338, 351, 287 NYS2d 659. Judgment reversed. [Supreme Ct, Erie Co (Wolfgang, J)]

Fourth Department *continued*

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

People v Schell, 300 AD2d 1120, 753 NYS2d 262 (4th Dept 2002)

The defendant was charged with first-degree sodomy for sexual acts against his daughter that occurred “on numerous occasions from the age of 5 years old up to the age of 10 years old. (1991 to 1996).” He waived indictment and pled to a superior court information (SCI) charging attempted first-degree sodomy regarding an act on Dec. 2, 1996, after the complainant’s 10th birthday on Oct. 23. The

defendant claimed the act charged was beyond the scope of charges considered by the grand jury.

Holding: The phrase “up to” included the time after the child’s 10th birthday until the end of that year, covering the Dec. 2, 1996 count. *People v O’Neil*, 201 Misc 402, 405, 104 NYS2d 863. The term “up to” a certain age usually refers to a time that ended on the day a person reached a certain age. *Compare People v Salaam*, 83 NY2d 51, 56, 607 NYS2d 899 with CPL 1.20 [42]; *compare Matter of Jude F.*, 291 AD2d 165, 171, 740 NYS2d 80 with Family Ct Act 353.5 [5] [d]. However, the count also referred to acts occurring in 1996 which, combined with the phrase “up to” a certain age, covered the time following the complainant’s 10th birthday. Judgment affirmed. [County Ct, Oswego Co (Hafner, Jr., J)] ⚖



Annual Meeting and Conference 2003: Wyoming County Assistant Public Defender Jerry Ader (Upper left) received the 2003 Service of Justice Award for providing distinguished service in the cause of justice. CLE included Creative Motions In Limine: Winning Your Trial Before It Starts—Ira Mickenberg, Recent Developments in New York Criminal Law and Procedure—Ed Nowak, Dysfunctional Families, Dysfunctional Prosecution: Issues in Domestic Violence Cases—Michele Maxian (Upper Right), Ethical and Psychological Dimensions of Judicial Recusal: Perspectives of Judges & Litigators—Vince Aprile, Sex Offender Risk Assessment and Treatment—Richard Hamill (lower left); Litigation Strategies for SORA Risk Classification—Panel Discussion—Al O’Connor (p. 2, middle right), Diane Webster, Richard Hamill; Understanding Medical Records in Sex Offense Cases—Anne Marie Haber (p. 2, middle left); Evidentiary Issues in Sex Abuse Cases—Martin Adelman (p. 2, lower left); Computer Forensics in Child Pornography Cases—Jerry Grant (lower center). NYSDA’s Board of Directors and Client Advisory Board met jointly (p. 2, lower right) and discussed issues including the work of Community Organizer Karla Andreu (lower right, in back).

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