



Public Defense Backup Center  
**REPORT**

Volume XX Number 4

August-October 2005

A PUBLICATION OF THE DEFENDER INSTITUTE

**Defender News**

**Attorney Advice on Effects of DisCon Amounted to IAC**

In an assault case involving fellow tenants in a co-op, the defendant pled guilty to disorderly conduct. The defendant later moved to vacate the plea because his attorney had wrongly advised him that the plea would have no effect on the co-op’s attempt to evict the defendant. The co-op used the guilty plea to buttress its civil case. In what seems to be a ruling of first impression in New York, a court has said that faulty advice by defense counsel that resulted in a potential loss of housing may be sufficient to warrant setting aside a plea. (NYLJ.com, 8/9/05.)

The court held that, if a hearing established the defendant’s contentions, he would be entitled to vacatur due to ineffective assistance of counsel, citing *People v McDonald*, 1 NY3d 109 (2003). *McDonald* [a case handled in the Court of Appeals by NYSDA attorney Al O’Connor] dealt with incorrect advice about the deportation consequences of a conviction. The new ruling extends *McDonald* to the area of housing, and indicates that the duty to give correct advice applies to other collateral consequences as well. (*People v Kenneth Becker*, NYLJ, 8/12/05, p. 19, col. 3 [Crim Ct Queens Co])

As a summary of the case prepared by The Legal Aid Society states, attorneys should be aware that “a plea to a DisCon is not necessarily a safe harbor and that a client considering a plea is entitled to accurate advice about potential consequences.” A disorderly conduct conviction may result in denial of public housing, although in a private action, a single act of disorderly conduct would probably not sustain a nuisance eviction of a renter. (See *Vesey Realty Co. v Doherty*, 466 NYS2d 559, 561 [Civ Ct NY Co 1983]). (CDD Summaries, V.79, #9.4.)

**INSIDE AT CENTER INSERT:  
Table of Lesser Included Offenses,  
15th Revision**

**Courtesy of the NY Defender Digest**

(Available in Printed Copies Only, Not on the Web)

**From Fingerprints to Firearms, Forensics Aren’t Foolproof**

A civilian working at the Army Criminal Investigation Laboratory at Fort Gillem, GA is found to have falsified DNA test results. ([www.msnbc.com](http://www.msnbc.com), 8/26/05.) A touted bullet-matching technique that mimicked CSI results for real-life juries is found to be bogus. Even hal- lowed proof like fingerprint evidence, on re-examination, may be found wanting. As shown below, whether the underlying science is bad, or the work done on an individual case is fraudulent or sloppy, defense lawyers continue to find ways to challenge forensic evidence.

**No Lead from the Lead**

The FBI Laboratory will no longer use a controversial bullet-matching technique based on analysis of lead. It was used mainly in cases where a weapon was not recovered, or a bullet was too damaged for ballistics comparison. The FBI had analyzed and compared the lead making up a bullet from the scene with the lead in other bullets somehow connected with a defendant. A “match” of “trace elements” in the lead (such as copper, arsenic, anti- mony or tin) was offered to show that the bullets came from the same batch and hence were purchased at the same time. This forensic “evidence” was criticized last year by a scientific panel put together by the National Research Council, principal operating arm of the National Academy of Sciences. The panel did not criti- cize the laboratory an- alysis of lead, but rather use of the statistical analy- sis method known as chaining, which could lead to the conclusion that an artificially large group of bullets were “identical.” This would not happen if other an- alytical methods were

**Contents**

Defender News ..... 1  
Immigration Practice Tips ..... 7  
Court of Appeals Update ..... 8  
Conferences & Seminars ..... 9  
Job Opportunities ..... 10  
From My Vantage Point..... 11  
Legislative Review (Drug Law) . 13  
Case Digest:  
    US Supreme Court ..... 16  
    NY Court of Appeals ..... 16  
    Third Department ..... 16  
    Fourth Department..... 22

used. The panel also observed that bullets sold in one package did not necessarily all come from the same batch of lead.

An FBI review conducted following the criticism found that “neither scientists nor bullet manufacturers are able to definitively attest to the significance of an association made between bullets in the course of a bullet lead examination.” Lead testing for this purpose has been stopped, and 300 state, local and foreign law enforcement agencies that received positive FBI “match” reports since 1966 have been notified of the change. ([www.msnbc.msn.com/id/9163996/](http://www.msnbc.msn.com/id/9163996/) as of 10/17/05; [NYTimes.com](http://NYTimes.com), 9/2/05.)

### “Zero Error Rate” Contested

If the fingerprints of even identical twins aren’t identical, does that mean that no two fingerprints are alike? “In fact, scientists just aren’t sure,” according to a recent news article. ([Newsday.com](http://Newsday.com), 9/19/05.)

One study purporting to prove that fingerprints are unique was authored by Stephen Meagher of the FBI’s Latent Fingerprint Section in Quantico, Virginia. His touted but highly controversial study supporting fingerprinting was based on a set of 50,000 pre-existing images of fingerprints. He compared each one electronically against the whole of the data set, making 2.5 billion comparisons. He concluded that the chances of each image being mistaken for any of the others were very small—1 in 10<sup>97</sup>.

But for forensic purposes, critics say Meagher’s study is irrelevant. Showing that an image is more like itself than other similar images does not say how likely it is that a smudged partial print taken from a crime scene matches archived prints of a known individual. And Meagher himself has said that “This is not a study on error rate, or an effort to demonstrate what constitutes an identification.” ([NewScientist.com](http://NewScientist.com), 9/19/05.)

The article cited above goes on to note that 16 leading fingerprint skeptics have provided information in a pending Massachusetts appellate case, offering arguments countering the long-standing “zero error rate” claimed as to fingerprint evidence by the US Department of Justice.

### Saratoga Speeds Up Fingerprints

Even as lawyers are forcing courts to take a fresh look at fingerprint evidence, law enforcement agencies are applying new technology to the field. Police in Saratoga Springs have a new automated fingerprint scanner. It is supposed to speed up the fingerprint process and let officers know at once if a print is smudged and needs to be retaken. The scanner is linked directly to a Division of Criminal Justice Services (DCJS) fingerprint database and to the National Crime Information Center. A DCJS grant will cover 75 percent of the \$37,000 cost. ([DailyGazette.net](http://DailyGazette.net), 9/1/05.)

## Evaluating Experts: Find Standards Online—Courts Do

Concluding that “[c]ourts will evaluate expert evidence in light of professional standards, and they will look to the Internet to find those standards,” a recent *New York Law Journal* article by Ken Strutin, NYSDA’s Director of Legal Information Services, set out several examples of professional standards available online and examples of opinions in which courts had availed themselves of such standards. From the use of dogs in sniffing out accelerants in cases of alleged arson to the participation of medical personnel in executions, standards relating to more and more areas of expertise can be accessed quickly. ([NYLJ.com](http://NYLJ.com), 10/11/05.)

Standards for public defense too can be easily found online. Whether asking courts to order auxiliary services for public defense clients or asking funders for additional money to ease excessive workloads, public defense programs and attorneys can find New York and national standards to support their requests. These standards can be quickly located through links on the Association’s website, [www.nysda.org](http://www.nysda.org), on the Defense Services page.

## Further Rockefeller Drug Law Reforms Enacted

An expansion of last year’s drug law reforms has been enacted, effective on October 29, 2005. The amendments authorize discretionary resentencing of many Class A-II drug offenders serving indeterminate sentences. Details of the legislation are set out at p. 13.

The Association has forwarded to public defense offices lists provided by the Department of Correctional

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

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XX Number 4

August-October 2005

Managing Editor  
Editor  
Contributors

Charles F. O’Brien  
Mardi Crawford  
Stephanie Batcheller, Al O’Connor,  
Ken Strutin

The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone 518-465-3524; Fax 518-465-3249. Our Web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER

Services of prisoners potentially eligible for resentencing. The lists should not be used to exclude prisoners from consideration, but to help identify those who may be eligible, so that relief can be sought. Because only those prisoners who are more than three years from parole release eligibility may be eligible to seek relief, and the date from which that deadline is measured may be October 29, 2005, lawyers must move quickly to preserve some clients' ability to seek resentencing.

Prisoners who think they may be eligible should contact their lawyers or the chief defender in the county of conviction. Attorneys or others can check the Breaking News section of the NYSDA home page, and the Rockefeller Drug Law page of the Hot Topics section for current information, or contact Al O'Connor at the Backup Center with questions.

### ***New Court of Appeals Rules in Effect***

Revised rules for practice in the Court of Appeals became effective September 1, 2005. See 22 NYCRR Part 500. The Rules of Practice of the Court of Appeals apply to civil and noncapital criminal appeals, motions, and criminal leave applications, as well as to certified questions from other courts.

The rules have been reorganized. Requirements applicable to all filings are set out in Rules 500.1 through 500.8. Noncapital criminal appeals and civil appeals are governed by Rules 500.9 through 500.19. Procedures concerning criminal leave applications are found in Rule 500.20. Rules 500.21 through 500.24 cover motions. Orders to show cause, along with the Primary Election Session and certified questions, are regulated by Rules 500.25, 500.26 and 500.27, respectively.

According to the Court's website, changes include:

... substitution of a Court-promulgated preliminary appeal statement for the jurisdictional statement previously required for appeals (see Rule 500.9); use of scheduling letters to set due dates for appeal papers (see Rule 500.12[a]) and elimination of the automatic 20-day extension for filing dates for appeals; reduction of the time period from 80 days to 60 days for perfecting appeals (see Rule 500.12[b]), unless an extension is granted (see Rule 500.15); and set filing dates for all applications for amicus curiae relief (see Rule 500.23). The number of copies to be filed on appeals and motions for leave to appeal in civil cases also has been changed.

The new rules, along with commentary, updated practice guides, and interactive forms are now available on the Court's website, [www.nycourts.gov/ctapps](http://www.nycourts.gov/ctapps). Questions about the new Rules should be directed to the Clerk's Office at (518) 455-7700.

### **Reprive.org.uk Seeks, Offers, Help to The Justice Center in New Orleans**

**For more info, see:  
[www.reprive.org.uk/new\\_katrina.shtml](http://www.reprive.org.uk/new_katrina.shtml)**

### ***Persons Convicted of Sex Offenses Targeted***

At every level of government across the state and nation, efforts to civilly commit or otherwise severely restrict the ability of persons convicted of sex offenses to live or even be in given communities continue. Despite warnings that over-restriction could worsen rather than improve public safety, despite concerns that many proposed measures are designed for maximum publicity rather than maximum effectiveness, law makers from city councils to Congress have passed or threaten to pass ever-stricter measures and other government officials look for ways to go beyond what the lawmakers have done.

In New York in early September, the Pataki Administration began reviewing prisoners convicted of sex offenses before their scheduled release. Several prisoners who would otherwise have been freed have been confined in Manhattan Psychiatric Center, in the Service for the Treatment and Abatement of Interpersonal Risk (STAIR) program. The new policy uses existing civil commitment procedures under the Mental Hygiene Law. Administration spokesperson Kevin Quinn has been quoted in the popular press as saying that this move to "push the envelope" is due to the Assembly's refusal to pass civil commitment legislation specifically geared to sex offenders. As for the confinement costs, estimated at \$535/day (just under \$200,000/year) per person, Quinn reportedly said, "You can't put a price on New Yorker's [sic] safety." (*Democrat and Chronicle* online, 10/9/05; *The Journal News* online, 10/10/05; *New York Post* online, 10/13/05.)

Groups opposing use of civil commitment procedures to keep persons convicted of sex offenses confined beyond their release date include the National Alliance for the Mentally Ill of New York State (NAMI-NY). NAMI-NY maintains that placing the burden of dealing with this issue on mental health systems would unfairly absorb already-stretched resources for the mentally ill. Further, linking sexual offenses with mental illness unduly stigmatizes persons suffering from mental illness. (*NYLJ.com*, 9/21/05.)

Meanwhile, the Binghamton ordinance banning the presence of persons convicted of sex crimes within a quarter-mile of schools, parks, and other facilities continues to make news. The ordinance was reported in the March-May issue of the *REPORT*. Since then, other local

legislators have considered such measures. (*NYLJ.com*, 9/21/05.) Some are specifically waiting for the constitutionality of the Binghamton ordinance to be determined. (See e.g. *Times Union* online, 9/12/05 and 10/4/05.) Officials in Malta have gone ahead with their own ordinance. (*DailyGazette.net*, 9/29/05.)

Experts say that “banning” laws may well exacerbate problems rather than solve them. “When you push offenders out of the more populated areas, they can lose access to jobs and treatment, and it makes them harder to track,” said Jill S. Levenson, a researcher on sexual violence at Lynn University in Boca Raton, Fla.” (*NYTimes.com*, 10/3/05.)

But in the current climate, headlines are made by those who advocate ever-harsher laws. At a recent Assembly hearing on civil commitment of sex offenders, Westchester County District Attorney and US Senatorial candidate Jeanine Pirro was chastised by Assemblyman Joseph R. Lentol for a blatantly political presentation. (*Press Republican* online, 9/22/05.) But it was Pirro whose testimony was highlighted in the press, not the many others who addressed the complexities of the issue. Among those other witnesses was Dennis Carroll, Assistant Supervisor, Sex Offender Commitment Division of the Washington Defender Association in Seattle, who spoke at NYSDA’s behest.

For up-to-date information on these and related issues in New York and around the nation, check [www.nysda.org](http://www.nysda.org). Check both the Breaking News and Updates portion of the home page and the Megan’s Law page under Hot Topics.

## ***Decline of Parole Decried***

A recent article by Michael Flax in *Justicia*, published by the Judicial Process Commission (JPC) in Rochester, notes the “astronomical decline” of parole releases, especially with regard to prisoners convicted of violent crimes, under the current administration. The article points to the federal Truth in Sentencing Incentive Program [42 USC 13703], which authorizes states to receive federal funds for taking steps that include increasing the time persons convicted of violent crimes are incarcerated. The article asserts that parole is denied for 24 months in 90 percent of cases in which prisoners were convicted of violent crimes. The article describes fiscal and human effects of an unwritten policy of curtailing parole. JPC can be contacted at 121 N. Fitzhugh Street, Rochester NY 14614. Email [info@rocjpc.org](mailto:info@rocjpc.org). (*Justicia*, July-August 2005.)

Another publication addressing parole issues is the August issue of *The Deuce Club*, published by the Coalition for Parole Restoration (CPR). A non-profit organization focused on the prison-industrial complex, CPR’s current primary focus is obtaining the just administration of parole for all currently incarcerated persons

facing Parole Board consideration. Along with a list of recommendations for parole reform, the issue contains an article on “Preparing for the Parole Board.” Membership in CPR includes a subscription to *The Deuce Club*. For more information, contact CPR, PO Box 1379, New York NY 10013-0877. Email [parolecpr@yahoo.com](mailto:parolecpr@yahoo.com).

## ***Other Parole News***

Meanwhile, on a completely different note about parole, an Albany newspaper alleged this summer that secret quotas exist limiting the number of parolees who can be returned to prison for violations of parole conditions. (*Times Union* online, 7/31/05.) Later reports indicated that parole officials were trying to find out who had leaked the information used in the initial article. (*Times Union* online, 8/11/05.) Anthony G. Ellis II, Executive Director of the Division of Parole, adamantly denied a quota system. The union representing parole officers, the New York State Public Employees Federation, called for Ellis’s resignation. (*Times Union* online, 8/15/05 and 8/18/05.)

In yet other parole news, there was a recent, rare reversal of a parole denial by the Third Department. The court found the basis for a denial of parole to be “so irrational under the circumstances as to border on impropriety.” The prisoner in question was an 87-year-old, terminally ill former doctor with a good institutional record who had been again turned down for parole at his second appearance because his crime, the killing of his wife in 1977, “represents a propensity for extreme violence.” The Board knew of the prisoner’s rehabilitation, positive contributions to the prison community, good record and expressions of remorse, as well as debilitating medical conditions, but acknowledged none of that in its decision. The case was remitted for a new parole hearing. *Matter of Friedgood v New York State Board of Parole*, No. 98352 (3rd Dept 10/20/05), 2005 NY App Div LEXIS 11244.

## ***Brief Notes and Follow-ups***

### **Gutting Federal Habeas: Congress to Keep Trying**

Despite strong objections to a proposal to further curtail federal habeas relief available to state prisoners (see the last issue of the *REPORT*), including two cautionary letters from the Judicial Conference of the United States, efforts to pass some form of habeas limit continue in Congress. As the *REPORT* went to press, a public hearing on a substitute measure offered by Arlen Specter (R-PA) was pending at the request of Democratic members of the Senate Judiciary Committee. (*National Law Journal* online, 10/20/05.)

## **NH Stops Using Trespass Charges Against Noncitizens**

As noted in the last issue of the *REPORT*, some local New Hampshire law enforcement officials had been charging noncitizens found to lack proper immigration papers with trespass. A district court dismissed such charges in eight cases on the basis that local police departments were overstepping their authority, trying to enforce federal immigration policy. (lowellsun.com, 8/17/05.) News accounts indicated that the state Attorney General then wrote to all New Hampshire law enforcement officials, telling them not to charge undocumented noncitizens with state criminal trespass. (www.unionleader.com, 8/23/05.)

## **Advisory Board Member Completes Leadership Program**

Velma Smith, NYSDA Advisory Board member and Executive Director for the New York Region of Rural Opportunities Inc. (ROI), was one of thirty to graduate in 2005 from Cornell University's Empire State Food and Agricultural Leadership Institute. As an advocate for farm workers, Smith "brought a unique (and sometimes controversial) perspective to her LEAD class, which consisted primarily of growers and grower affiliates." (*Building Blocks* [ROI newsletter], Summer 05.)

## **Polling Jury Leads to Acquittal**

When a Columbia County jury was polled following a conviction on robbery and petit larceny counts, Juror Number 2 denied that she agreed with the verdict. Sent back for further deliberations, the jury requested—several hours later—read-back of the two prosecution witnesses' testimony and clarification of reasonable doubt. Two hours later, the jury acquitted the defendant. Afterward, jurors said they had found the evidence to be "thin." The case reportedly consisted largely of the defendant's presence in a store and his rapid exit; no stolen merchandise was ever recovered. According to Columbia County Assistant Public Defender Robert Linville, "The moral of the story if you're a defense attorney is always poll the jury." (*NYLJ*, 8/2/05.)

## **Can Suspended Lawyer Continue as Judge?**

After a lawyer was suspended pending consideration of disciplinary charges (*Matter of DiStephano*, No. D-46-05, 3rd Dept 8/4/05), he was not immediately asked to resign his position as town justice. Robert Tembeckjian, administrator of the state Commission on Judicial Conduct, was quoted as saying that since town judges do not have to be lawyers, "the fact that you've been suspended as a lawyer doesn't mean you lack a job qualification" (*Times Union* online, 8/9/05.) Two weeks after the suspension, the judge did resign. (*Times Union* online, 8/18/05.)

## **Judge Censured for Ex Parte Communications, etc.**

The Commission on Judicial Conduct announced in September a determination that Chateaugay Town Court (Franklin County) Judge Marie A. Cook should be censured for disposing of numerous cases without notice to the prosecution, engaging in improper ex parte communications, and granting special consideration in a traffic case at the request of another judge. This determination and others are available on the Commission's website: [www.scjc.state.ny.us](http://www.scjc.state.ny.us).

## **Sentencing Project Has New Executive Director**

The Sentencing Project in Washington, DC has announced that Marc Mauer is the new Executive Director. Mauer authored or co-authored many Sentencing Project influential studies of sentencing patterns and their effects. He replaces Malcolm C. Young, who founded The Sentencing Project in 1986 and recently left to head the John Howard Association of Illinois, which provides public oversight of that state's correctional facilities.

## **2006 ILSF Distribution Info Available**

The Office of the State Comptroller (OSC) issued a bulletin in early September about the anticipated distribution of public defense money from the Indigent Legal Services Fund (ILSF) to counties on March 31, 2006. Projections for the ILSF indicate that about \$50 million will be available for distribution in 2006, but the enacted State budget appropriated only \$37 million. OSC is requesting a supplemental or deficiency budget appropriation to match the anticipated fund amount.

OSC distributed the bulletin and supporting analysis to county CEOs and CFOs. NYSDA sent copies to all Chief Defenders. The bulletin is available on the OSC website: [www.osc.state.ny.us](http://www.osc.state.ny.us).

## **Forfeiture News**

### ***Innocent-Owner Defense Prevails Under Nassau Vehicle Forfeiture Law***

The owner of a vehicle was able to avoid forfeiture of it under Nassau County's revised DWI forfeiture law by showing that the drunken individual found by police behind the wheel of the car was using it without the owner's permission. Specifically, the owner had loaned the car to his son, who in turn gave a third person permission to drive it. Hearing testimony showed that Jeffrey L. Saporta repeatedly told his son Jonathan that only family members were allowed to drive the car. The revised law went into effect in March 2004, after the Court of Appeals struck down an earlier version as unconstitutional. See *Nassau v Canavan*, 1 NY3d 134. (*NYLJ* online, 8/30/05.)

### **Two OATH Rulings Favor Defendants**

In two New York City cases, police efforts to retain vehicles have been overruled by the Office of Administrative Trials and Hearings (OATH). In one, the OATH judge credited testimony by a car owner and two others that he was not driving the car but merely hanging out listening to music from its radio. While police reports indicated police saw the owner get out of the car, the complaint omitted such contention. *Police Dept. v Angel Rios*, OATH Index No. 146/06 (7/21/05).

In the other case, police failed to prove the third prong of the *Krimstock* test [see *Krimstock v Kelly*, 306 F3d 40 (2d Cir 2002)], that it was necessary to retain a vehicle to protect the public or to ensure its availability for a forfeiture action. When police arrived at the scene of a fender-bender the defendant-driver showed signs of intoxication and provided a breathalyzer sample that yielded a reading of .156. The 45-year-old owner of the car had two jobs, had never before been arrested, and was released on his own recognizance in the criminal case. The vehicle was ordered returned to its owner. *Police Dept. v Javier*, OATH Index No. 241/06 (8/5/05).

### **Federal Court Cannot Restrain Forfeitable Assets Before Conviction**

The federal appeals court for the 2nd Circuit said recently that the federal statute providing for criminal forfeiture of property (28 USCS 2461) does not permit courts to restrain a defendant's assets pending conviction. A district judge had granted the government's request to freeze assets of \$7.5 million in a white collar crime matter. (NYLJ online, 8/23/05.) The case is *United States v Razmilovic*, 419 F3d 134 (2nd Cir 2005).

### **Defender Horton Helps Forgotten Victims**

In what some might find an unusual alliance, a public defender has been helping obtain justice for Attica prison guards killed or injured in the Attica prison uprising of 1971. A group called the Forgotten Victims of Attica formed in 2000 after \$8 million was awarded to prisoners for deaths and injuries suffered during the state's violent re-taking of the prison. Families of slain prison workers demanded restitution, opening of Attica-related records, and an apology from New York State. This September, on the observance of the 34th Attica anniversary, the Forgotten Victims had obtained at least one of their goals; the state has agreed to pay \$12 million over the next six years.

Genesee County Public Defender Gary Horton has assisted the group in their quest. As there was no recourse through the courts, garnering public attention to gain the ear of state officials became necessary. Horton, a NYSDA Board member, brought the Forgotten Victims and NYSDA's Executive Director, Jonathan Gradess, together to assist the group. (*Democrat and Chronicle* online, 9/14/05 and 10/24/05.)

### **Former Justice and Attica Investigator Dies**

Bernard S. Meyer, who as a special deputy attorney general was in charge of the state's investigation into the 1971 Attica Prison uprising, died in September at the age of 89. He later served on the Court of Appeals, from 1979 to 1986. (*NY Times* online, 9/7/05.)

### **First Integrated Domestic Violence Court Judge Dies**

Ruth Levine Sussman, who as an acting New York state Supreme Court justice organized and headed New York's first Integrated Domestic Violence (IDV) Court, died in August at the age of 46. From the Bronx, IDV courts have spread across the state, impacting clients, lawyers, and public defense programs. Sussman was the daughter of Judge Howard A. and Barbara Levine. (*NY Times News Service*, 9/5/05.)

### **Oneonta Racial Profiling Trial Begins**

In September 1992, law enforcement officials interrogated scores of African Americans in Oneonta after the victim of a home invasion described the intruder—never found—as black. In the intervening years, those who were targeted solely on the basis of race have sought judicial recognition that they were wronged. A federal suit was dismissed, and a state suit stalled for years. As the *REPORT* went to press, the class action suit was at long last scheduled for trial. (villagevoice.com, 8/2/05; *Times Union* online, 10/22/05.)

### **Research Paper Proposes Partial Plea Bargaining Ban**

A new research paper proposing a "partial ban" on plea bargaining says that the deleterious effect of plea bargaining on innocent persons is not due to the *process* of plea bargaining, but to the effect that current plea bargaining practice has on prosecutorial screening of cases:

"... Because of the availability of plea bargaining, the strength of evidence of any given case becomes less important to the prosecution. Defendants in weak cases are more likely to be charged—and therefore more likely to be convicted. With the strength of evidence playing a relatively small role in the result of the case, more innocent defendants are likely to be among those convicted."

Oren Gazal, "Partial Ban on Plea Bargains," University of Michigan John M. Olin Center for Law & Economics, Paper #05-008 (2005), available for download at [www.law.umich.edu/CENTERSANDPROGRAMS/OLIN/PAPERS.HTM#2005](http://www.law.umich.edu/CENTERSANDPROGRAMS/OLIN/PAPERS.HTM#2005). The author asserts that barring plea bargains containing *large* sentence concessions would force prosecutors to drop weak cases that now result in pleas. ♪

## Defense-Relevant Immigration News

By Adam Lubow and Marianne C. Yang of NYSDA's  
Immigrant Defense Project (IDP)\*

### **2nd Circuit Rules NY Felony Reckless Assault Is a "Crime Involving Moral Turpitude," But Attempt Is Not**

The Second Circuit recently affirmed a Board of Immigration Appeals (BIA) decision that a conviction for second-degree assault under NY Penal Law 120.05(4) (recklessly cause serious physical injury to another by means of a deadly weapon or dangerous instrument) constitutes a "crime involving moral turpitude" for immigration purposes. See *Gill v INS*, 420 F3d 82 (2d Cir. 2005). Focusing on the *mens rea* with which the crime must be committed, the court found the BIA's determination consistent with 2nd Circuit and BIA precedents that have ruled that crimes that must be committed knowingly or intentionally (or even recklessly in certain aggravated circumstances, such as reckless assault with a deadly weapon or when the resulting injury is serious), categorically involve moral turpitude. See *id.*, at 89-90 (internal cites omitted). A conviction that constitutes a "crime involving moral turpitude" under immigration law may trigger severe negative immigration consequences for non-citizens, among them immigration detention, removal from the US and ineligibility to obtain lawful immigration. See, e.g., 8 USC 1227(a)(2)(A)(i); 8 USC 1182(a)(2)(A)(i); 8 USC 1226(c)(1).

Mr. Gill, however, had been convicted of *attempted* second-degree assault under NY Penal Law 110/120.05(4) (attempting to recklessly cause serious physical injury to another by means of a deadly weapon or dangerous instrument), for which he had received a nine-month sentence of incarceration. The 2nd Circuit ruled that this conviction for the attempted reckless assault does not constitute a crime involving moral turpitude and, therefore, does not make Mr. Gill, a lawful permanent resident, deportable as charged under 8 USC 1227(a)(2)(A)(i). Noting that under New York's attempt statute (NY Penal Law 110.00), a defendant can only be guilty of an attempted crime if he specifically intends all elements of that crime, the court found it a "legal impossibility" in New York to be guilty of attempting to commit a reckless crime: "[A] person cannot 'attempt' (as this term is used in New

\* IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For back-up assistance on individual cases, call the IDP at (718) 858-9658 ext. 201. We return messages. IDP is located at 25 Chapel Street, Box 703, Brooklyn, NY 11201.

#### IDP UPDATED CONTACT INFO

NYSDA Immigrant Defense Project moved to a new home this year, thanks to the Center for Community Alternatives' Brooklyn office. The new mailing address is: NYSDA Immigrant Defense Project, 25 Chapel Street, Box 703, Brooklyn, NY 11201.

Defense Attorneys with questions about how to avoid or minimize the immigration consequences for their noncitizen clients should call (718) 858-9658 ext. 201. Messages will be returned as soon as possible.

Web site: [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)

York criminal law) to commit a crime of recklessness, particularly not one defined, as in §120.05(4), by an unintended result such as bodily injury" *Gill*, 420 F3d at 91.<sup>1</sup> Because of the legal impossibility of the crime of attempted reckless assault, the court reasoned:

Without in any way questioning the *state's* ability to hold a defendant to his plea to an attempted reckless crime (which may have made practical sense in terms of reaching a contextually appropriate sentence or sentencing range), we find that, in the immigration context, *no* mental state can be clearly discerned from the conviction, let alone the sort of aggravated recklessness that has been found to demonstrate moral turpitude . . . [footnote omitted]

*Id.* The court accordingly reversed Mr. Gill's removal order and remanded with instructions to close his removal proceedings.

With *Gill*, the 2nd Circuit joins the 3rd Circuit in ruling that the legal impossibility of an attempted reckless crime under criminal law precludes a finding of moral turpitude in the immigration context. In *Knapik v Ashcroft*, 384 F3d 84 (3d Cir. 2004), the 3rd Circuit held that a conviction for New York attempted first-degree reckless endangerment under NYPL 110/120.25<sup>2</sup> was legally incoherent and therefore not a crime involving moral turpitude for immigration purposes.

(continued on page 12)

<sup>1</sup> To demonstrate its point the court cited, among other cases, *People v Campbell* (72 NY2d 602 [1988]) [dismissing a conviction for attempted Penal Law 120.05(3) which at that time penalized causing serious physical injury to a peace officer, police officer, etc., with the intent to prevent the officer from performing a lawful duty, because the physical injury can be unintended], and *People v Trepanier* (446 NYS2d 829, 833 [4th Dept 1982]) ["The crime of attempted reckless endangerment is nonexistent since it is a nonintentional offense"].

<sup>2</sup> NYPL 120.25 reads: "A person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."

# Court of Appeals Update

## Significant Criminal Cases Pending in the New York Court of Appeals

Courtesy of Robert Dean,  
Center for Appellate Litigation

(Expanded version available on NYSDA website,  
Courts NY Hot Topic page, [www.nysda.org](http://www.nysda.org) and Center for  
Appellate Litigation, [www.appellate-litigation.org](http://www.appellate-litigation.org).)

### I. CASES AWAITING DECISION

*People v Felix Gomez* — Consent to a car search.\*

*People v Harold L. Dunbar* — Reasonable suspicion to search.\*

### II. CASES SCHEDULED FOR ARGUMENT

*People v Trevor Green* — “Claim of right” defense to robbery.\*

*People v Alvaro Carvajal* — Territorial jurisdiction for possession of drugs seized in California.\*

*People v Craig Lewis* — Burglary jury charge on intent for entering in violation of an order of protection.\*

*Matter of Kadeem W.* — Sufficiency of evidence that juvenile shared companion’s intent.\*

*People v James Robbins* — For drug sale in or near school grounds, how distance is measured.\*

*People v Herman Turner* — Ineffective assistance of original appellate counsel.\*

*People v Corby Norcott* — (1) Defense precluded from eliciting testimony to show prosecution’s main witness had a motive to lie. (2) Sufficiency of the evidence. (3) Charge on acting in concert.\*

*People v Andrew Goldstein* — (1) Admissibility of psychiatric witness’s testimony concerning out-of-court statements relied upon to form opinion (*Crawford*). (2) Preclusion of defense psychiatric testimony.\*

*People v Santos Suarez* — Whether stabbing evidence made out “depraved indifference” murder.\*

*People v Trisha McPherson* — (1) Whether there was sufficient proof of depraved indifference (as opposed to intentional) murder, where the People’s proof showed only that the defendant stabbed her abusive boyfriend a single time after he pushed her during an argument. (2) In a case in which trial counsel raised a battered woman’s defense, whether counsel was ineffective for failing to investigate abuse witnesses and to obtain corroborative hospital records.

\*A longer summary of this case appeared in the “Court of Appeals Update” in the last issue of the *REPORT* in the same category.

\*\*A longer summary of this case appeared in the “Court of Appeals Update” in the last issue of the *REPORT* in the category, “Cases Scheduled for Argument.”

*People v James Jacobs* — Effective assistance of counsel when one of the trial lawyers was not admitted.\*

*People v Richard Miller* — (1) Whether second-degree murder were inclusory concurrent counts of first-degree murder. (2) Whether instructions that a requested item is not in evidence is ministerial. (3) Sitting juror allowed to act as an “interpreter” for a vocally impaired witness.\*

*People v Christopher Rodriguez* — Whether second-degree murder were inclusory concurrent counts of first-degree murder.\*

*People v Edwin Echevarria* — (1) Whether the court’s acceptance of a partial verdict of guilty as to second-degree murder constituted an acquittal of first-degree murder under CPL §§ 300.40(3)(b) and 300.50(4). (2) The sufficiency of the trial court’s inquiry into juror misconduct.

*People v Tyrone Hicks* — (1) Refusal to dismiss a sworn juror; did court conduct “probing and tactful” inquiry. (2) Prosecutorial misconduct. (3) Refusal to set aside verdict for newly discovered evidence.\*

### III. CASES WAITING TO BE SCHEDULED

*People v Bartolome Brito* — (1) Whether erroneous preclusion of defense witness can be deemed harmless error. (2) Denial of a for-cause challenge to a prospective juror. (3) Whether search exceeded the scope of the warrant. (4) Were eavesdropping warrants properly issued.\*\*

*People v Joan Suarrcy-Bongarzone* — (1) When attorney hired by family member communicated her representation to the proper police authority, did right to counsel indelibly attach. (2) Was person who entered a police station and confessed to murder in custody for Miranda purposes.\*\*

*People v Matthew Waldron* — (1) Excludability of pre-indictment delay for defense counsel effort to secure a plea bargain. (2) Ineffective assistance for not objecting to the prosecutor’s remarks.\*\*

*People v Calvin Moore* — By walking away from police, did a defendant elevate anonymous tip to reasonable suspicion.\*\*

*People v Sandro Lopez* — Did appellate court have authority to review an excessive sentence despite a valid waiver of appeal.\*\*

*People v Winston Nicholson* — (1) Whether appellant’s waiver of the right to appeal was unknowing and involuntary when he was advised that he waived the right to appeal “by pleading guilty.” (2) Whether, alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v Yolanda Billingslea* — (1) Whether appellant’s waiver of the right to appeal was unknowing and involuntary when she was advised that the appeal waiver was an automatic consequence of the guilty plea. (2) Whether,

alternatively, the intermediate appellate court has a residuum of authority to sua sponte, and in extraordinary cases, review the excessiveness of a sentence despite a valid appeal waiver.

*People v John Boyer* — The scope of the Wharton “confirmatory identification” exception to the CPL § 710.30 notice requirement: Whether a police officer’s fleeting glimpse of a suspect many floors above him on a fire escape at night permits the subsequent show-up identification to be classified as “confirmatory” and thus not subject to ID notice.

*People v Gerald Garson* — (1) Whether grand jury evidence of counts of receiving reward for official misconduct was insufficient, where judge’s duty as a public servant was defined solely by reference to the Rules of Judicial Conduct. (2) Whether count charging official misconduct was multiplicitous.

### III. NEW LEAVE GRANTS

*People v Harry Bloomfield* and *People v Stuart Creggy* — Sufficiency of evidence of conspiracy and falsifying business records. Whether letters were “business records” “kept or maintained” by corporations (PL §175.00[2]) where they were found in the files of the lawyer who created the corporations rather than in the files of the corporations themselves or their management company.

*People v Baumann & Sons Buses, Inc.* — In an anti-noise prosecution, where defendant was accused of creating unreasonable noise by the idling of bus engines (Islip Town Code §35-3[D]), whether the accusatory instrument was insufficient for failing to allege the public nature of the nuisance.

*People v Najib Bosier* — Whether the trial court properly denied defendant’s motion to introduce prior grand jury testimony of complainant to impeach the complainant’s subsequent grand jury testimony on ground that defendant procured the complainant’s unavailability as a witness through threats.

*People v Trevor Burns* — Whether the court erred in refusing to admit into evidence a statement by an unavailable witness corroborating defendant’s claim that he was not the shooter, both because (a) the statement constituted a declaration against the witness’s penal interest and (b) because precluding the statement deprived the defendant of his right to present a defense.

*People v Mikel Wardlaw* — Whether the court’s erroneous granting of defendant’s application to go pro se at a pretrial suppression hearing absolutely requires the appellate court to remit for a de novo suppression hearing, or whether the appellate court can instead simply affirm the judgment if it believes that any error in admitting the evidence at trial would be harmless beyond a reasonable doubt.

(continued on page 15)

## CONFERENCES & SEMINARS

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Experts: Getting & Grooming Yours; Derailing & Defusing Theirs  
**Dates:** November 2–5, 2005  
**Place:** Santa Fe, NM  
**Contact:** NACDL: tel (202)872-8600; fax (202)872-8690; e-mail [assist@nacdl.org](mailto:assist@nacdl.org); web site [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Criminal Trial Skills Update  
**Date:** November 5, 2005  
**Place:** Syracuse, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** 2005 Annual Conference - Defining the Future: The Fundamental Value of Justice for All  
**Dates:** November 16–19, 2005  
**Place:** Orlando, FL  
**Contact:** NLADA: tel (202)452-0620; fax (202)872-1031; e-mail [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Annual Mid-Hudson Trainer  
**Date:** November 18, 2005  
**Place:** Poughkeepsie, NY  
**Contact:** Patricia Marcus, (212)532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com)

**Sponsor:** **New York State Defenders Association**  
**Theme:** **39th Annual Meeting and Conference**  
**Dates:** **July (date tba), 2006**  
**Place:** **Corning, NY**  
**Contact:** **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); website [www.nysda.org](http://www.nysda.org)**

**Visit the Training page at [www.nysda.org](http://www.nysda.org) often!**

**Information about CLE events may reach the *REPORT* too late for publication; not all regional training events are listed here.**

# Job Opportunities

The Massachusetts Committee for Public Counsel Services (CPCS) seeks a **Deputy Chief Counsel, Private Counsel Division** and **Deputy Chief Counsel, Children and Family Law Program (CAFL)**.

The Private Counsel Division utilizes the services of approximately 2600 private assigned counsel statewide in criminal and civil cases. The Deputy Chief Counsel is responsible for the support and oversight of private bar panels in all practice areas, except for Children and Family Law. Candidates must have experience in the provision of legal services to indigent persons.

The CAFL Program provides legal services to indigent parents and children on child welfare cases including care and protection proceedings (abuse and neglect/dependency cases), children in need of services cases, termination of parental rights cases, and any other non-delinquency proceedings in which a court may place a child in the care and custody of the state. The Program maintains two direct service staff offices and utilizes the services of approximately 900 private bar attorneys statewide. Candidates must possess in-depth knowledge of child welfare law and issues.

Both positions require: strong leadership skills and qualities; analytical, interpersonal, communication, negotiation and decision-making skills; ability to work with courts, state agencies and legislators; 10 years prior management experience, including supervision of legal and support staff; and eligibility to practice law in Massachusetts. Salary \$105,749. For complete job postings, see [www.mass.gov/cpcs](http://www.mass.gov/cpcs).

Please submit résumé and statement of interest in either or both positions to Willie J. Davis, Chair, Committee for Public Counsel Services, 44 Bromfield Street, Boston, MA 02108 or fax to (617)-988-8370 or email to [dcc@publiccounsel.net](mailto:dcc@publiccounsel.net). Applications should be submitted by 10/28/05, but may be accepted until the positions are filled.

The Defender Association in Seattle-King County is accepting applications from **lawyers** with experience in felony practice. A minimum of three years experience is preferred. EOE. Please send résumé, cover letter describing trial experience and training, list of references, and short writing sample, by email, to [NOINOD@aol.com](mailto:NOINOD@aol.com).

## Don't Miss an Application Deadline!

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

The Capital Defender Office for Northern Virginia seeks a committed **attorney** interested in representing defendants in capital cases. Applicants should have demonstrated a superior ability in capital defense, criminal defense, appellate and/or post-conviction cases and be prepared to qualify as capital counsel pursuant to Virginia Code Section 19.2-163.8 within a reasonable period of time. In addition to an interest in doing capital trial work, applicants should possess excellent oral, written, and interpersonal skills. The position offers an excellent state benefits package, a rewarding work environment and a great opportunity for professional growth. Membership in the Virginia State Bar or an ability to become a member required. Starting salary \$55,256. EOE. To apply, mail cover letter, résumé, three references and a representative writing sample to Joseph T. Flood, Capital Defender, 7900 Sudley Road, Suite #208, Manassas, VA 20109.

Prisoners' Legal Services of New York (PLS) seeks an Executive Director. PLS is a civil legal services program for inmates in New York State prisons. State funded, it has regional offices in Albany, Buffalo, Ithaca and Plattsburgh. PLS handles cases involving mental health and medical care, prison disciplinary matters, excessive use of force, conditions of confinement, sentence calculation and jail time credit. The Executive Director is responsible for the management of the program and for insuring that it provides high quality, effective and efficient legal services to clients. Applicants should have extensive legal practice experience preferably in legal services, civil rights, poverty law or federal law. They should also have significant leadership/management experience. Excellent communi-

cation skills, strong analytical ability, and a history of working well with others are essential. Frequent travel is required. Major Responsibilities: Provide overall leadership to the organization. Work with Board, managers and staff to develop and implement strategic plan. Be the spokesperson for PLS and develop strategic partnerships to advance the vision and mission of the organization. Work with managers and staff in setting and reviewing annual priorities, office and organizational work plans and budget. Secure funding, through state contracts, foundation grants, major donations, and other sources in order to effectively grow the organization within its vision and mission. Ensure sound financial and fiscal management. Assure that high quality, diverse staff are recruited, hired and maintained. Work with the Board to ensure effective oversight, Board development and organizational growth. Work with inmate populations to assess needs of clients and develop service plans. PLS pays a competitive public interest salary commensurate with experience and provides excellent fringe benefits. EOE. Applicants should email their cover letter, résumé, writing sample and a list of three (3) references with telephone numbers to: Paul J. Curran, Esquire, Kaye Scholer, 425 Park Avenue, New York, NY 10022. Email: [pcurran@kayescholer.com](mailto:pcurran@kayescholer.com).

The National Legal Aid and Defender Association (NLADA) seeks a **Director of Defender Legal Services**. NLADA is a national, non-profit membership association that advocates equal justice, and supports and promotes access to and excellence in the delivery of civil and defender legal services to people who cannot afford attorneys. Founded in 1911, NLADA is the world's oldest and largest membership organization devoted to promoting equal access to justice. Applicants should be seasoned defender leaders, strong advocates concerned about advancing indigent defense standards who value the holistic delivery of defender legal services to low-income individuals and communities and who are excited by leadership development training. AA/ EOE. For full description see [www.nlada.org/Jobs/NLADA\\_Jobs](http://www.nlada.org/Jobs/NLADA_Jobs). Competitive salary, generous benefits. Send cover letter, résumé, writing sample, and salary requirements to: Director

(continued on page 12)

# From My Vantage Point

By Jonathan E. Gradess\*

## **NYSDA Works**

What help do you, struggling as a public defense lawyer or chief defender in any county in the state, get from NYSDA? What do you, as a client, client family member, or client representative, gain from the Association's existence? What does your tax money, used to fund much of the Backup Center's work, accomplish?

This column will not plead with you to become a NYSDA member, although that would be great. Rather, the concrete examples of NYSDA's work below expand on my last column, "Islands of Hope," (*Backup Center REPORT*, Vol. XX, No. 3, June-July 2005). There, I reflected on the year leading up to the 2005 Annual Meeting and Conference. I noted that the death penalty remains blocked in New York State, that NYSDA and the State Bar Association both passed standards for public defense representation while support for an independent statewide public defense commission grew, that the Legislature and Governor delivered some legislative reform, and that participants in the 2005 Defender Institute Basic Trial Skills program inspired one another—and me—with their commitment to quality public defense representation.

Here, I describe what we are doing to help link those islands of hope, and others, and to help each grow. The goal is to raise a new continent of justice out of the current sea of disparity and despair.

## **Can NYSDA Give You a New Set of Wheels?**

While we are not a car dealership, NYSDA services mean you don't have to reinvent the wheel on every criminal practice issue or let your cases ride on the worn-out treads of outdated law. If you have Internet access, you can check out recent developments in Hot Topics at [www.nysda.org](http://www.nysda.org). Links there will take you to news stories about the latest reform of the Rockefeller Drug Laws, procedures and developments regarding state funding through the Indigent Legal Services Fund, and much more. This newsletter, the *Backup Center REPORT*, provides not only news items about public defense and criminal and family law issues, but case summaries of relevant current appellate decisions, practice tips, and more. The *REPORT* is mailed to all members, including prisoner members, as well as to Chief Defenders and prison libraries, and is posted on the web. Faxes and emails are sent to Chief Defenders regarding funding and other developments that affect offices across the state. NYSDA's Public Defense Case Management System helps public defense offices perform necessary tasks like checking for potential conflicts, keeping track of court dates, and analyzing workload. And NYSDA trainers, held in several

regions around the state, many on an annual basis, allow public defense lawyers to get affordable (even more so for members), relevant MCLE credits.

But I said this would not be an advertisement for NYSDA membership. Nor is it a plea for support of NYSDA's budget in the next state funding cycle, although such support would be welcome. Rather, I want to point out how the services mentioned here, and the others that NYSDA provides throughout the year, weave a tapestry of needs fulfilled and needs as yet unmet.

## **Advocating for Change**

Our trainings, conferences, consultations with public defense lawyers and clients, and other activities bring information to us as well as disseminate information. Clients call us because their lawyers don't have time to accept their calls or visit them in jail. Clients' families call us because lawyers don't have time to talk to family members, even family members with relevant information like the names of potential witnesses, a client's mental health history, or other information important to the case. Public defense lawyers call us because they lack the resources to research a unique pretrial issue or prepare for trial involving technological or scientific evidence. Offices call because they are being denied the resources to staff new specialty courts or meet increased demands for services in the wake of new prosecutorial or police policies.

The information we learn about systemic problems informs our advocacy for public defense improvement. We present testimony to the Legislature or other bodies, publish reports, write letters to county officials and others about changes necessary to bring a particular system into compliance with statewide and national standards. We hope that our efforts also help build a public defense community dedicated to meeting clients' needs in an effective, efficient way. We hope that we are encouraging the notion that good public defense systems provide high quality legal services not only in difficult cases but also in what may be mistakenly thought of as "routine guilty plea cases." There are no routine cases, only cases that are important matters affecting the lives and liberties of individual human beings and, because of their numbers, are the real measure of how justice (or injustice) is done.

## **Gaining Ground, Losing Ground**

NYSDA's Public Defense Backup Center has been doing what it does for more than a quarter of a century. Contrasting with the islands of hope I offered in my last column are the waves of problems eroding much of any progress we have made. In my testimony before the Kaye Commission in February, I tried to describe the ocean of injustice that surrounds us. I stated bluntly that at this point in my 36-year career in public defense—most of that career spent trying to improve the system of representation

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

## From My Vantage Point *continued*

for the poor—things are worse in many, many respects than when I began.

### **NYSDA's Services Illustrate the Need for An Independent Public Defense Commission**

The pride that I feel, and hope all of you share, in what NYSDA is and does cannot blind me to the fact that we are not enough. Only an entity that has oversight authority and the power of the purse can bring about the change needed to achieve our goal of high quality legal representation for all persons eligible for public defense representation in every county of the state. I have written here many times about the need for a statewide Independent Public Defense Commission. In this column, I wanted to make clear to you that our call for that Commission is a direct outgrowth of all we do at the Backup Center. I hope also that what NYSDA does has helped each of you, and will help you in the future. I hope that you will help us bring about the creation of a body that can do what we cannot.

### **About Katrina**

This column was conceived before the massive tragedy wreaked upon New Orleans and the Gulf Coast by a natural disaster compounded rather than ameliorated by governmental reaction. My use of water analogies is not meant to disparage or exploit the suffering of Hurricane Katrina victims. Like all of you, I grieve for the loss of life, homes, and livelihoods there. I cannot help but note that the disregard that allowed New Orleans to be swept away is not unlike the disregard we have seen in the trickle-down policy failures that have for years assaulted our clients.

Let us mourn the dead and the destroyed lives of those who survived. Let us remember them and their losses, and honor them not by promises but by daily efforts to see and rectify the economic, racial, and social disparities that currently ensure more people suffer every day. As defenders, let us renew our work to bring real justice to every client. As New York residents, let us demand that our state put money into public defense and other programs to guarantee everyone in New York justice, freedom, and a chance to pursue happiness. As Americans, let us make known that we will no longer accept administration policies of deceit and death. ♪

#### **Katrina Legal Aid Resource Center**

The National Legal Aid and Defender Association, the American Bar Association, Probono.net, and the Legal Services Corporation present:

**[www.katrinalegalaid.org](http://www.katrinalegalaid.org)**

A website with resources for people affected by the hurricanes, for legal aid and defender programs helping them, and for private attorney volunteers.

---

## **Immigration Practice Tips**

*(continued from page 7)*

**Bottom line:** *Knapik* and *Gill* provide defense attorneys potential safe havens to avoid or minimize immigration consequences for their noncitizen clients. In removal proceedings that take place in the 2nd and 3rd Circuits, a conviction by guilty plea or trial to a New York *attempted* reckless crime should not be deemed a crime involving moral turpitude, even though the completed crime would be deemed moral turpitude. Practitioners should remember, however, that even if a conviction does not trigger the crime involving moral turpitude ground of removability, the same conviction might trigger another ground of removal, such as the "aggravated felony" ground. ♪

---

## **Job Opportunities** *(continued from page 10)*

of Defender Legal Services, NLADA, 1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036. Email to [DDLS@nlada.org](mailto:DDLS@nlada.org). Position is open until filled.

The Quixote Center, a non-profit social justice organization, seeks an exceptional, savvy, and experienced **Field Organizer** to launch our Equal Justice USA (EJUSA) program's Southeast Field Office. The EJUSA program is a recognized leader in the national movement to halt executions and raise public awareness about systemic inequities corrupting the imposition of the death penalty in the United States. The Field Organizer will work from home or in local office space and can be based anywhere in Tennessee, South Carolina, Georgia, or Alabama. Other states may be possible for the right candidate. The Field Organizer will work with campaigns in each of the above target states to help state-based groups develop anti-death penalty and moratorium campaigns and build their movements. The position will involve travel. The Quixote Center is a non-hierarchical workplace. All full-time staff receive equal base salaries and benefits regardless of tenure or position and decisions are made by consensus. AA/EOE. For a full job description see [www.ejusa.org](http://www.ejusa.org). Minimum Commitment: two years. Salary: \$32,000/year (plus up to \$6,000/year additional for staff with dependents). Excellent benefits, including 4 weeks vacation, 12 sick days, 12 paid holidays, employer-paid health insurance, retirement plan, and prof. development. Target start date: December 2005. Send résumé, cover letter, writing sample, three references, to Shari Silberstein: [sharis@quixote.org](mailto:sharis@quixote.org); fax: 301-864-2182; or mail: Quixote Center, PO Box 5206, Hyattsville, MD 20782.

The Legal Action Center (LAC) is seeking to hire 3 new attorneys: **Senior Staff Attorney – Litigation and Legal Counseling, Staff Attorney – Litigation and Legal Counseling, and Staff Attorney – Criminal Justice Policy/National H.I.R.E. Network.** LAC is a non-profit public interest law firm and policy organization with offices in New York City and Washington, DC that specializes in the areas of alcohol and drug addiction, AIDS and criminal justice. Details available at [www.lac.org](http://www.lac.org). ♪

# Legislative Review

## A Summary of the 2005 Rockefeller Drug Law Reform Legislation

By Al O'Connor\*

[Ed. Note: A summary of other 2005 legislation will appear in the next issue of the REPORT.]

### Introduction

On August 30th, Governor Pataki signed into law an expansion of last year's Drug Law Reform Act (DLRA). The new law (L.2005, chap. 643) authorizes discretionary resentencing of Class A-II drug offenders serving indeterminate sentences who are more than 12 months from work release eligibility and "meet the eligibility requirements" for merit time. The law becomes effective sixty days after the Governor's signature on October 29, 2005. By definition, the law excludes A-II offenders who are currently on parole. They remain eligible for early termination of parole after three years of unrevoked supervision under the terms of the 2004 DLRA (L.2004, chap. 738).

With the exception of possible filing deadlines (discussed below), the resentencing procedure is identical to the one specified in the 2004 DLRA for A-I drug offenses. Inmates have a right to assigned counsel to prepare the application, a right to a hearing on contested issues, a right to appeal from the denial of resentencing, and from a determinate sentence offered or actually imposed by the resentencing court. The new alternative determinate sentence ranges under the 2004 DLRA are:

Class A-II Drug Offense	Determinate Sentence Range
First Felony Offense	Between 3 and 10 years
Second Felony (prior non-violent)	Between 6 and 14 years
Second Felony (prior violent)	Between 8 and 17 years

Plus 5 years post-release supervision (all cases)

### Eligibility Criteria

#### More Than 3 Years From Parole Eligibility

The bill defines the Class A-II offenders eligible for resentencing by means of shorthand (but awkward) references to work release and merit time. The first involves a temporal component: inmates must be "more than twelve months from being an eligible inmate as that term is defined in subdivision 2 of section 851 of the correction law." Correction Law § 851 (2) addresses work release eligibility and defines an eligible inmate in two ways: as a person 1) "who is eligible for release on parole " or 2) "who will become eligible for release on parole or condi-

tional release within two years." Therefore, inmates are eligible for resentencing when they are more than 12 months from being within two years of parole eligibility. Stated more simply, inmates who are more than three years from their court-imposed minimum terms are eligible.

#### More Than 1 Year From Parole Eligibility?

Although the predominant interpretation of the law is that inmates must be more than three years from parole eligibility to qualify for resentencing, a New York State Assembly memo in support of an identically worded bill (A.8980) suggests a plausible alternative reading of the statute. Referencing the first definition of work release eligibility included in Correction Law § 851, the Assembly memo states that inmates who are "more than twelve months from being eligible for appearance before the parole board" are eligible for A-II resentencing relief. Read in this way, the statute awkwardly defines inmates who are more than three years or more than one year from parole release as eligible for resentencing.

#### As of When?

The bill does not specify the controlling date for purposes of the eligibility period. Is the eligibility window measured from October 29, 2005, the effective date of the legislation? From the initial filing date of a re-sentencing application? Some other date? Using the effective date of the legislation to define the eligibility pool avoids a race to the courthouse by inmates whose window of opportunity would otherwise expire, and prevents inequities that might arise from delays in the appointment of counsel, or in the filing process. Because a "statute speaks, not from the time when it was enacted, or when the courts are called on to interpret it, but as of the time it took effect" (McKinney's Cons. Laws of NY, Book 1, Statutes § 93), there is some support for October 29th as the controlling date.

However, the bill sponsor's memo suggests otherwise. It states that Class A-II offenders who are within the eligibility window "at the time of the petition" are eligible for resentencing. Therefore, caution dictates that whenever possible a motion be filed before an inmate might otherwise be time-barred. When a deadline is imminent, a bare bones application should suffice to toll the limitations period.

#### Statutorily Eligible to Earn Merit Time

The law requires that an inmate "meet the eligibility requirements of paragraph (d) of subdivision 1 of section 803 of the correction law" pertaining to merit time. The bill sponsor's memo makes clear that the law "is not intended to require that [inmates] have earned the merit time allowance before they may apply for resentencing . . ." The merit time reference is only a shorthand way of excluding those A-II offenders who are statutorily ineligi-

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

ble to earn merit time because they are serving sentences for other convictions.

Correction Law § 803 (1)(d) excludes from merit time eligibility inmates serving time for any of the following offenses:

*non-drug Class A-I felonies (i.e., murder in the first degree, attempted murder in the first degree, murder in the second degree, arson in the first degree, kidnapping in the first degree, conspiracy in the first degree), a violent felony pursuant to Penal Law § 70.02, a sex offense defined in Penal Law Article 130, incest, sexual performance by a child offenses defined in Penal Law Article 263, manslaughter in the second degree, vehicular manslaughter in the first and second degrees, criminally negligent homicide, and aggravated harassment of an employee by an inmate.*

Therefore, a Class A-II drug offender whose current DOCS commitment also includes a sentence for any of these crimes is ineligible for resentencing. This rule probably applies where the inmate was previously convicted of a merit time ineligible offense but had yet not completed the sentence at the time of the current Class A-II drug offense commitment. In this situation, the time owed to parole on the prior sentence is generally added to the Class A-II sentence, resulting in merit time ineligibility for all purposes.

### **Merit Time Withholding Criteria Irrelevant to Eligibility**

Correction Law § 803 (1)(d) provides that merit time allowances “shall be withheld for any serious disciplinary infraction or upon a judicial determination that the person, while an inmate, commenced or continued a civil action, proceeding or claim that was found to be frivolous . . .” Because the actual earning of merit time is not a prerequisite to relief, it would logically seem the companion criteria for withholding of credit are irrelevant to eligibility. While an inmate’s prison disciplinary history is relevant to the court’s discretionary decision to grant or deny relief, it does not operate as an eligibility bar.

Unfortunately, DOCS has distributed a list of Class A-II drug offenders and has singled out 65 as ineligible for resentencing because of prison disciplinary infractions. The DOCS is not a party to these resentencing proceedings and its interpretation of the statutory language is certainly not controlling.

If a resentencing court rules the withholding criteria are relevant to eligibility, counsel might consider challenging the DOCS’ interpretation of the statutory term “serious disciplinary infraction” as overbroad. The DOCS’ regulations broadly define the term to include, among other things, *cumulative* “receipt of disciplinary sanctions . . . which total 60 or more days of SHU and/or keeplock” (7 NYCRR § 280.2). Thus, under these regulations, several

minor disciplinary infractions are the equivalent of a “serious disciplinary infraction,” a result arguably not intended by the Legislature. While the regulation has been implicated in a few unsuccessful lawsuits filed by pro se inmates [*Matter of La Rocco v Goord*, 15 AD3d 809 (3d Dept 2005); *Matter of Scarola v Goord*, 266 AD2d 598 (3d Dept 1999)], it apparently has not been challenged as inconsistent with the enabling legislation. See, e.g., *Jones v Berman*, 37 NY2d 42, 52-53 (1975).

### **Resentencing Procedure and Rules**

As noted, the procedure for adjudicating Class A-II resentencing petitions is identical to the one specified in the 2004 DLRA for Class A-I resentencings. Inmates have a right to assigned counsel to prepare the resentencing application and to advocate for a determinate sentence under the new scheme. The application must be on notice to the district attorney. Whenever possible, it will be assigned to the original sentencing judge. Otherwise, the application will be randomly assigned to a new judge.

The court may not “entertain any matter challenging the underlying basis of the subject conviction.” It is not clear whether this language would preclude a court from resentencing a defendant convicted of a Class A-II possession offense as a Class B felon when the weight of the controlled substance was less than the revised threshold for criminal possession of a controlled substance in the second degree (4 ounces). The amelioration doctrine of *People v Behlog*, 74 NY2d 237 (1989), might arguably apply in this situation.

It is clear, however, that a resentencing court has discretion to run a new Class A-II sentence concurrently with another term of imprisonment, even where the original sentencing court imposed consecutive terms. *Matter of Murray v Goord*, 1 NY3d 29 (2003) (Last judge in sentencing chain has discretion over consecutive/concurrent determination).

The court “may consider any facts or circumstances relevant to the imposition of a new sentence” including the inmate’s institutional record. Because the bill stipulates that no new presentence report shall be ordered, it will fall to defense counsel to compile facts supporting resentencing. The court “shall offer an opportunity for a hearing and bring the applicant before it.” See, *People v Figueroa*, 21 AD3d 337 (1st Dept 8/25/05) (Statutory directive for a hearing is mandatory). The court may also conduct a hearing to “determine any controverted issue of fact relevant to the issue of sentencing.”

Unless “substantial justice dictates” that the application be denied, the court must offer the inmate a determinate sentence as an alternative to the indeterminate one he or she is now serving. The inmate has the option to accept or reject the new determinate sentence. But in either case, he or she has a right to appeal from a determinate sentence so offered or imposed on the ground that it is harsh and excessive. The law also provides that “upon remand

to the sentencing court following such appeal the defendant shall be given an opportunity to withdraw an application for resentencing before any sentence is imposed." It logically follows that a defendant has a corresponding right to accept the proposed determinate sentence after an unsuccessful appeal.

## Comparing Indeterminate and Determinate Class A-II Sentences

### Good Time and Merit Time Reductions

In many cases, the decision to accept or reject the court's offer will hinge on which sentence will result in the earlier release opportunity. But even if a determinate sentence is longer than the earliest release opportunity under the indeterminate sentence, Class A-II drug offenders with prior felony convictions (especially violent offenses) or extensive misdemeanor records should not discount the singular advantage of a determinate sentence: elimination of the Board of Parole as an obstacle to release.

Estimating the earliest release opportunity involves consideration of good time and merit time credits, coupled with a realistic assessment of whether an inmate is poised to earn these reductions. Eligibility rules differ for indeterminate and determinate sentences:

#### *Indeterminate Sentences*

##### *1/3 Potential Reduction for Merit Time*

Class A-II drug offenders serving indeterminate sentences with a maximum of life imprisonment are ineligible for good time credit [Correction Law § 803 (1)].

Under the 2004 DLRA, inmates currently serving Class A-II indeterminate sentences can earn 1/6th off the minimum terms as merit time. To do so, they must participate in assigned work and treatment programs and obtain a) a GED, or b) an alcohol and substance abuse certificate, or c) a vocational trade certificate, or d) perform 400 hours in a community work crew. Class A-II offenders can also earn a bonus 1/6th merit time allowance, or a total of one-third off their minimum terms, by satisfying two or more of the above requirements.

For indeterminate sentences, a merit time allowance results in earlier eligibility for presumptive parole release (see Correction Law § 806), or an earlier appearance before the Board of Parole, but it does not guarantee release. Inmates who are denied discretionary release at a merit board appearance are eligible for reconsideration at the completion of their court-imposed minimum terms.

#### *Determinate Sentences*

##### *2/7th Potential Reduction for Good Time/Merit Time*

Under the 2004 DLRA, drug offenders serving determinate sentences may earn up to 1/7th off their sentences as good time credit. Unlike violent felony offenders who are ineligible for merit time, drug offenders may earn an additional 1/7th off their determinate sentences as merit time credit.

Thus, assuming all good time and merit time credits are earned, a Class A-II offender resentenced to 7 years could earn 2/7th off the sentence in good time and merit time credits and be conditionally released after 5 years. Note that merit time awarded on a determinate sentence results in earlier release without involvement by the Board of Parole.

## Parole vs. Post-Release Supervision

Although Class A-II indeterminate terms carry life sentences, the 2004 DLRA provided for mandatory early termination of parole after three years of unrevoked supervision for persons serving indeterminate sentences for Class A-I and A-II indeterminate drug offenses (two years for all other drug offenders). Therefore, unless they are granted discretionary early termination of parole after two years, Class A-II offenders will be under parole supervision for three years. Those who violate parole will obviously be subject to longer supervision terms. By contrast, Class A-II determinate sentences now carry a 5 year period of post-release supervision, which is not subject to the mandatory early termination provision [see Executive Law § 259-j (3-a)]. However, Class A-II offenders serving determinate sentences might arguably be eligible for discretionary early termination of post-release supervision after two years (see Executive Law § 259-j).

## A-II Offenders Whose Highest Count of Conviction Was A-I

Class A-II drug offenders whose highest count of conviction were Class A-I drug felonies eligible for resentencing on the A-I conviction under the 2004 DLRA may now be resentenced on the A-II counts. In these cases, resentencing on the lesser counts will eliminate another life sentence and obviate the need for release by the Board of Parole. ♪

---

## Court of Appeals Update

(continued from page 9)

### IV. CAPITAL APPEALS PENDING

*People v Robert Shulman* — Appeal as of right directly to Court of Appeals from Suffolk County conviction for capital offense. Defendant was convicted of killing three prostitutes. Argued September 6, 2005. 31 issues. For details, see the Court of Appeals Update in the March-May issue of the *REPORT* (Vol. XX, No. 2) or the website.

*People v John Taylor* — Appeal as of right directly to Court of Appeals from Queens County conviction for capital offense. Defendant was convicted in the "Wendys" slayings. Appellant's brief due April 2006. ♪

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

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

## United States Supreme Court

Habeas Corpus (Federal) HAB; 182.5(15)

Misconduct (Prosecution) MIS; 250(15)

**Dye v Hofbauer, No. 04-8384, 10/11/2005, 546 US \_\_**

The petitioner was convicted of murder and other felonies in state court. In each of three trials his defense was that a key prosecution witness was the killer. His current conviction was affirmed on appeal and federal habeas corpus relief was denied. A 6th Circuit reversal was vacated on rehearing and the district court decision was affirmed.

**Holding:** The appeals court improperly determined that the petitioner failed to raise a federal question concerning prosecutorial misconduct at trial. The court should not have relied solely on the state appellate court's opinion without examining the appellate brief, which had been included in the district court record. *Smith v Digmon*, 434 US 332, 333 (1978). The habeas petition was not too general. It made "clear and repeated references" to the state court brief in the appendix, where the federal bases for the prosecutorial misconduct claims were presented with more than sufficient particularity. Fed Rules Civ Proc 81(a)(2), 10(c). Judgment reversed and remanded.

## New York State Court of Appeals

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

Plea Bargaining (General) PLE; 284(10)

**People v Fernandez, No.184 SSM 17, 9/13/2005**

The defendant claimed that his trial counsel was ineffective for failing to advise of him a plea offer. He also alleged that he would have accepted the offer, regardless of his protestations of innocence.

**Holding:** The defendant did not produce sufficient evidence to show "that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer." *People v Rogers*, 8 AD3d 888, 890-891. Since he had rejected a similar plea offer earlier, his statement that he would have accepted a later plea bargain was not enough. Defense

counsel affirmed that at the time of the rejected plea offer, the defendant was confident that the charges would be dismissed because a key prosecution witness could not be found. Judgment affirmed.

## Third Department

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

**People v Monroe, 17 AD3d 863, 793 NYS2d 276 (3rd Dept 2005)**

The defendant was convicted of several crimes arising from an altercation at a gas station involving two codefendants and the complainant. The prosecution did not turn over a police report related to an argument that the complainant had with the attendant at another gas station.

**Holding:** The defendant is not entitled to a reversal despite a *Brady* violation because the defendant was allowed to reopen proof and use the exculpatory information to impeach the complainant right before summations. *See People v Cortijo*, 70 NY2d 868, 870. Further, since the material was admissible only to impeach the complainant and not to provide proof of the complainant's propensity to start altercations, there was no reasonable probability that earlier disclosure of the police report would have affected the verdict. A new trial is not warranted. *See People v Bryce*, 88 NY2d 124, 128. Judgment affirmed. (County Ct, Tompkins Co [Rowley, JJ])

Evidence (Sufficiency) EVI; 155(130)

Misconduct (Juror) MIS; 250(12)

**People v Karen, 17 AD3d 865, 793 NYS2d 273 (3rd Dept 2005)**

The defendant was convicted of several crimes in the death of his wife, including second-degree murder.

**Holding:** The defendant's active concealment of his wife's death by disposing of her body in a trash can in a ravine near their home and saying she left with a stranger, together with forensic and other evidence, including an expert's testimony that the wife died of asphyxia, is legally sufficient to establish that the defendant intentionally caused his wife's death. The trial court properly exercised its discretion to reject claims that two incidents during deliberations constituted juror misconduct warranting a new trial. The trial court properly resolved the first incident involving the credibility of a juror who had stated that her mind was made up from "day one." *See eg People v Cabrera*, 305 AD2d 263, 263. The second incident arose when one juror threatened to inform the judge that another juror, who was 20 years old, had consumed a beer during sequestration, after which the 20-year-old changed his

**Third Department** *continued*

vote. Since the claim involved only the tenor of the jury's deliberative process, and not a question of outside influence, the court properly exercised its discretion to deny the defendant's motion to set aside the verdict. *See People v Brown*, 48 NY2d 388, 393. The juror in question confirmed his guilty verdict during polling. *People v Goode*, 270 AD2d 144, 145, *lv den* 95 NY2d 835. Judgment affirmed. (County Ct, Sullivan Co [La Buda, JJ])

---

**Parole (Release [Consideration for (Includes Guidelines)])** **PRL; 276(35[b])**
**Matter of Plevy v Travis, 17 AD3d 879, 793 NYS2d 262 (3rd Dept 2005)**

In prison for 1976 and 1977 convictions of second degree murder and burglary, the defendant made a second appearance before the parole board in 2003, seeking parole release. The board denied the request citing the violent nature of the defendant's crimes, the defendant's criminal history, and a prior violation of probation. The defendant brought an Article 78 proceeding after the determination was affirmed on administrative appeal.

**Holding:** The board improperly based its decision on a prior violation of probation that had been dismissed. As a result, a new hearing is required. *See Matter of Lewis v Travis*, 9 AD3d 800. Judgment reversed. (Supreme Ct, Albany Co [Teresi, JJ])

---

**Self-Incrimination (Comment)** **SLF; 340(10)**
**Impeachment (Of Defendant [Including Sandoval])** **IMP; 192(35)**
**People v Hunt, 18 AD3d 891, 794 NYS2d 490 (3rd Dept 2005)**

The defendant was convicted of criminal possession of stolen property based on two shotguns that he purchased and resold.

**Holding:** The trial court erred in allowing testimony that the defendant asserted his constitutional right against self-incrimination when asked about shotguns, after he answered questions about handguns. Constitutional invocations cannot be used against a defendant during the prosecution's direct case. *See People v Von Werne*, 41 NY2d 584, 587-88. Such testimony, admitted without limiting instructions, creates a prejudicial inference of consciousness of guilt. *See People v Al-Kanani*, 26 NY2d 473, 478. The prosecution's proffered purpose of explaining why police questioning ceased was insufficient. The improper testimony was highlighted by the prosecution and considered by the jury. The inference of the defendant's consciousness of guilt was very damaging where the defense contested that the shotguns had been stolen. The error cannot

be deemed harmless beyond a reasonable doubt. Admission of the same evidence before the grand jury did not render the indictment defective.

The court's *Sandoval* ruling allowing the defendant to be asked about three previous felony convictions for attempted burglary and forgery, and the facts thereof, must be revisited. The court must review the facts of those crimes to "conduct a proper balancing of their probative value versus any prejudice to [the] defendant." The defendant's other arguments are either unpreserved or rendered moot. Judgment reversed, new trial ordered. (County Ct, Chenango Co [Sullivan, JJ])

---

**Auxiliary Services (Investigators)** **AUX; 54(35)**
**Identification (Suggestive Procedures)** **IDE; 190(50)**
**People v Rockwell, 18 AD3d 969, 794 NYS2d 726 (3rd Dept 2005)**

The defendant was convicted of forgery-related crimes. Three witnesses identified the defendant after being shown a photograph depicting only the defendant.

**Holding:** While the single-photo procedure was impermissibly suggestive, the prosecution provided clear and convincing evidence that the identification had a separate, independent basis in the extensive and prolonged contact that the witnesses each had with the defendant. *See People v Durham*, 235 AD2d 850, 850-851. The trial court's *Sandoval* ruling to allow a past forgery-related crime was within the trial court's discretion, balancing the probative value of the prior conviction with regard to the defendant's credibility against the prejudicial effect and possibility that the defendant could be convicted simply based on a perceived propensity to commit crime. *People v Di Bella*, 277 AD2d 699, 701 *lv den* 96 NY2d 758. A court may authorize the defense hiring of an investigator at public expense upon a demonstration of necessity (*see* County Law 722-c), but the defendant here only asserted that an investigator would be helpful. The court adjourned trial to allow additional time for investigation. Denial of auxiliary services was proper. *See People v Marlowe*, 167 AD2d 692 *lv den* 77 NY2d 963. The defendant's other arguments are without merit. Judgment affirmed. (County Ct, Chenango Co [Sullivan, JJ])

---

**Sentencing (Mitigation)** **SEN; 345(50)**
**People v Wilt, 18 AD3d 971, 794 NYS2d 724 (3rd Dept 2005)**

The defendant was convicted of first-degree assault and sentenced to 18 years in prison for an incident occurring when he was 16 years old.

**Holding:** In the interests of justice, the defendant's sentence is reduced to a term of eight years in prison. *See* CPL 470.15(6)[b], 470.20(6); Penal Law 70.02(1)[a], 70.02(3)[a]. *See eg People v Strawbridge*, 299 AD2d 584, 594

**Third Department** *continued*

*lv den* 99 NY2d 632, 100 NY2d 599. The defendant's youth, lack of any criminal history, and documented emotional and mental health impairments are mitigating factors warranting a reduction. CPL 390.30; *People v Nickel*, 14 AD3d 869, 872.

The claim that the trial evidence was legally insufficient to disprove the defendant's defense of justification because of witness inconsistencies fails; there is no cause to disturb the jury's resolution of witness credibility. See *People v Mothon*, 284 AD2d 568, 570 *lv den* 96 NY2d 865. The defendant's claim of ineffective assistance of counsel is not supported. Discovery was complete when counsel was assigned, and counsel vigorously cross-examined the witnesses. The claim of prosecutorial misconduct was not preserved for review. While the prosecutor's characterizations (eg, "devil worshiper") are not condoned, they were not so egregious or pervasive as to have deprived the defendant of a fair trial. Judgment modified, sentence is reduced eight years, and as modified, affirmed. (County Ct, Schenectady Co [Eidens, JJ])

**Misconduct (Prosecution) MIS; 250(15)**

**Instruction to Jury (Cautionary Instructions) ISJ; 205(25)**

**People v Randolph, 18 AD3d 1013, 795 NYS2d 782 (3rd Dept 2005)**

The defendant was convicted of multiple counts of burglary.

**Holding:** Repeated references by the prosecution to the defendant's incarceration were improper under the circumstances. See *People v Jenkins*, 88 NY2d 948, 951. Allowance of testimony elicited by the prosecution regarding threatening phone calls made to the apartment owner regarding her testimony was improper without evidence attributing the calls to the defendant; there were no curative instructions. While it is appropriate to elicit evidence of non-attributable threats made for the purpose of explaining inconsistent statements brought out by the defense, the jury must be cautioned. *People v Rivera*, 160 AD2d 267, 271. These cumulative errors were not harmless where there was conflicting evidence and crucial credibility determinations to make. Judgment reversed, matter remitted for new trial. (County Ct, Schenectady Co [Giardino, JJ])

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

**People v Milazo, 18 AD3d 1068, 795 NYS2d 418 (3rd Dept 2005)**

The defendant was convicted of criminal possession of stolen property but acquitted of grand larceny with

regard to a car he was driving with a co-defendant as passenger. Over objection, the jury heard the co-defendant's statement that he and the defendant had stolen the car.

**Holding:** The court excluded the testimony of the defendant's father regarding the co-defendant coming into the presence of the father and the defendant and discussing the need for a new ignition switch on a car he said he had recently purchased. This was said to have occurred within the period of time in which the car was stolen. The court denied admission of the proposed testimony as being improperly noticed alibi testimony.

"[T]he failure to file a notice of alibi may be considered ineffective assistance if it precluded the presentation of an alibi defense which could have changed the outcome of the case." See *People v Douglas*, 296 AD2d 656, 657 *lv den* 99 NY2d 535. Here, there was no strategic or legitimate reason for counsel not to pursue this defense. The defense would have provided conflicting evidence concerning the acquisition and ownership of the stolen property. Counsel presented no witnesses or documentary evidence and the jury reached a verdict in only twenty minutes. In these circumstances, the failure to properly provide notice of alibi demonstrates a failure to provide meaningful representation. Judgment reversed. (County Ct, Broome Co [Smith, JJ])

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

**In re Hill v Selsky, 19 AD3d 64, 795 NYS2d 794 (3rd Dept 2005)**

The petitioner inmate was involved in a tier III prison disciplinary proceeding. Two witnesses initially agreed to testify at the hearing, but later refused to testify, without giving reasons. The Hearing Officer sent correctional officers back to the witnesses' cells with a correction sergeant to verify the refusal, declined to verify the refusals himself, and found the petitioner guilty.

**Holding:** Supreme Court correctly granted the petitioner's CPLR Article 78 request for relief. The Hearing Officer is required to give an inmate a written statement stating the reasons for a witness's refusal to testify at a superintendent's hearing. *Matter of Barnes v Le Fevre*, 69 NY2d 649, 650. The criteria to determine whether a hearing officer must personally interview a requested inmate witness who refuses to testify include: whether the witness previously agreed to testify, whether the witness's reason for refusing appears in the record, and "whether some inquiry into the reason for the refusal has been conducted." If an inmate witness previously agreed to testify, but later refuses without giving a reason, "the hearing officer is required to personally ascertain the reason for the inmate's unwillingness to testify." See eg *Matter of Brodie v Selsky*, 203 AD2d 671, 672. Here, the hearing officer had no "opportunity to judge the authenticity of

**Third Department** *continued*

the witnesses' refusals," thereby failing to adequately protect the petitioner's right to call witnesses. Judgment affirmed. (Supreme Ct, Chemung Co [O'Brien III, JJ])

---

**Sentencing (Concurrent/Consecutive) (Determinate Sentencing) (Resentencing)** **SEN; 345(10) (70.5)**
**People v Carpenter, 19 AD3d 730, 796 NYS2d 730 (3rd Dept 2005)**

The defendant pled guilty to 12 counts of rape and related felonies. The sentence was a 40-year determinate term (consecutive determinate terms of 25 years and 15 years on counts one and eight) to run concurrently with the 10 remaining determinate and indeterminate sentences. The defendant sought after imprisonment to vacate the determinate sentences on counts one through three and five through eight because the law when those crimes were committed authorized only indeterminate sentences. The court resentenced the defendant to an aggregate indeterminate term of 36 to 40 years by reducing the previously imposed determinate term of 25 years on count five to an indeterminate term of four to eight years, and running it consecutively to determinate, consecutive terms of 25 years and seven years imposed in counts nine and ten.

**Holding:** The defendant's sentencing challenge survived his appeal waiver. *People v Seaberg*, 74 NY2d 1, 9. The trial court had no power to alter valid concurrent sentences for counts nine and 10 after the defendant began serving them. *Cf* CPL 430.10; *People v Yannicelli*, 40 NY2d 598, 602. It did not have the right to convert concurrent terms to consecutive ones even if the duration of the sentences remained the same. *People v Romain*, 288 AD2d 242, 243 *lv den* 98 NY2d 640. A plea deal "does not invest the court with authority it otherwise lacks." *Cf People v De Valle*, 94 NY2d 870, 871. The court had the authority to change the originally illegal sentence for count five. *Cf People v Rogner*, 285 AD2d 749 *lv den* 96 NY2d 941. Nor was it error to change the sentences for counts one and eight from consecutive to concurrent. There was no double jeopardy; the final aggregate sentence did not exceed the defendant's legitimate expectation. Judgment modified. (County Ct, Sullivan Co [La Buda, JJ])

---

**Evidence (Uncharged Crimes)** **EVI; 155(132)**
**Sex Offenses (General)** **SEX; 350(4)**
**People v Reilly, 19 AD3d 736, 796 NYS2d 726 (3rd Dept 2005)**

The defendant was convicted of first-degree sexual

abuse for entering the complainant's bedroom from a window and forcibly touching her in a sexual way. There was evidence of prior unreported occasions when the complainant awoke to find the defendant in her house on top of her and when she opened the door and he kissed her without consent. The defendant claimed they had a consensual relationship. Evidence of a later incident in which he was found looking into a woman's bedroom located near complainant's home was also admitted.

**Holding:** Evidence of the later peeping incident was inadmissible under *Molineux*; it did not help to prove intent and was highly prejudicial. *See People v Ely*, 68 NY2d 520, 529-530. It added credibility to the complainant's account and suggested a propensity for voyeurism and sexual misconduct. *See People v Vargas*, 88 NY2d 856, 858. It was not harmless error; the proof against the defendant was not overwhelming. *See People v Crimmins*, 36 NY2d 230, 241. The defendant and complainant's accounts differed significantly and acquittal on the burglary count cast doubt on the certainty of convicting the defendant of sexual abuse without the peeping evidence. The prosecutor's improper remark that defendant was a sexual predator compounded the error. Judgment reversed, remanded for new trial. (County Ct, Broome Co [Smith, JJ])

**Dissent:** [Carpinello, JJ] Evidence of later voyeurism was properly admitted under *Molineux*, because the act was "equivocal." *People v Alvino*, 71 NY2d 233, 243.

---

**Identification (Informers) (Wade Hearing)** **IDE; 190(25) (57)**
**People v Russ, 19 AD3d 746, 796 NYS2d 444 (3rd Dept 2005)**

The defendant was arrested two weeks after an undercover buy and bust operation. The undercover officer could not independently identify the defendant at the *Wade* hearing, where the existence of a confidential informant at the sale was first mentioned. The prosecution declined to reveal the identity of the informant despite the possibility that the informant possessed exculpatory information. The court's decision on the *Wade/Huntley* issues required that the identity of the informant be revealed. Due to the prosecution's refusal to disclose the information, the court dismissed the indictment in the interests of justice. The prosecution appealed.

**Holding:** Before the trial court could *sua sponte* consider a motion to dismiss in the interests of justice, it had to provide fair notice of its intention to the prosecution. *People v Dolan*, 184 AD2d 892, 893. While the prosecution's refusal to comply with the court's disclosure order justified dismissal (*See eg Roviario v US*, 353 US 53, 60-61 [1957]; *People v Goggins*, 34 NY2d 163, 169), notice first had to be provided. Judgment reversed and remanded. (County Ct, Broome Co [Smith, JJ])

**Third Department** *continued*

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

**Sentencing (General)** **SEN; 345(37)**  
**People v Van Deusen, 19 AD3d 747, 796 NYS2d 721 (3rd Dept 2005)**

The defendant pled guilty to first-degree robbery in satisfaction of related charges, and received a sentence promise of between five and 15 years in prison. No mention of postrelease supervision was made during the plea hearing. The defendant was sentenced to eight years in prison, and five years postrelease supervision. A motion to withdraw the plea was denied.

**Holding:** A defendant should be advised of postrelease supervision at the time of a guilty plea. *See People v Catu, 4 NY3d 242.* Failure to provide this warning could result in a plea being withdrawn. *See People v Goss, 286 AD2d 180.* However, this applies when the defendant has been deprived of the benefit of a plea bargain by addition of the postrelease period. *People v Jachimowicz, 292 AD2d 688, 689.* Since the defendant here agreed to a maximum period, 15 years, that was greater than her prison sentence, 8 years, and the five-year postrelease term combined, she did not have the right to withdraw her plea. Judgment affirmed. (County Ct, Chenango Co [Sullivan, JJ])

**Prisoners (General)** **PRS I; 300(17)**

**Sentencing (Pre-sentence Investigation and Report)** **SEN; 345(65)**  
**Brown v Goord, 19 AD3d 773, 796 NYS2d 439 (3rd Dept 2005)**

The petitioner had been convicted of assaulting a woman, and acquitted of rape and sodomy. While in prison, he requested, through FOIL, a copy of his Department of Correctional Services guidance file, and discovered references to sex crimes. He challenged the accuracy of the statements and asked that these references be expunged. *See 7 NYCRR 5.50.* The request was denied because the information was based on presentence investigation report prepared by Probation. *7 NYCRR 5.51, 5.52.* The petitioner’s article 78 seeking expungement was denied.

**Holding:** There was a rational basis to remove the sex offender references from the petitioner’s guidance folder. *See Matter of Pangburn v Costello, 262 AD2d 1064 lv den 94 NY2d 756.* The only basis for the sex offender references in the presentence report was the allegations of rape and sodomy of which the defendant was acquitted. The Department of Correctional Services did not have a

rational basis for refusing to remove those references from the petitioner’s guidance folder. Judgment modified. (Supreme Ct, Albany Co [Ceresia Jr., JJ])

**Sentencing (Persistent Felony Offender) (Persistent Violent Felony Offender) (Second Felony Offender)** **SEN; 345(58) (59) (72)**

**People v Boyer, 19 AD3d 804, 799 NYS2d 281 (3rd Dept 2005)**

When the defendant was convicted by plea in 1994 of second-degree burglary for an agreed-upon sentence of five and one-half years to 11 years, he had a prior nonviolent felony conviction dating from 1984 and a 1989 Class D violent felony conviction. After the prosecutor filed a predicate felony offender statement based on the 1984 crime, the defendant received the agreed-upon sentence, as a second felony offender. In 2001 the defendant pled guilty to attempted second-degree burglary. He was sentenced to 12 years to life in prison as a persistent violent felony offender based on his 1989 and 1994 violent felony convictions. He then sought to vacate the plea and sentence from the 1994 conviction. The defendant was resentenced as a second violent felony offender in that matter, but the plea was not vacated. He subsequently challenged the refusal to vacate the plea. He also challenged the current persistent felony offender sentence as being based on the illegal 1994 sentence.

**Holding:** The motion to vacate the 1994 plea was properly denied; the record was sufficient to allow the defendant to have challenged it on direct appeal, which he did not do. *See CPL 440.10(2) (c).* Since a lawful sentence for the 1994 offense was not imposed until after the later offense, the sentence as a persistent felony offender in the later case based on the 1994 sentence cannot stand. *See People v Wright, 270 AD2d 213, 214-215 lv den 95 NY2d 859.* Judgment modified and remanded for resentencing as a second violent felony offender. (Supreme Ct, Albany Co [Breslin, JJ])

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

**People v Arotin, 19 AD3d 845, 796 NYS2d 743 (3rd Dept 2005)**

The defendant pled guilty to attempted gross sexual imposition in Ohio. The Ohio court designated him a level I “sexually oriented offender” without a hearing after he scored low on the sex offender risk assessment tests, but noted the score might have been higher since he denied committing the acts underlying the charges. Changing his parole supervision to New York, the defendant scored 120 on the Board of Examiners of Sex Offender’s risk assessment test and was designated a level III offender. His

**Third Department** *continued*

motion to reduce the classification was denied.

**Holding:** Ohio's level I sex offender classification was not entitled to full faith and credit (US Const, art IV, § 1) in New York. Sex offender registration and notification is a purely regulatory activity within the power of the state. The purpose of the full faith and credit provision (*see Luna v Dobson*, 97 NY2d 178, 182) is not violated by allowing a convicted sex offender to be governed by this state's registration requirements.

Clear and convincing evidence is required to sustain a level III finding. *See People v Dort*, 18 AD3d 23, 25. The record, which did not contain the plea colloquy, shows the defendant maintained his innocence, claiming he pled guilty to avoid a lengthy prison term. The offense for which he was indicted did not include "deviate sexual intercourse." Under the Board's guidelines, this is strong evidence such conduct did not occur. Evidence of oral sex was based on a presentence report that took the information from an Ohio police report relying on a social worker's statement about eliciting the information in a "re-interview." This unproven element was responsible for 25 points. Nor was there evidence sufficient to support the finding of substance abuse. Judgment reversed and remanded. (County Ct, Saratoga Co [Scarano Jr., JJ])

**Self-Incrimination (Conduct and Silence)** SLF; 340(5)

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

**People v Stewart**, 20 AD3d 769, 798 NYS2d 570 (3rd Dept 2005)

At the defendant's rape trial, the prosecution offered evidence that the defendant refused to talk to the police about the incident. His motion for a mistrial was denied. He was convicted of rape and related charges and sentenced to 14 years.

**Holding:** The prosecution improperly produced evidence on its direct case that violated the defendant's right to silence. *See People v Conyers*, 49 NY2d 174, 177 *vacated other gnds* 449 US 809, *adhered to on remand* 52 NY2d 454. It was not harmless error (*see People v Crimmins*, 36 NY2d 230) since a nine-year-old complainant provided the primary testimony and there was no supporting medical evidence. The court also erred by not submitting the issue of venue to the jury. The prosecution must prove by a preponderance of evidence that the county prosecuting the case is the correct venue. *See People v Greenberg*, 89 NY2d 553, 555-556. The crimes allegedly occurred in the defendant's vehicle and the complainant was unsure of the location. The private motor vehicle exception (*see* CPL 20.40 [4] [g]) was also a factual question for the jury. Judgment reversed, remitted for new trial. (County Ct, Cortland Co [Smith, JJ])

**Weapons (Possession)**

WEA; 385(30)

**People v Capra**, 20 AD3d 824, 798 NYS2d 791 (3rd Dept 2005)

The defendant was originally charged with armed robbery, but pled guilty to count two of the indictment, third-degree criminal possession of a weapon (Penal Law 265.02 [1]) and was sentenced to seven years in prison. Since the crime was not a violent felony, the court resentenced the defendant to three and one-half to seven years. The defendant appealed. The statutory provision cited in the indictment was a misdemeanor, not a class D felony. The motion was denied.

**Holding:** The indictment charged the defendant with third-degree criminal possession of a weapon, a class D felony. *See* Penal Law 265.02(1). While the indictment inartfully used statutory language from Penal Law 265.01, the misdemeanor of fourth-degree possession, it did not change the nature of the allegation. The only difference between the two crimes is the existence of a prior conviction. The prosecution is precluded from mentioning in an indictment a prior conviction as an element of the offense. *See* CPL 200.60 [1]. Using the misdemeanor language was an improvisation to describe the weapons possession offense without referring to the previous conviction. The defendant understood that he was pleading guilty to a felony and faced a prison sentence greater than a year. He did not admit committing a prior conviction, but he did not raise any issues concerning his guilt as a second felony offender or possible meritorious defenses. *See People v Seeber*, 4 NY3d 780, 781-782. Judgment affirmed. (County Ct, Albany Co [Breslin, JJ])

**Admissions (Miranda Advice)**

ADM; 15(25)

**People v Sturdivant**, 799 NYS2d 835 (3rd Dept 2005)

The defendant was charged with attempted arson and related offenses. In jail, a detective talked to the defendant about the events. Initially, the defendant denied what happened, but when the detective told him the complainant's version of the events, he admitted it. Then the defendant agreed to accompany the detective upstairs to talk further. In the interview, the officer administered *Miranda* for the first time. The defendant waived those rights and made statements, some that affirmed and some that contradicted his earlier admissions. Suppression of the statements was denied.

**Holding:** The defendant's statements in the jail cell and five minutes later in the interview room made to the same officer were part of a continuous custodial interrogation, and obtained in violation of *Miranda*. Warnings must precede questioning. *See People v Chapple*, 38 NY2d 112, 115. Without a clearly defined break to remove the influence of the earlier pre-*Miranda* questioning, the later warnings were ineffective. *See People v Paulman*, 5 NY3d

**Third Department** *continued*

122. “County Court incorrectly found that because defendant began to change his story in his second statement, he was no longer under the influence of the first inquiry (see *People v Bethel* [67 NY2d 364], 367-368. . .)” Judgment reversed and remanded. (Supreme Ct, Albany Co [Teresi, JJ])

**Equal Protection (Punishments) EQP; 140(15)**

**People v Pauly, 799 NYS2d 841 (3rd Dept 2005)**

After being arrested for first-degree criminal possession of a controlled substance, an A-I felony, the defendant pled guilty to third-degree drug possession, a class B felony, waived his right to appeal, and was sentenced to five to 15 years in prison. On appeal, he claimed that the Rockefeller Drug Law Reform Act (L 2004, ch 738) violated equal protection by retroactively permitting A-I felony drug offenders to seek resentencing but not Class B offenders.

**Holding:** The defendant’s waiver of his right to appeal included challenging the severity of his sentence. *People v Hidalgo*, 91 NY2d 733, 737. However, his constitutional challenge survived. The Reform Act did not violate equal protection. There was a rational basis to distinguish between A-I and B felons in applying the law retroactively. *People v Walker*, 81 NY2d 661, 668. (County Ct, Greene Co [Pulver Jr., JJ])

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

**Titmas v Hogue, 799 NYS2d 626 (3rd Dept 2005)**

The defendant was convicted of first-degree sodomy. The court granted his request to delay sentencing to permit him to receive treatment for his physical and mental disabilities at an out-of-state residential facility. After 13 months, he was returned to serve a five-year prison sentence. The defendant’s request to receive credit for the time spent in the hospital was denied.

**Holding:** The defendant was not custody when he was hospitalized; he was not entitled to jail time credit. See Penal Law 70.30 (3). *Matter of Poole v Koehler*, 160 AD2d 880. There was no bail set during the time when he was in the hospital, so he was not in custody. See *Matter of Hawkins v Coughlin*, 72 NY2d 158, 162-163. And the defendant’s release to the hospital was not a condition of release set by the court but an accommodation. See *People v Fortunato*, 234 AD2d 713, 714 *lv den* 89 NY2d 1035. Judgment affirmed. (Supreme Ct, Sullivan Co [La Buda, JJ])

**Fourth Department**

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

**People v Figueroa, 17 AD3d 1130, 794 NYS2d 262 (4th Dept 2005)**

**Holding:** The claim of error as to how the mandatory surcharge was calculated survived the defendant’s waiver of the right to appeal. See *People v Nicholson*, 15 AD3d 237. Although unpreserved, the issue is reached as a matter of discretion in the interest of justice. The mandatory surcharge is reduced, according to the applicable provisions of Vehicle and Traffic Law former 1809, to \$160. The judgment is further modified by vacating the sentence for misdemeanor driving while intoxicated and reckless driving, and remitted for resentencing because the court referred to “mandatory minimum fines” on those counts, reflecting a misapprehension that there was no discretion as to the fines. See *People v Domin*, 284 AD2d 731, 733 *lv den* 96 NY2d 918. The right to challenge the legality of a sentence is not waivable. See *People v Seaberg*, 74 NY2d 1, 9. (County Ct, Erie Co [Drury, JJ])

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

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

**People v Wardlaw, 18 AD3d 106, 794 NYS2d 524 (4th Dept 2005)**

**Holding:** The court erred in accepting the defendant’s waiver of the right to counsel and allowing him to act pro se at the *Huntley* hearing. The court did not undertake “a sufficiently ‘searching inquiry’” to reasonably ensure that the defendant had had the “‘dangers and disadvantages’ of giving up the fundamental right to counsel” impressed upon him. See *People v Sawyer*, 57 NY2d 12, 21 *rearg dismd* 57 NY2d 776 *cert den* 459 US 1178. Uncontroverted hearing evidence established that the defendant was not in custody during questioning, received *Miranda* warnings and waived his rights, and requested a lawyer only after making statements whereupon questioning stopped. However, the error in permitting the defendant to proceed pro se is assumed to have led to erroneous trial admission of his statements because the deprivation of counsel invalidated the hearing itself. Cf *People v Wicks*, 76 NY2d 128, 132-133 *rearg den* 76 NY2d 773. The general remedy is remittal for a de novo suppression hearing and, if the statements were suppressed, a new trial. See *People v Slaughter*, 78 NY2d 485, 493. Analysis of applicable case law indicates that deprivation to counsel at a pretrial suppression hearing is subject to a constitutional harmless error analysis. See *People v Carracedo*, 214 AD2d 404 *app decided after remittal for de novo hearing* 228 AD2d 199 *affd* 89 NY2d 1059. The error here was harmless beyond a reasonable doubt. The complainant’s strong testimony was supported by irrefutable physical evidence including DNA samples taken from the complainant and found to

**Fourth Department** *continued*

be the defendant's. The defendant's statements were "barely, if at all, incriminating." Judgment affirmed. (County Ct, Erie Co [D'Amico, JJ])

**Sentencing (Concurrent/Consecutive) (Excessiveness)** SEN; 345(10) (33)

**People v Bailey, 17 AD3d 1041, 793 NYS2d 799 (4th Dept 2005)**

**Holding:** Concurrent sentences were not required where the underlying acts constituted separate and distinct acts, though they were part of a continuous course of activity. Imposition of four consecutive terms of imprisonment did render the sentence unduly harsh. *See* Criminal Procedure Law 470.15(6) (b). Sentences on the three counts of third-degree sodomy shall run concurrently with one another and consecutively to the sentence for third-degree rape. Judgment affirmed as modified. (County Ct, Oneida Co [Donalty, JJ])

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

**People ex rel Taylor v Lape, 17 AD3d 1175, 794 NYS2d 698 (4th Dept 2005)**

**Holding:** No appeal lies from an ex parte order denying permission to proceed as a poor person in a habeas corpus proceeding under CPLR 1101. *See Sholes v Meagher*, 100 NY2d 333, 335. The petitioner can reapply for poor person status in Supreme Court, with notice to the County Attorney (CPLR 1101[c]) to obtain an appealable order. *See gen* CPLR 5701(a)(2). (Supreme Ct, Oneida Co [Siegel, AJ])

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

**Reckless Endangerment (Evidence) (Instructions)** RED; 326(15) (20)

**People v Dann, 17 AD3d 1152, 793 NYS2d 852 (4th Dept 2005)**

**Holding:** The court erred in failing to charge the jury on second-degree reckless endangerment as a lesser included offense of first-degree reckless endangerment. *See gen* *People v Glover*, 57 NY2d 61, 63. These offenses meet the requirement that it be theoretically impossible to commit the greater without committing the lesser. *See People v Smith*, 234 AD2d 997 *lv den* 89 NY2d 1101. The second requirement, that a reasonable view of the evidence show that the lesser but not the greater offense was committed, is also met. Evidence was presented that the defendant shot at the complainant's home from about 50

yards away, using birdshot. This could be viewed as creating a substantial risk of serious physical injury but not a grave risk of death. First-degree reckless endangerment counts reversed, new trial granted on those counts. (County Ct, Onondaga Co [Aloi, JJ])

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

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

**People v Davis, 17 AD3d 1155, 794 NYS2d 554 (4th Dept 2005)**

**Holding:** The defendant was again classified as a level three sex offender at a new hearing ordered on the ground that the initial hearing court refused to allow defense evidence on the risk of repeat offending and threat to public safety. The contention that the court abused its discretion in determining the current classification is unpreserved. The defendant failed to include in the appellate record the risk assessment instrument and other documents used by the court. *See People v Taylor*, 231 AD2d 945, 946 *lv den* 89 NY2d 930. The court's refusal to grant a second adjournment to allow the defendant to obtain documents controverting alleged factual errors was not improper where a two-week adjournment had already been granted. The defendant did not commence a declaratory judgment action to challenge the constitutionality of the Sex Offender Registration Act. *See People v Langdon*, 258 AD2d 937. In any event, the constitutional challenges lack merit. Order affirmed. (County Ct, Onondaga Co [Fahey, JJ])

**Juveniles (Delinquency—Procedural Law)** JUV; 230(20)

**Misconduct (Judicial)** MIS; 250(10)

**Re Yadiel Roque C., 17 AD3d 1168, 793 NYS2d 857 (4th Dept 2005)**

**Holding:** The contention that the court's intrusive conduct during the fact-finding hearing denied the appellant a fair trial is not preserved, but is reviewed in the interest of justice. *See Matter of Nicholas D.*, 11 AD3d 545, 546. While a judge may intervene "to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial," (internal quotes omitted), the court must not give the appearance of being, or act as, an advocate. *See People v Zamorano*, 301 AD2d 544, 546. The principle that a judge is to protect the record rather than making it applies to bench trials, including delinquency proceedings. *See Matter of Carlos S.*, 5 AD3d 1051 *lv den* 2 NY3d 707. The judge here assumed an advocate's appearance by extensive examination of witnesses. Order reversed, matter remitted for new hearing. (Family Ct, Wayne Co [Sirkin, JJ]) ♪

# NYSDA MEMBERSHIP APPLICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

*To pay by credit card:*  Visa  MasterCard  Discover  American Express

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

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

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

**NEW YORK STATE DEFENDERS ASSOCIATION**  
194 Washington Ave., Suite 500, Albany, NY 12210-2314

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