



Public Defense Backup Center REPORT

Volume XX Number 5

November-December 2005

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Reentry Net Now Online

Criminal defense, legal services, and social services practitioners, as well as policy advocates, now have access to a free online information clearinghouse dealing with the consequences of criminal proceedings. Reentry Net's new website at www.reentry.net/ny provides hundreds of reentry resources, including practice materials for advocates and clients, selected by experts. Among them are:

- A manual on the collateral consequences of criminal proceedings in New York;
- An overview of criminal process and criminal law terms for non-lawyers; and
- Model motions and briefs, sample letters and forms for employment and housing.

The site also contains interactive news and calendar tools, and program directories with referral information, along with national research and policy materials. Registration is free!

Reentry Net is a project of The Bronx Defenders and Pro Bono Net, supported by the JEHT Foundation and the Bernard F. and Alva B. Gimbel Foundation. The site provides links to its sponsoring organizations, including Center for Community Alternatives, Center for Employment Opportunities, Correctional Association of NY, Empire Justice Center, Fortune Society, Legal Aid Society, Legal Services of New York, Legal Support Unit, MFY Legal Services, National H.I.R.E. Network, Neighborhood Defender Service of Harlem, NYSDA (which includes reentry information on its Prisoners' Rights Hot Topics page), Prisoner Reentry Institute, John Jay College

of Criminal Justice, and the Women's Prison Association. The site also provides links to specific information on other sites such as the Legal Action Center (www.lac.org), and much more.

Reentry—More Than a Buzzword

The long-neglected issue of what happens to public defense clients and others after sentence is imposed or completed is gaining public and political awareness. Increasingly, alternatives are demanded to the burdensome costs of prison building, the societal costs of emptying targeted communities into euphemistically-named correctional facilities far away, and the increasingly visible failure of an over-emphasis on incarceration as the response to crime. Nationwide, state expenditures for prisons have grown by more than 1,000 percent in 15 years, but failed to end recidivism, requiring other approaches. Peggy Burke, of the Center for Effective Public Policy (in Maryland) has noted that there are now conversations "in governors' offices, state legislatures, courts, [and] state correction agencies on whether or not our incarceration strategies have been effective." (www.csmonitor.com, 12/2/05.)

Such conversations are not limited to state agencies and offices. The National District Attorneys Association adopted in July a set of Policy Positions on Prisoner Reentry. While stressing victim and community safety, these positions recognize the need to address obstacles to prisoners' safe return to their communities, including unmet health care needs, lack of education, and lack of services and support. (See www.ndaa-apri.org.) The National Governors Association (NGA) has created a Prisoner Reentry Policy Academy, through which seven states have "assembled interdisciplinary

Hold the Date!

Gideon Day—April 11, 2006

[Note Changed Date]

Watch for details on this annual observance of *Gideon v Wainwright* in the next *REPORT*

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nary reentry policy teams comprised of representatives from the governor's office and key state agencies such as corrections, public safety, health and human services, welfare, workforce, and housing" with the goal of developing statewide strategic action plans to coordinate services and improve reentry outcomes. (See the NGA website, URL unavailable at press time.)

Meanwhile, in Congress, testimony in support of the Second Chance Act of 2005 was presented to the House Subcommittee on Crime, Terrorism, and Homeland Security on Nov. 3, 2005. This bill, HR 1704 (and a companion bill, S 1934) has bipartisan support. It would authorize federal demonstration and mentoring grants to states, create a federal re-entry taskforce, and establish a national re-entry resource center. (www.reentrypolicy.org.)

DNA Databanking Developments

A federal appeals court upheld New York State's DNA databank law, Executive Law Article 995 *et seq.*, in November. "We hold that the constitutionality of New York's DNA statute is properly analyzed under the Fourth Amendment's 'special needs' test; under that test, we find the statute constitutional." *Nicholas v Goord*, No. 04-3887-pr, 2005 USApp LEXIS 25607 (2nd Cir 11/28/2005).

A few days later, Gov. George E. Pataki announced a plan to begin collecting DNA samples from convicted persons not covered by the current statute. This followed the Legislature's refusal to expand the existing statute to include persons convicted of any crime, whether misdemeanor or felony. The governor signed an executive order that makes providing a DNA sample a mandatory condition of participation in temporary release programs. Providing a sample could also be made a condition for parole release or probation, and of plea bargains. Concerns about the propriety and legality of the order were immediately raised by, among others, Donna Lieberman, the Executive Director of the New York Civil Liberties Union. (nytimes.com, 12/7/05.) The New York State Commission on Forensic Science approved the order despite constitutional objections. (northcountrygazette.org, 12/13/05; timesunion.com, 12/14/05.)

In a press release announcing the order, quotes from both Pataki and New York State Director of Criminal Justice Chauncey G. Parker lauded, among other things, the use of DNA to exonerate innocent people. (www.ny.gov/governor/.) However, use of information in DNA databanks may tend to be one-sided, for initial prosecution rather than in defense post-conviction. A recent series in the Pittsburgh *Post-Gazette* noted that Pennsylvania's law, like most such laws around the nation, contains criteria for judges to use in deciding which defendants are entitled to post-conviction testing that may bar testing for those who pled guilty, are on parole, or otherwise pre-

cluded, limiting the number of defendants whose innocence can be established by DNA. (post-gazette.com, 12/20/05.)

New York's law, Criminal Procedure Law 440.30 (1-a), permits any defendant, regardless of the date of conviction, to seek post-conviction DNA testing, and requires prosecutors to advise defendants about the location and existence of evidence to be tested. Post-conviction motions for forensic DNA testing can be brought at any time. Defendants are not required to show that DNA evidence exists or is available for testing; the prosecutor acts as a gatekeeper who must provide the information about availability. See *People v Pitts*, 4 NY3d 303, 311 (2005).

It is hoped that *Pitts* is in fact making it easier for wrongfully convicted persons to prove their innocence. National experience prior to *Pitts* indicated that some prosecutors were resistant to post-conviction efforts to prove innocence. A law review article last year noted that, "Empirical proof suggests that prosecutors have consented to DNA tests in less than fifty percent of the cases in which testing later exonerated the inmate." (Daniel S. Medwed, "The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence," 84 Boston ULRev 125 [2004]).

Rocky Reform of 2004 Releases Few

Even as the 2005 extension of last year's Rockefeller Drug Law reform passed (see p. 9 and the last issue of the *REPORT*), the one-year anniversary of the 2004 legislation brought evidence of what most already knew: few prisoners have been released under those provisions. According to a report released in December by The Legal Aid Society, only about 30 percent of those originally eligible for new

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sentences under the amended law have been freed. (nytimes.com, 12/15/05.) Only about 140 prisoners have successfully used the 2004 amendments to end their confinement.

While the 2004 releases were being tallied, tabloid coverage of a handful of cases trumpeted efforts by violent offenders to win release under the newest reform. While the legislation was “designed to cut penalties for low-level drug offenders who got jail terms normally reserved for drug kingpins,” the *New York Post* emphasized, it complained that some high-profile prisoners are “trying to join a rogues’ gallery of thugs who have had their sentences slashed under the revised Rockefeller drug law.” (*NY Post*, 11/22/05.)

New Trial for Goldstein in “Kendra’s Law” Case

The Court of Appeals has reversed the murder conviction of Andrew Goldstein. He will be retried a third time for killing Kendra Webdale, for whom “Kendra’s Law,” the assisted outpatient treatment statute (Mental Hygiene Law 9.60) is named. Reversal was based on admission of testimony by the prosecution’s psychiatrist wherein she recounted hearsay statements of third parties in violation of *Crawford v Washington*, 541 US 36 (2004). The opinion contains a very favorable definition of “testimonial” statements. The court inferred that the third parties “knew they were responding to questions from an agent of the State engaged in trial preparation” and rejected the prosecution’s theory that an expert was not a state agent: “The Confrontation Clause would offer too little protection if it could be avoided by assigning the job of interviewing witnesses to an independent contractor rather than an employee.” *People v Goldstein*, No. 155 (Ct Apps, 12/20/05). (See summary p. 20.)

The sunset provision of Kendra’s Law was extended this year to June 30, 2010. The extension followed debate about the law’s effectiveness, as discussed in an article in the *New York Law Journal*. (*NYLJ* online, 6/3/05.) Further study is required. Members of the Assisted Outpatient Treatment Quality Improvement Panel, which will review data about the law, include Kendra Webdale’s mother, Pat Webdale, who is a board member of the National Alliance for the Mentally Ill—New York State. (naminys.org, 11/9/05.)

CLE on Criminal Law, Family Court, and Federal Issues

From small, focused trainings co-sponsored with local offices or organizations to large, annual training events for attorneys from across the state, NYSDA offers affordable Continuing Legal Education relevant to public defense lawyers. Since the Defender Institute Basic Trial

Skills Program and the 38th Annual Meeting and Conference in Saratoga Springs in the summer, the Association has provided CLE training to nearly 300 lawyers on a variety of subjects.

NYSDA co-sponsored programs with The Ontario County Defenders Association in August, October, and December. The topics were Domestic Violence: Contemporaneous Criminal and Family Court Prosecutions, Access to Courtrooms Under the 6th and 1st Amendments, and Crawfish and Crawford: How I Stopped Worrying About Hearsay Objections and Learned to Love the Confrontation Clause. The Association cosponsored two programs with the Appellate Division, Fourth Judicial Department (Assigned Counsel Criminal Appeals Mandatory Eligibility Training and Assigned Counsel Family Court Appeals Mandatory Eligibility Training), a program with the Office of the Federal Public Defender for the Northern District of New York and Vermont and the Federal Bar Association (Federal Criminal Defense Practice Update) and a program with the Center for Family Representation, Inc. (The New Permanency Bill: Challenges and Opportunities for Advocates Working with Parents). In addition, the Association presented its Criminal Defense Update 2005 in Rochester and Litigation Strategies for SORA Risk Classification in New York City.

Judicial Disciplinary Actions Noted

Abuse of Contempt Power Leads to Discipline

The Commission on Judicial Conduct (Commission) recently disciplined two judges for misusing or exploiting their contempt power. Commissioner Richard D. Emery wrote concurring opinions, expressing surprise that such abuse continues to occur despite sanctions imposed in earlier matters and “well-established rules that are fashioned to restrict and even defuse imposition of summary punishment.” *New York Law Journal* writer John Caher noted that taken together, these cases “suggest a growing concern over the misuse of contempt powers, and a growing willingness of the commission to discern misconduct from legal error.” (*NYLJ* online, 11/16/05).

Supreme Court Justice Duane A. Hart of Queens was censured for holding a litigant in contempt because the litigant’s attorney tried to make a record that the attorney had a right and duty to make. The contempt was withdrawn before the litigant was jailed, but Hart continued to deny that his actions were inappropriate under the circumstances. The Commission’s main opinion noted that Hart’s “intransigence” suggested Hart “still fails to recognize that the awesome contempt power should be exercised only with appropriate restraint and within the carefully mandated safeguards.”

Nassau Family Court Judge Richard A. Lawrence was admonished, “apparently for repeatedly sighing, fidgeting, and turning his back on the court,” according to the

Law Journal. Lawrence acted without first warning the litigant that a contempt citation might be the result of continuing the conduct, and failed to give the litigant or the litigant's lawyer a chance to make a statement. However, Lawrence reportedly "appeared contrite and promised to scrupulously follow the statute in the future," leading to his lesser punishment.

Family Court Judge Censured

For "neglecting to inform litigants of their statutory rights and [for] addressing them in an intemperate, demeaning manner," Schenectady Family Court Judge Jo Anne Assini should be censured for judicial misconduct, according to a determination by the Commission. Included in the bases for the ruling was that Assini had failed to tell some litigants about their right to counsel and told one litigant who sought appointment of counsel that he had to contact five attorneys before she would consider assigning a lawyer. (NYLJ online, 12/2/05; www.northcountrygazette.org, 12/2/05.)

This and other determinations can be found on the Commission's website, www.scjc.state.ny.us.

Queens Judge Suspended

The Court of Appeals has suspended Queens Supreme Court Justice Laura D. Blackburne. The court must now consider whether Blackburne should be removed from the bench, as the Commission has recommended, for ordering a defendant removed from the courtroom through a private stairwell to escape arrest. (NYLJ online, 11/23/05 and 12/6/05.)

Court Issues Acquittal in False Confession Case

After a bench trial lasting several months, on Dec. 21, 2005 Acting Nassau County Supreme Court Justice Victor M. Ort acquitted John Kogut of murder. Kogut's original conviction was overturned following DNA testing showing that semen in Theresa Fusco's body did not match that of Kogut or two co-defendants. The primary evidence against Kogut was a 15-minute videotaped confession that the judge ultimately refused to consider, finding too many discrepancies between it and actual facts. Prior to the retrial, a lengthy hearing had been held on admission of expert testimony about false confessions. In a Sept. 15, 2005 ruling published in the *New York Law Journal* on September 29th, the court allowed defense lawyer Paul Casteleiro of New Jersey to call Williams College Professor Saul Kassin at trial. His testimony included statements that 25 percent of DNA exonerations have involved false confessions and that the purpose of long interrogations (Kogut was questioned for 13 hours) is to isolate suspects and question them repeatedly until they

confess. The charges against Kogut's co-defendants were dismissed in late December. (NYLJ online, 9/27/05, 9/29/05, 12/22/05, and 12/30/05.)

More Sex Offender Developments

Advising clients about the potential consequences of convictions of sex offense charges gets increasingly difficult. As just one example of potential changes, state legislators appear to be moving to make sure lower-level convicted sex offenders in New York are not removed from publicly available lists as scheduled. "Thousands of sex offenders months away from escaping public scrutiny would continue to be tracked until 2007 under a proposal released by the Assembly on Friday [Dec. 16, 2005]." (www.timesunion.com, 12/17/05.)

Regulations aimed at persons convicted of sex offenses remain the subject of intense media and political attention across the state at the turn of the year. Issues discussed in the last *REPORT* — civil commitment of offenders after their prison sentences expire and extreme restrictions on where offenders can live, work, and be — remain at the top of the list, but harsher sentences, technological tracking of offenders, heightened reporting requirements, and other proposals have also made the news.

Silver Says Assembly Taking Up Sex Offender Laws

In the wake of Executive Branch efforts to use existing civil commitment laws to hold sex offenders beyond their maximum sentence (see the last issue of the *REPORT*), Assembly Speaker Sheldon Silver announced on Dec. 7, 2005 that comprehensive sex offender legislation would be a priority in 2006. His press release noted that the legislation to be proposed will provide for life sentences and civil commitment and include "a range of initiatives to further regulate and punish sex offenders, improve the use of DNA evidence, assist victims and eliminate the statute of limitations in many sex offense cases." (www.assembly.state.ny.us.)

Governor Pushes Civil Commitment

Governor Pataki called for the Legislature to pass a sex offender civil commitment law before January 10th. That is the date set for further legal proceedings brought by several of the men detained as a result of Pataki's use of existing Mental Hygiene Law provisions to keep sex offenders confined. Such an accelerated timetable has been decried: "Given the interests implicated by the measures—due process, individual liberty, public safety—the officials need to ensure they craft the right protections for New York; they don't need to rush just anything onto the books." (thejournalnews.com, 12/9/05.) The *New York Times* has urged the Legislature to look at other states

before acceding to the governor's push for civil commitment: "Other states have already tried Mr. Pataki's approach, and run into more problems than expected." (www.nytimes.com, 12/7/05.)

A major question regarding civil commitment is whether the vast amount of public funds it will take could be more effectively used in other ways to increase public safety. For example, "[e]very dollar spent on SVP programs is a dollar that could be spent on the much more ubiquitous, but relatively invisible, forms of violence against women and children." (James, "Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence," 34 Seton Hall LRev 1233, 1250 [2004]).

According to Silver's press release, civil commitment will cost upwards of \$80,000 a year, more than double the cost of housing an offender in state prison (timesunion.com, 12/8/05.) A comparison of various states' statutes for civil commitment of sex offenders indicates that some states have experienced much higher costs (Minnesota—\$110,000; California—\$103,000; North Dakota—\$100,000; Florida—\$97,000). Models vary, and costs for various aspects of civil commitment (treatment, confinement, legal costs) may be spread over many parts of the budget and are not necessarily separately identified, making comparison difficult. ("Involuntary Commitment of Sexually Violent Predators: Comparing State Laws," Washington State Institute for Public Police (March 2005) pp. 1-2, and 6., online at www.wsipp.wa.gov.)

Location Restrictions Considered, Implemented

Local politicians continue to call for limitations of where individuals convicted of sex offenses can be in their communities. Proposals have been publicized from Saratoga County (dailygazette.net, 12/29/05) to Cheektowaga in Erie County. (buffalonews.com, 12/23/05.) Buffalo has passed its own ordinance. (buffalonews.com, 12/2/05.) Similar proposals have been raised elsewhere.

Meanwhile, the state Legislature has amended an existing law to prohibit all level 3 offenders, not just those whose victims were minors, from entering school grounds or, apparently, areas within 1000 feet of school property. (See Legislative Review at p. 11.) Binghamton then repealed its ordinance, described in the last issue of the *REPORT*, barring sex offenders from being within a quarter-mile of schools, parks, etc. However, the City Council did vote to enforce the new state limitations as to level 2 offenders as well. As a result, federal court proceedings, initiated with regard to the original ordinance, may not be over. (pressconnects.com, 10/27/05.)

Availability of Information About Offenders Increases

The Broome County Sheriff has adopted an online sex offender notification service offered by Watch Systems, a

company based in Covington, LA. Not currently available in Binghamton and some other Broome County municipalities, the program allows users "to map the location of sex offenders in their neighborhoods and receive e-mail when offenders move into the area." (pressconnects.com, 11/17/05.)

In the Capital District, police in the Village of Scotia, Schenectady County, have announced a new policy. Depending on the risk assessment level of offenders, different amounts of information will be posted online and maintained for public viewing at the police department. (dailygazette.net, 12/23/05.) Cayuga County's lawmakers are also considering increasing the amount of information about sex offenders available from the sheriff's department there. (syracuse.com, 11/20/05.)

If proposals in other states take root in New York, identifying information about sex offenders would be even more available. While some seem unlikely to come to fruition, in the current climate it is hard to identify any proposal as "too extreme." In Ohio, two legislators want to require the "most serious sex offenders to have pink identifying license plates for at least five years after their release from prison." (daytondailynews.com, 11/17/05.) The Florida Sheriffs Association wants drivers licenses to indicate when licensees are sexual predators. (orlandosentinel.com, 10/28/05.)

GPS Tracks Parolees, Seeks Matches to Crime Scenes

Technology is being increasingly suggested and used as a method of controlling individuals under supervision. A new California law allows that state and its counties to monitor the location of people under probation or parole supervision using a Global Positioning System (GPS). (San Jose, CA www.mercurynews.com, 10/5/05.)

A pilot program in set up on one California county is taking GPS use a step further. There, parolees' locations will be automatically cross-referenced to the locations of crimes, and the sheriff's department will be notified by the state if any parolees were within 500 feet of the scene. Not surprisingly, the first set of parolees to be included in the system are high-risk sex offenders—as noted above, such offenders are the subject of many proposals for intense scrutiny. However, the Orange County (CA) sheriff hopes to soon include other parolees perceived as high-risk, such as gang members, drug dealers and stalkers. Eventually, the sheriff says, all probationers and parolees should be included. (www.mercurynews.com, 10/30/05.)

Such proposals may lead to a whole new industry. One company reported in July 2005 that it was tracking 5,000 persons on parole, on probation, or under house arrest. (www.wired.com, 7/31/05.) ♪

CONFERENCES & SEMINARS

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: January 26-29, 2006
Place: Chicago, IL
Contact: NLADA: (202)452-0620; a.bullock@nlada.org; website www.nlada.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: The Criminal Defense Toolbox: Renovating the Way You Practice Law
Dates: February 8-11, 2006
Place: Charleston, SC
Contact: NACDL: website www.criminaljustice.org

Sponsor: California Public Defenders Association & California Attorneys for Criminal Justice
Theme: Capital Case Defense Seminar 2006
Dates: February 17-20, 2006
Place: Monterey, CA
Contact: tel (916)448-8868; fax (916)448-8965; website www.cacj.org/seminars.htm

Sponsor: **New York State Defenders Association**
Theme: **20th Annual Metropolitan New York Trainer**
Date: **February 25, 2006**
Place: **New York City**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org**

Sponsor: National Criminal Defense College
Theme: Theories, Stories & Improv
Dates: March 3-5, 2006
Place: Atlanta, GA
Contact: NCDC: tel (478)746-4151; fax (478)743-0160; website www.ncdc.net

Sponsor: National Legal Aid and Defender Association
Theme: 2006 Life in the Balance
Dates: March 4-7, 2006
Place: Philadelphia, PA
Contact: NLADA: (202)452-0620; website www.nlada.org

Visit the Training page at www.nysda.org often!

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

Sponsor: National Criminal Defense College
Theme: Trial Practice Institutes 2006
Dates: June 11-24, 2006
July 16-29, 2006
Place: Macon, GA
Contact: NCDC: tel (478)746-4151; fax (478)743-0160; website www.ncdc.net

Sponsor: **New York State Defenders Association**
Theme: **39th Annual Meeting and Conference**
Dates: **July 23-25, 2006**
Place: **Corning, NY**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org**

Job Opportunities

The Orange County Legal Aid Society seeks a **staff attorney** to work in the areas of criminal and family law. NY bar admission, related work or clinic experience required. Salary \$44-55,000, good benefits. Send cover letter and resume to: Legal Aid Society of Orange County, Inc., PO 328, Goshen NY 10924. Fax (845)294-2638.

The National Legal Aid and Defender Association 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. Competitive salary, generous benefits. Send cover letter, résumé, writing sample, and salary requirements to: Director of Defender Legal Services, NLADA, 1140 Connecticut Avenue NW, Suite 900, Washington, DC 20036. Email to DDL@nlada.org. Position is open until filled.

Job Listings are also available at www.nysda.org

See Job Opportunities (under NYSDA Resources)

Find:

- Notices received after *REPORT* deadline
- Links to more detailed information
- Jobs in other states
- National positions

Defense-Relevant Immigration News

By Manuel D. Vargas of NYSDA's
Immigrant Defense Project (IDP*)

House of Representatives passes bill that would severely impact on rights of immigrants who are undocumented or have criminal records

On December 16, by a vote of 239 to 182, the US House of Representatives passed HR 4437, the Border Protection, Antiterrorism, and Illegal Immigration Control Act. If enacted, it would make millions of undocumented immigrants subject to criminal prosecution for a new federal crime of unlawful presence in the US. In addition, instead of enacting long-needed reforms of the nation's deportation laws to give immigrants facing deportation based on past criminal convictions a chance to show why their deportation would be unfair and contrary to the nation's interests, HR 4437 increases the unfairness and harshness of the immigration laws relating to such noncitizens. Among the changes most relevant to immigrants and the criminal justice system are the following:

- **HR 4437 would impose extremely harsh criminal penalties on immigrants living and working in the US without lawful admission documentation.**

Mere presence in the US without a valid visa will become a crime subject to stiff federal criminal penalties despite the fact that workers from abroad are needed and solicited by US employers. The bill imposes particularly draconian penalties on immigrants found in the US without proper documentation if they have ever been convicted of certain crimes, including a mandatory *minimum* of ten years in federal prison for someone convicted in the past of the ever-expanding "aggravated felony" category that may include crimes that the criminal justice system found so minor that no jail time was imposed [§§ 203 and 204]

- **HR 4437 would further expand mandatory deportation provisions in current law to include additional categories of minor offenses for which no extenuating circumstances may be considered.**

The bill does this by expanding the misnamed "aggravated felony" definition to include:

* 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 backup 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.

- Mere presence in the US without proper documentation**, a category that could include millions of immigrants currently living and doing hard work needed by US employers [§§ 201 & 203]
- Assisting an undocumented immigrant to reside in the US**, which could be interpreted broadly to include helping another immigrant in any way to get a job or a place to live [§§ 201 & 202]
- Misdemeanor drunk driving offenses**, including such offenses committed before enactment of this law [§ 606]
- Accidental injury offenses** where the immigrant had no intention to cause any injury to another, including such offenses committed before enactment of this law [§ 613]
- Minor accessory roles** in the criminal conduct of others, including such conduct committed before enactment of this law [§ 201]

- **HR 4437 would bar grant of lawful resident status to millions of immigrants currently working in the US, including many immigrants with US citizen spouses or children or fleeing persecution abroad.**

The bill does this by:

- Barring lawful admission, without a waiver, of immigrants who at any time in the past have been convicted of an offense falling within the grossly misnamed "aggravated felony" definition [§ 604(b) & (c)], including mere presence in the US without proper documentation
- Barring lawful admission of immigrants who at any time in the past have been found to have possessed or used a false social security card or other document to be able to work or pay taxes in the US [§ 604(a)]
- Barring a waiver of inadmissibility for refugees and asylees whom the US government has already determined have established legitimate claims of fleeing persecution if at any time in the past they have been convicted of a so-called "aggravated felony" offense [§ 605]

- **HR 4437 would bar a grant of citizenship to many immigrants who are already lawful residents based on long-ago conduct.**

The bill would do this by prohibiting a good moral character finding for any immigrant who *at any time in the past* has been convicted of any offense falling within the grossly misnamed "aggravated felony" definition even if the individual can demonstrate complete rehabilitation and excellent present moral character. [§ 612]

- **HR 4437 would deem an immigrant convicted of a**

(continued on page 14)

From My Vantage Point

By Jonathan E. Gradess*

Speak With One Voice in 2006

More than a decade of neglect of legal services for the poor by the Executive Branch should soon end. We can take comfort in the fact that whatever disagreements we may have with gubernatorial front-runner Eliot Spitzer's substantive criminal justice policies, I believe as governor he can be called upon to support basic fairness, helping to level the playing field in the public defense system.

But we must do more than outlast the current administration.

Thirty-one months ago, assigned counsel fees were legislatively increased. The change was effective in 2004 with only 50 percent of the projected increase being borne by the State and promised for 2005. The effect of the increase, however, was to move county after county, fearful of higher costs, to join a race to the bottom. Established defender systems, the New York statutory scheme, and existing national standards were disregarded as local cost containment efforts propelled many counties to bypass quality in a search for cheaper delivery models. Three years after the assigned counsel fee bill, we face a fractured, chaotic system. In that chaos, or perhaps because of it, there is hope and opportunity. The defender community must seize this opportunity by coming together to speak with one voice so that changes sure to come in the months ahead constitute real reform.

Movement Toward Reform

During the last three years we have finally seen an increase in state financing of defense services through the establishment of the Indigent Legal Services Fund. The Fund's reporting, though not without problems, has begun to give the first statewide fiscal picture of defense services. During this same period three sets of standards have been promulgated—by the Chief Defenders and NYSDA, the New York State Bar Association, and NYSDA's Client Advisory Board. A bill establishing an Independent Public Defense Commission has been introduced in both houses of the Legislature.

More importantly, Chief Judge Kaye has commissioned a far-reaching inquiry into public defense services. Her Commission on the Future of Indigent Defense Services has held four public hearings, deliberated for a year, and commissioned its own statewide study by The Spangenberg Group. The Commission has reportedly given Judge Kaye a confidential preliminary report widely believed to contain recommendations for meaningful statewide reform of public defense services. If the testimony at each of the hearings—all of which were attended

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by NYSDA staff—and the written testimony provided to the Commission are any indication of the Commission's approach, it is reasonable to assume that defenders from across this state will welcome the Kaye Commission's final report slated for this spring.

If it remains true to evidence placed before the Commission, the ultimate report will reflect current activity by many groups calling for broad reform. Witnesses from across the state suggested the need for an oversight agency to monitor and govern public defense services. Many witnesses in each venue called specifically for the Independent Public Defense Commission. Uniform support was heard for standards, increased state funding, and political independence. Most importantly, a system providing client-centered representation was demanded by defender witnesses, many of whom fell on their sword to show that our current system is a sham.

Meanwhile, the State Bar Association's Special Committee to Ensure Quality of Mandated Representation and the New York State Association of Criminal Defense Lawyers are each exploring oversight mechanisms and state defender systems. It is likely that each would support an entity that coordinated and delivered defender services at the state level and no doubt would throw their respective clout behind a call for a commission empowered to promulgate standards, increase funding and deliver services.

The New York and American Civil Liberties Unions have called on New York State to begin the funding and administration of defense services. The Brennan Center and the National Association of Criminal Defense Lawyers have called for state involvement. The New York State Defenders Association, the Committee for an Independent Public Defense Commission, the Appellate Division Committee on Representation of the Poor, and the *New York Times*, have all called on the State to establish a commission or oversight body. From my vantage point, we—along with the Chief Defenders who voted last year to support the Independent Public Defense Commission—all seem to be in the same chapter, even if we are not on the exact same page.

Defense Unanimity Needed

If there is a threat to public defense reform, it is one that arises whenever an idea reaches critical mass. That threat is a resistance to changing what is known, familiar and established. Our review of the report of the Commission on the Future of Indigent Defense Services and evaluation of competing proposals for state defender systems and commissions may generate forthright internal disagreement. Careful consideration of the structure and design of system reform by defenders, motivated by a good faith desire to protect clients' rights, may produce

(continued on page 14)

2005 Legislative Review

by Al O'Connor*

[Ed. Note: The Legislative Review, summarizing New York legislative action relevant to criminal defense and related fields, appears annually in the REPORT. Copies of the feature dating from 1998 to the present can also be found on the NYSDA website, www.nysda.org, under Hot Topics—Legislation NY. As noted below, a summary of the 2005 amendments to the Rockefeller Drug Laws was published in the last REPORT.]

Penal Law

➤ **Chap. 643 (S.5880) (Authorizes resentencing of certain A-II felony drug offenders). Effective: October 29, 2005.**

For a detailed analysis, see “A Summary of the 2005 Rockefeller Drug Law Reform Legislation,” in the Aug.-Oct. Backup Center REPORT.

In the final days of the session, the Legislature agreed to expand last year’s Drug Law Reform Act (summarized in the Sept.-Dec. 2004 issue of the REPORT, Vol. XIX, No. 4) by authorizing discretionary resentencing of Class A-II drug offenders serving indeterminate sentences, who are more than 12 months from work release eligibility, and who “meet the eligibility requirements” for merit time [Correction Law § 803 (1)(d)]. The class reportedly includes approximately 500 inmates. The procedure is identical to the A-I resentencing process specified in the Drug Law Reform Act. Inmates have a right to 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 determinate sentence ranges are as follows:

<u>Class A-II Drug Offense</u>	<u>Determinate Sentence Range</u>
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)	

➤ **Chap. 39 (A.6285-B) (“Vasean’s Law”—Eliminates criminal negligence as element of vehicular assault and vehicular manslaughter). Effective: June 8, 2005 (by operation of L.2005, chap. 92).**

In response to the death of an 11 year-old, Vasean Alleyne, killed by a motorist who was intoxicated, but not otherwise at fault in the accident, the Legislature has eliminated criminal negligence as an element of vehicular

assault and vehicular manslaughter. Criminal liability for these offenses will now attach upon proof the defendant was intoxicated or impaired by drugs and “as a result of such intoxication or impairment” operated a vehicle in a manner that caused physical injury, serious physical injury or death to another person. The legislation establishes a rebuttable presumption concerning causation:

If it is established that the person operating such motor vehicle vessel, public vessel, snowmobile or all terrain vehicle caused such death while unlawfully intoxicated or impaired by the use of a drug, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment by the use of a drug, such person operated the motor vehicle, vessel, public vessel, snowmobile or all terrain vehicle in a manner that caused such [physical injury, serious physical injury or death].

NEW OFFENSES AND ENHANCED PENALTIES

➤ **Chap. 49 (S.4584) (Leaving the scene of an accident—increased penalties). Effective: June 17, 2005 (by operation of L.2005, chap. 108).**

Upgrades penalties for offenses relating to leaving the scene of an accident involving injury (VTL § 600) as follows:

Physical injury—failure to provide license, insurance card or identifying information—offense remains Class B misdemeanor. All other violations of the statute (*i.e.*, failure to stop)—Class A misdemeanor (from Class B) punishable by fine of \$500–\$1000 and imprisonment; subsequent offense, Class E felony (from Class A misdemeanor) punishable by fine of \$1000–\$2500.

Serious physical injury—Class E felony (except where violation involved mere failure to provide license, insurance card or identifying information), punishable by fine of \$1000–\$5000 and imprisonment.

Death—Class D felony (from E), punishable by fine of \$2000–\$5000 and imprisonment.

➤ **Chap. 294 (S.2440) (Riot in the first degree—prison incidents). Effective: November 1, 2005.**

Adds a new subdivision (2) to riot in the first degree (Penal Law § 240.06) pertaining to conduct in state correctional facilities.

A person is guilty of riot in the first degree when he:

(2) while in a correctional facility, as that term is defined in subdivision four of section two of the correction law, simultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing alarm within such correc-

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tional facility and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.

► **Chap. 450 (A.6723) (Compelling prostitution). Effective: November 1, 2005.**

Establishes the new crime of compelling prostitution:

Penal Law § 230.33

A person is guilty of compelling prostitution when, being twenty-one years of age or older, he or she knowingly advances prostitution by compelling a person less than sixteen years old, by force or intimidation, to engage in prostitution.

(Class B felony)

► **Chap. 394 (S.5920) (New offenses related to methamphetamine). Effective: October 1, 2005.**

Enacts new provisions relating to methamphetamine manufacturing:

Penal Law § 220.70 Criminal possession of methamphetamine manufacturing material in the second degree

A person is guilty of criminal possession of methamphetamine manufacturing material in the second degree when he or she possesses a precursor, a chemical reagent or a solvent with the intent to use or knowing another intends to use such precursor, chemical reagent, or solvent to unlawfully produce, prepare or manufacture methamphetamine.

(Class A misdemeanor)

Penal Law § 220.71 Criminal possession of methamphetamine manufacturing material in the first degree

A person is guilty of criminal possession of methamphetamine manufacturing material in the first degree when he or she commits the offense of criminal possession of methamphetamine manufacturing material in the second degree, as defined in section 220.70 of this article, and has previously been convicted within the preceding five years of criminal possession of methamphetamine manufacturing material in the second degree, as defined in section 220.70 of this article, or a violation of this section.

(Class E felony)

Penal Law § 220.72 Criminal possession of precursors of methamphetamine

A person is guilty of criminal possession of precursors of methamphetamine when he or she possesses at the same time a precursor and a solvent or chemical reagent, with intent to use or know-

ing that another intends to use each such precursor, solvent or chemical reagent to unlawfully manufacture methamphetamine.

(Class E felony)

Penal Law § 220.73 Unlawful manufacture of methamphetamine in the third degree

A person is guilty of unlawful manufacture of methamphetamine in the third degree when he or she possesses at the same time and location, with intent to use, or knowing that another intends to use each such product to unlawfully manufacture, prepare or produce methamphetamine:

1. two or more items of laboratory equipment and two or more precursors, chemical reagents or solvents in any combination; or
2. one item of laboratory equipment and three or more precursors, chemical reagents or solvents in any combination; or
3. a precursor:
 - (a) mixed together with a chemical reagent or solvent; or
 - (b) with two or more chemical reagents and/or solvents mixed together.

(Class D felony)

Penal Law § 220.74 Unlawful manufacture of methamphetamine in the second degree

A person is guilty of unlawful manufacture of methamphetamine in the second degree when he or she:

1. commits the offense of unlawful manufacture of methamphetamine in the third degree as defined in section 220.73 of this article in the presence of another person under the age of sixteen, provided, however, that the actor is at least five years older than such other person under the age of sixteen; or
2. commits the crime of unlawful manufacture of methamphetamine in the third degree as defined in section 220.73 of this article and has previously been convicted within the preceding five years of the offense of criminal possession of precursors of methamphetamine as defined in section 220.72 of this article, criminal possession of methamphetamine manufacturing material in the first degree as defined in section 220.71 of this article, unlawful disposal of methamphetamine laboratory material as defined in section 220.76 of this article, unlawful manufacture of methamphetamine in the third degree as defined in section 220.73 of this article, unlawful manufacture of methamphetamine in the second degree as defined in this section, or unlawful manufacture of metham-

phetamine in the first degree as defined in section 220.75 of this article.

(Class C felony)

Penal Law § 220.75 Unlawful manufacture of methamphetamine in the first degree

A person is guilty of unlawful manufacture of methamphetamine in the first degree when such person commits the crime of unlawful manufacture of methamphetamine in the second degree, as defined in subdivision one of section 220.74 of this article, after having previously been convicted within the preceding five years of unlawful manufacture of methamphetamine in the third degree, as defined in section 220.73, unlawful manufacture of methamphetamine in the second degree, as defined in section 220.74 of this article, or unlawful manufacture of methamphetamine in the first degree, as defined in this section.

(Class B felony)

Penal Law § 220.76 unlawful disposal of methamphetamine laboratory material

A person is guilty of unlawful disposal of methamphetamine laboratory material when, knowing that such actions are in furtherance of a methamphetamine operation, he or she knowingly disposes of, or possesses with intent to dispose of, hazardous or dangerous material under circumstances that create a substantial risk to human health or safety or a substantial danger to the environment.

(Class E felony)

The bill also adds a new subdivision 11 to Penal Law § 155.30 (grand larceny in the fourth degree) and a new subdivision 7 to Penal Law § 165.45 (criminal possession of stolen property in the fourth degree) when the property “consists of anhydrous ammonia or liquified ammonia gas and the actor intends to use, or knows another person intends to use [it] to manufacture metamphetamine.”

DEFINITIONS

For the purposes of sections 220.70, 220.71, 220.72, 220.73, 220.74, 220.75 and 220.76 of this article:

(a) “precursor” means ephedrine, pseudoephedrine, or any salt, isomer or salt of an isomer of such substances.

(b) “chemical reagent” means a chemical reagent that can be used in the manufacture, production or preparation of methamphetamine.

(c) “solvent” means a solvent that can be used in the manufacture, production or preparation of methamphetamine.

(d) “laboratory equipment” means any items, components or materials that can be used in the manufacture, preparation or production of methamphetamine.

(e) “hazardous or dangerous material” means any substance, or combination of substances, that results from or is used in the manufacture, preparation or production of methamphetamine which, because of its quantity, concentration, or physical or chemical characteristics, poses a substantial risk to human health or safety, or a substantial danger to the environment.

Sex Offenders

➤ **Chap. 544 (A.8894) (Prohibits certain sex offenders on probation or parole from entering “school grounds”). Effective: September 1, 2005.**

The 2000 Sexual Assault Reform Act prohibited under-supervision sex offenders whose victims were under the age of eighteen from knowingly entering school buildings, school playgrounds, athletic fields, and day care centers [*i.e.*, facilities “primarily used for the care and treatment of persons under the age of eighteen”] while minors are present [Penal Law § 65.10 (4-a), Executive Law § 259-c (14)]. The law allows offenders to do so if they are a registered student, employee, or have a family member enrolled in such a facility, provided they obtain the written authorization of the superintendent or chief administrator of the facility and the written permission of their parole or probation officer, or the sentencing court.

Chapter 544 bill extends the prohibition to all under-supervision Level 3 sex offenders, regardless of the age of their victim. The 2000 legislation defined “school grounds” by cross-referencing subparagraph (a) of Penal Law § 220.00 (14), effectively prohibiting entry within the real property boundary lines of schools. Chapter 544 strikes the reference to subparagraph (a) and now seemingly prohibits entry within 1000 feet of the real property boundary lines of a school, a restriction that (even if intended) will be nearly impossible to enforce in urban areas.

➤ **Chap. 680 (S.5753-A) (Sex Offender Registration Act—Lists of organizations with “vulnerable populations”). Effective: November 1, 2005.**

Amends Correction Law § 168 (l) to require law enforcement agencies to compile lists of organizations with “vulnerable populations” within their jurisdiction to facilitate the community notification provisions of Megan’s Law. The bill provides that “such listing shall include and not be limited to: superintendents of schools or chief school administrators, superintendents of parks, public and private libraries, public and private

school bus transportation companies, day care centers, nursery schools, pre-schools, neighborhood watch groups, community centers, civic associations, nursing homes, victim's advocacy groups and places of worship."

➤ **Chap. 684 (S.1168) (SORA hearings in absentia). Effective: October 4, 2005.**

Amends Correction Law § 168 to authorize courts to conduct sex offender risk classification hearings in absentia when an offender fails to appear "without sufficient excuse" at a scheduled proceeding.

➤ **Chap. 604 (S.2795-B) (Prohibits sex offenders from working on ice cream trucks). Effective: August 30, 2005.**

Adds a new section to the Sex Offender Registration Act:

Correction Law § 168-v

Prohibition of employment on motor vehicles engaged in retail sales of frozen deserts. No person required to maintain registration under this article (Sex Offender Registration Act) shall operate, be employed on or dispense goods for sale at retail on a motor vehicle engaged in retail sales of frozen deserts as defined in subdivision thirty-seven of section three hundred seventy-five of the vehicle and traffic law.

First offense—Class A misdemeanor; second and subsequent offenses—Class D felony

➤ **Chap. 252 (A.3156) (Sex Offenders barred from Prison Community Services Programs). Effective: July 19, 2005.**

Bars persons convicted of an Article 130 sex offense from participating in a prison community services program, which involves leaves up to 14 hours in a day to participate in religious services, volunteer work, or athletic events.

Criminal Procedure Law

➤ **Chap. 690 S.3566 (Grand Jury affidavit—credit/debit card account numbers). Effective: October 4, 2005.**

Adds a new subparagraph (g) to CPL § 190.30 (3) to allow the owner of a credit card or debit card to submit an affidavit to the grand jury concerning "that person's ownership of, or possessory right in, a credit card account number or debit card account number, and the defendant's lack of superior or equal right to use or possession thereof."

➤ **Chap. 457 (A.7561) (Credit card payments for monies payable to a court). Effective: August 9, 2005.**

In 2003 the Legislature expanded authority for credit card payment of fines, mandatory surcharges and crime victim's assistance fees (L.2003, chap. 537). This bill

authorizes credit card payment of "other monies payable to a court" (e.g., DNA databank fees, sex offender registration fees), and extends the sunset provision of the credit card program to August 9, 2010.

➤ **Chap. (S.877-a) (United States Probation Officers). Effective: May 24, 2005.**

Amends CPL § 2.15 (10) to replace the antiquated term "Federal parole officers" with "United States probation officers."

➤ **Chap.685 (S.1628-b) (Powers of Uniformed Court Officers). Effective: October 4, 2005.**

Adds CPL § 2.20 (1)(j) to provide that "uniformed court officers shall have the power to issue traffic summonses and complaints for parking, standing or stopping violations pursuant to the vehicle and traffic law whenever acting pursuant to their special duties."

Miscellaneous

➤ **Chap. 22 (A.6714) (FOIL—Reasonable time limits for disclosure of agency records). Effective: May 5, 2005.**

Amends the Freedom of Information Law (Public Officers Law § 89) to require agencies to provide access to records within a reasonable period of time of the request. The amendment specifies that "if an agency determines to grant a request in whole or in part, and if circumstances prevent disclosure . . . within twenty business days from the date of acknowledgement of receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part." The failure of an agency to comply with this new provision, or with the time requirements for processing an administrative appeal from the denial of a request, "shall constitute a denial."

➤ **Chap. 106—(S.5110-a) (Ticket scalping—maximum price restriction lifted for large venues). Effective: June 14, 2005.**

The Arts and Cultural Affairs Law restricts the resale price of tickets to no more than the established price plus five dollars or twenty percent of the established price, whichever is greater. This law, among other changes, eliminates the "maximum price" restriction in venues of more than 6,000 seats, in an effort designed to "allow for free-market economics to take hold and ultimately increase the supply and reduce the cost of tickets."

➤ **Chap. 607 (S.2986) (Justice Courts—Jefferson County). Effective: August 30, 2005.**

Adds a new subdivision 10 to Uniform Justice Court Act § 106 to provide that a “justice of a local criminal court situated in the county of Jefferson may preside . . . anywhere in the county of Jefferson for the limited purposes of arraignments and/or appearance proceedings pursuant to a bench warrant provided such arraignments and/or proceedings are held in a courtroom whenever possible or other suitable facility open to the public and provided further, that any municipality providing such facilities shall have consented to such usage.”

➤ **Chap. 377 (S.5196) (Crime Victims’ Compensation—Relocation expenses). Effective: August 2, 2005.**

Amends Executive Law § 621 to authorize payments to crime victims for relocation expenses.

➤ **Chap. 258 (A.4953-a) (Genesee County Jail). Effective: July 19, 2005.**

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

➤ **Chap. 408 (A.6717) (Crime Victim’s Compensation – Pre-existing conditions). Effective: August 8, 2005.**

Amends Executive Law § 626 (1) to make expenses related to the exacerbation of a pre-existing condition or disability resulting from a crime or causally related to a crime compensable under the Crime Victim’s Compensation Act.

➤ **Chap. 84 (S.23) (Niagara County Jail). Effective: June 7, 2005.**

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

➤ **Chap. 457 (A.1011-a) (Cruelty to animals a printable offense). Effective: November 1, 2005.**

Makes cruelty to animals (Agriculture and Markets Law § 353) a fingerprintable offense under CPL § 160.10 (1)(b).

Sunset Clause Expired/Extended

➤ **Sunset of L.1989, chap. 79—Local Conditional Release Commissions**

In 1989, the Legislature established local conditional release commissions to rule on applications for early release by inmates serving definite sentences in local jails, who could be discretionarily released to probation supervision after serving at least 60 days (*see* Correction Law Article 12 and Penal Law § 70.40). These local com-

missions replaced the Board of Parole, which had previously ruled on conditional release applications and overseen the released inmate’s supervision in the community. The legislation had an original sunset date of May 1, 1990. It has been repeatedly extended, most recently until September 1, 2005.

In the summer of 2004, former State Senator Guy Vellella was granted conditional release from Riker’s Island after serving 60 days of a one-year sentence for conspiracy in the fourth degree. Vellella’s early release fueled charges of political favoritism, and a subsequent investigation revealed numerous irregularities in the processing of conditional release applications by the New York City local conditional release commission. Mayor Bloomberg replaced the commissioners, and a newly appointed commission rescinded Vellella’s release and ordered him back to jail, an act that was later upheld by the Appellate Division. *See Vellella v. NYC Local Conditional Release Com.*, 13 AD2d 201 (1st Dept 2004).

Despite efforts by the Assembly Corrections Committee to salvage the local conditional release process, the Vellella scandal sealed its fate as the Senate refused to extend the sunset provision. Conditional release from a definite sentence will continue to be available (at least theoretically) because the statute now reverts to its pre-1989 status. After September 1st, the Board of Parole will resume its statutory responsibility to determine conditional release applications, and the Division of Parole will regain its supervisory authority over those local inmates (if any) who are released to supervision by the Board from local correctional facilities.

➤ **Chap. 60, part E (S.1820) (Sunset Extended—VTL—suspension of driver’s license for failure to pay child support). Sunset extended to June 30, 2007.**

Legislation was enacted in 1995 to mandate suspension of a parent’s driver’s license for failure to pay four or more months of child support (L.1995, chap. 81). The sunset clause of this law has been extended from June 30, 2005 to June 30, 2007.

➤ **Chap. 56, part C (Family Protection and Domestic Violence Intervention Act of 1994). Sunset Clause Extended to September 1, 2007.**

Extends the sunset clause of the Family Protection and Domestic Violence Intervention Act of 1994 (*e.g.*, mandatory arrest) from September 1, 2005 to September 1, 2007.

➤ **Chap. 60, part E (Sunset Extended—Driver’s License Suspension after Drug Conviction). Sunset Extended to October 1, 2007.**

In 1993 the Legislature passed a law requiring a 6-month suspension of the driver's license, or a 6-month delay in eligibility for a driver's license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, chap. 533). The sunset clause of this legislation has been extended from October 1, 2005 to October 1, 2007.

➤ **Chap. 577 (S.5280) (Sunset Extended—Closed-Circuit testimony of child witnesses). Sunset extended to September 1, 2007.**

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child witnesses from September 1, 2005 to September 1, 2007.

➤ **Chapter 56 (A.6840) (Omnibus Sunset Extender). Extends the sunset clauses of the following programs and laws:**

Jenna's Law (1998) and Sentencing Reform Act (1995): (Sept. 1, 2009)
Correction Law Article 26-A—SHOCK Incarceration Program (Sept. 1, 2007)
Correction Law § 805—Earned Eligibility Program (Sept. 1, 2007)
Correction Law Article 26 (§ 851 et seq)—Temporary Release Programs (Sept. 1, 2007)
CPLR § 1101 (f) – Fees for inmate filings (Sept. 1, 2007)
Penal Law §§ 205.16, 205.17, 205.18, 205.19—Absconding offenses (Sept. 1, 2007)
Penal Law § 60.35 – No waiver of mandatory surcharge (Sept. 1, 2007)
Executive Law § 259-r—Medical Parole (Sept. 1, 2007)
Correction Law § 189—\$1 weekly incarceration fee (Sept. 1, 2007)
Correction Law § 2 (18)—ASAT (Sept. 1, 2007)
Executive Law § 259-a (9)—Parole supervision fee (Sept. 1, 2007)
VTL §1809—Mandatory Surcharges (Sept. 1, 2007)
VTL §1809—Ignition Interlock Program (Sept. 1, 2007) ☺

Immigration Practice Tips

(continued from page 7)

crime even in some situations where a state or local court has vacated or reversed the conviction.

The bill would amend the immigration laws to allow the federal government to ignore certain vacatur or reversals of a criminal conviction by a state or local court, including vacatur or reversals based on unlawful failure to advise the immigrant of the immigration consequences of a guilty plea. [§ 613]

Due to these and other potential changes in deportation laws relating to accusations of criminal conduct,

defense practitioners advising non-citizens currently accused of crimes and considering guilty pleas may wish to counsel that the noncitizen or noncitizen's lawyer consider making a statement on the record during any plea allocution indicating that the plea is based on the defendant's understanding of current immigration law. This may give the defendant a basis for later moving to withdraw or vacate the plea should HR 4437's crime-related provisions become law in 2006.

In the New York delegation, those voting in favor of H.R. 4437 were: King (R-03), Fossella (R-13), Kelly (R-19), Sweeney (R-20), McHugh (R-23), Boehlert (R-24), Walsh (R-25), Reynolds (R-26), Higgins (D-27), Kuhl (R-29). Those voting against the bill were Bishop (D-01), Israel (D-02), Ackerman (D-05), Meeks (D-06), Crowley (D-07), Nadler (D-08), Weiner (D-09), Towns (D-10), Owens (D-11), Velazquez (D-12), Maloney (D-14), Rangel (D-15), Serrano (D-16), Engel (D-17), Lowey (D-18), McNulty (D-21), Hinchey (D-22), Slaughter (D-28). Not voting was McCarthy (D-04). H.R. 4437 now goes to the Senate, which is expected to take up consideration of similar measures in early 2006. ☺

From My Vantage Point

(continued from page 8)

alternate views within the defender community. While full airing of any divergent views is healthy and productive, nitpicking and entanglement in trifling details is not and will certainly stall any reform. As we deliberate on the particulars of reform measures, we must not, as a community, be distracted or diverted from our primary goal—statewide reform. This call, made before, has never been more urgent.

There is a need for unity in 2006.

Our clients—those we represent inadequately today because of resource deprivation and those we will represent tomorrow in a reformed system—have the right to demand our allegiance to change. The *status quo* is not acceptable. The current system is broken. The New York public defense system must be replaced.

In many struggles over the years, I have been warned that the "perfect" must not become enemy of the "good." That advice is worth remembering in 2006 as we go forward together. My wish for the New Year is that we live out our common commitment to our clients. We have reached critical mass in New York; there is consensus for reform. Let us not bicker away our chances, stumbling on details. Let us not allow our differences to be characterized by our opponents in such a way that we are separated from our cause. Let us not focus on trees while the enemies of our clients clear-cut the forest.

Let us find the way to speak with one voice as together we transform our public defense system. ☺

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

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

United States Supreme Court

Death Penalty (Penalty Phase) DEA; 100(120)

**Schriro v Smith, 546 US __, 126 Sct 7,
163 LEd2d 6 (2005)**

An Arizona jury convicted the respondent of capital murder. At the sentencing hearing, he presented mitigation evidence of low intelligence but was sentenced to death. Following a direct appeal and state post-conviction proceedings, the respondent filed a federal habeas corpus petition claiming that his mental retardation made him ineligible for the death penalty. After denial of that writ and further proceedings, and the decision in *Atkins v Virginia*, 536 US 304 (2002), the 9th Circuit directed the respondent to begin a state court action to determine if Arizona was prohibited from executing him based on his claim of mental retardation.

Holding: The federal circuit court could not require a state trial court to conduct a jury trial to determine if the respondent was mentally retarded. The enforcement mechanism of the *Atkins* prohibition against executing mentally retarded defendants was left to the states. 536 US 304, 317. Arizona had adopted its own measures for resolving such claims, and was entitled to a chance to apply them before being preempted by a federal court. The constitutionality of the state's procedures can be contested at a future time. Judgment vacated and remanded.

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

Jails (Libraries) JAL; 212(25)

**Kane v Espitia, 546 US __, 126 Sct 407,
163 LEd2d 10 (2005)**

The respondent, representing himself in state court, was denied access to a law library before trial and only allowed four hours of access before closing arguments. His claim that restricted library access violated his 6th Amendment rights was rejected in state appeals and federal district court habeas corpus proceedings. The 9th Circuit reversed, finding that denial of pretrial law library access violated the right to self-representation.

Holding: *Faretta v California* (422 US 806 [1975]) did not clearly establish a pro se defendant's right to pretrial

law library access. Federal habeas relief is not available absent a state court decision "contrary to, or involv[ing] an unreasonable application of clearly established federal law, as determined by the Supreme Court . . ." 28 USC 2254(d)(1). While *Faretta* recognized a 6th Amendment right to self-representation, it was silent on what specific legal assistance a state had to provide to a pro se defendant. A split of authority exists as to the existence of a right to law library access for pro se defendants. The respondent's claim did not meet the requirements of federal habeas jurisdiction. Judgment reversed, matter remanded.

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

Jurisdiction (General) JSD; 227(3)

**Eberhart v United States, 546 US __, 126 Sct 403,
163 LEd2d 14 (2005)**

After conviction in federal court and on the last day to file post-trial motions, the petitioner moved for judgment of acquittal or, in the alternative, for a new trial based on a flawed transcript given to the jury. Almost six months later, he filed a supplemental memorandum with two new grounds: admission of potential hearsay testimony and the judge's failure to give a buyer-seller jury instruction. The government opposed the supplement on its merits, not untimeliness. A new trial was granted based on the cumulative impact of all three errors. On appeal, the government challenged the untimeliness of the supplemental memorandum. The new trial order was reversed for lack of jurisdiction.

Holding: The seven-day time limit for a new trial motion under Federal Rules of Criminal Procedure 33 and 45 is a claim-processing rule, not jurisdictional. See *Kontrick v Ryan*, 540 US 443, 456 (2004). The government's failure to raise a timeliness objection before the motion was decided at the trial level forfeited the defense. See *Scarborough v Principi*, 541 US 401, 413-414 (2004). The government's objection, made for the first time on appeal, must be rejected and the merits addressed. Judgment reversed and remanded.

Habeas Corpus (Federal) HAB; 182.5(15)

Bradshaw v Richey, No. 05-101, 11/28/2005, 546 US __

Evidence showed that the respondent set fire to his neighbor's apartment to kill his former girlfriend and her new boyfriend who lived below. The intended victims survived but the neighbor's 2-year-old child died. The respondent's conviction of aggravated murder committed in the course of a felony based on a theory of transferred intent and his sentence of death were affirmed. State post-

US Supreme Court *continued*

conviction relief was denied and a federal habeas petition was rejected in district court. The 6th Circuit reversed, finding transferred intent was not a permissible theory under state law and the evidence of intent was constitutionally insufficient, and that trial counsel was ineffective in dealing with expert assistance as to the arson evidence.

Holding: The state supreme court’s explanation of state law, including dicta issued on direct appeal, bound the federal court. *See Estelle v McGuire*, 502 US 62, 67-68 (1991). At the time of the offense, Ohio law provided adequate notice of the transferred intent doctrine: “[n]o person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another.” Ohio Rev Code Ann. § 2903.01(D). There was sufficient evidence to support a conviction for aggravated felony murder where evidence of intent to kill was proven directly. *See Ohio Rev Code Ann § 2903.01(B)*.

Denial of the respondent’s *Strickland* claim (*see Strickland v Washington*, 466 U.S. 668 [1984]) by the state court had not been unreasonable. The 6th Circuit improperly relied on evidence not before the state courts. *See 28 USC 2254(e)(2)*. Judgment vacated and remanded.

New York State Court of Appeals

Search and Seizure (Appellate Review) (Automobiles and Other Vehicles [Investigative Searches]) (Consent [Coercion and Other Illegal Conduct]) SEA; 335(5) (15[k]) (20[f])

People v Dunbar, No. 134, 10/20/2005

Holding: The trial court suppressed evidence recovered from the defendant’s car, determining that the police did not have a founded suspicion of criminality to justify extensive questioning of the defendant leading to his granting permission for a search of his person and car. *See People v Hollman*, 79 NY2d 181, 191-192. The extended questioning might have caused the defendant to believe that he was a suspect, resulting in giving the police unjustified authorization to conduct their search. The record supports the court’s finding, affirmed by the Appellate Division, ending review. Order affirmed.

Search and Seizure (Appellate Review) (Automobiles and Other Vehicles [Investigative Searches]) (Consent [Coercion and Other Illegal Conduct]) SEA; 335(5) (15[k]) (20[f])

People v Gomez, No. 133, 10/25/2005

Police stopped the defendant for driving a car with

tinted windows. VTL 375 (12-a) (b). One officer asked whether he had weapons or drugs, the other inspected the undercarriage and noticed fresh undercoating around the gas tank. The registration card appeared to have been tampered with. The defendant consented to a search of his car. The police pulled up glued carpeting in the rear seat and discovered a cut in the floorboard, which was pried open, revealing seven bags of cocaine. The defendant’s motion to suppress was denied; his conviction of possessing drugs was affirmed.

Holding: The officers’ destructive search of the defendant’s car exceeded the scope of his consent, which under the 4th Amendment is measured by “objective reasonableness.” *See Florida v Jimeno*, 500 US 248, 251 (1991). A search would normally be understood to include any readily opened container in the vehicle, such as a paper bag, but not one that had to be opened with force. *See US v Snow*, 44 F3d 133, 136 (1995). By removing attached carpeting and altering sheet metal with a crowbar, the police exceeded common understanding of a search—specific consent or probable cause was required. The Appellate Division did not determine whether there was probable cause. General consent to search does not include impairing the “structural integrity of a vehicle.” The narrower question of whether pulling up carpet and twisting a knife in the floorboard opening were by themselves excessive need not be reached. Order reversed, matter remanded.

Dissent: [Read, J] A bright-line ruling that destructive searches are per se unreasonable and outside scope of consent is unjustified. *See Ohio v Robinette*, 519 US 33, 39 (1996). It was objectively reasonable under the totality of the circumstances to search any area of the car where drugs might be secreted. A reasonable person would expect force to be used to open a hidden compartment.

Death Penalty (General) (States [New York]) DEA; 100(80) (155[gg])

Homicide (Murder [Instructions]) HMC; 185(40[m])

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

People v Shulman, No. 130, 10/25/2005

The defendant was convicted in Suffolk County of first-degree murder for the serial killings of three women. The jury returned a death sentence. CPL 400.27[1].

Holding: New York’s death penalty having been declared invalid, *People v LaValle* (3 NY3d 88), the defendant’s sentence must be set aside and other death-penalty issues need not be addressed.

Considering all the facts, police had probable cause to arrest the defendant. Trace evidence connected him with the bodies of two of the decedents, and the patterns of their deaths (including blunt head trauma and dismem-

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berment) were similar, making it more probable than not that he committed the crimes. *See* CPL 140.10[1][b]; *People v Bigelow*, 66 NY2d 417, 423.

The court rejected several defense challenges for cause during jury selection. *See* CPL 270.20(1)(b) CPL 270.20(1)(c). Juror SC was a Rikers Island Corrections Officer who described life without parole as “3 hots and a cot, free medical, \$50,000 a year wasted.” On voir dire, he claimed the remark was sarcastic and assured the judge that he could be fair and impartial. The defendant cited a lack of candor and a cavalier attitude. The court did not abuse its discretion by finding SC’s answers truthful and that the juror could be fair and impartial. *See People v Johnson*, 94 NY2d 600, 613.

Juror SR, asked if she could ignore opinions formed from media accounts of the case, stated “I think I can” or that she would “try” to disregard those opinions. This wording did not automatically make the statements equivocal. Her other answers, including that she would want a juror with her state of mind if she or a loved one were on trial, demonstrated an ability to be fair and impartial. *See People v Chambers*, 97 NY2d 417, 419.

The defense claimed juror TV was unfit for service because he was unwilling to follow instructions, having read a newspaper account about jury selection in the case despite a court admonition. *See* CPL 270.20(1)(b). The judge found that TV misunderstood the instructions, thinking only reading about the facts of the case was barred. TV agreed to comply with the court’s instructions in future and believed he could be fair and impartial.

The defense challenged juror JC because his wife’s brother was a former Suffolk County prosecutor. *See* CPL 270.20(1)(c). The court held that the relationship was tangential—the brother-in-law attended one investigation meeting regarding the defendant before his arrest, but resigned and moved out-of-state months before jury selection. He was not “counsel for the people” within the meaning of the statute.

The court allowed jurors to read newspapers, and warned them against reading beyond the headlines of articles about the case. A headline, “Link to Two More Victims,” appeared after the testimony of the prosecution’s forensic serologist about blood matching the decedents. Readers might have believed the article referred to trial testimony, though it concerned two Westchester decedents. The court rejected a defense request to ask the jurors whether they had seen the headline or heard about the article’s contents, having found the headline “somewhat neutral.” Since the article was not “poisonous,” the three-part analysis for evaluating mid-trial publicity outlined in *US v McDonough* (56 F3d 381 [2d Cir 1995]) was not appropriate. The court did not abuse its discretion

under New York law by rejecting the defendant’s request to canvass the jury about the article. *See People v Moore*, 42 NY2d 421, 433-434. The prosecutor’s argument that bringing the article to the jurors’ attention might foster speculation supported the judge’s decision.

The court denied the defendant’s request to instruct the jury to disregard post-mortem actions, the method of dismembering and disposing of the decedents’ bodies, in assessing whether the murders were committed in a “similar fashion.” *See* Penal Law 125.27(1)(a)(xi). The defendant claimed that the “similar fashion” language related solely to the killing acts underlying the first-degree murder charge, not to the entirety of each “separate transaction.” The “similar fashion” phrase of the serial murder statute related to “separate criminal transactions.” *See* McKinney’s Cons Laws of NY, Book I, Statutes § 254. Similarity of conduct was not limited to the killing act alone, and postmortem actions were relevant. No comprehensive definition of “similarity” has been adopted. *See People v Mateo*, 93 NY2d 327, 333.

Judgment modified by vacating death sentence and remanded to county court for resentencing in accordance with CPL 470.30(5)(c) and Penal Law 60.06 and 70.00(5).

Evidence (Sufficiency)

EVI; 155(130)

Motor Vehicles (Reckless Driving)

MVH; 260(20)

Primeau v Town of Amherst, No. 192, 10/27/2005

Holding: “The Appellate Division correctly concluded that no ‘valid line of reasoning and permissible inferences [exist] which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial.’ The record is devoid of evidence supporting the verdict finding defendant driver guilty of operating a snowplow recklessly within the meaning of Vehicle and Traffic Law § 1104(e).” *See Riley v County of Broome*, 95 NY2d 455, 465-466. Order affirmed.

Counsel (Competence/Effective Assistance/Adequacy)

COU; 95(15)

People v Turner, No. 163, 11/17/2005

Suspected of a 1982 murder, the defendant disappeared until his arrest in 1998. At trial, defense counsel sought to avoid a compromise verdict, opposing a prosecution request for a jury instruction on the lesser-included offense of manslaughter. The instruction was given. The jury acquitted the defendant on murder and convicted him of manslaughter. The conviction was affirmed on appeal, in which counsel raised only a *Rosario* issue. A subsequent claim of ineffectiveness of appellate counsel was denied. A federal habeas petition was rejected. The possibility of an ineffectiveness claim against the appel-

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late lawyer for not arguing trial counsel’s ineffectiveness was left open. Another coram nobis filed in the Appellate Division was granted.

Holding: Appellate counsel was ineffective for failing to raise ineffectiveness of trial counsel who did not challenge the manslaughter conviction as time barred. The federal standard for ineffectiveness requires that counsel’s representation fall below an objective standard of reasonableness and a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different. *Strickland v Washington*, 466 US 668 (1984). Both the federal standard and New York’s modified version of the second part of the *Strickland* test permit a single failing in an otherwise competent performance to be found so “egregious and prejudicial” as to deprive a defendant of the constitutional right to counsel. *See People v Caban*, 5 NY3d 143, 155-156; *Murray v Carrier*, 477 US 478, 496 (1986). The statute of limitations defense was clear-cut and completely dispositive; there was no reasonable explanation for overlooking it. Manslaughter had a five-year statute of limitations. CPL 30.10 [2] [b], [4] [a]. The defendant was arrested 16 years after the crime. Even with maximum tolling the case was brought six years too late. Order affirmed.

Burglary (Elements) (Evidence) BUR; 65(15) (20)

People v Lewis, No. 156, 11/21/2005

The complainant obtained two orders of protection requiring the defendant to stay away from her and her home. After his last arrest, she told him to leave, took back her keys, and left. In her absence, the defendant entered her apartment without her knowledge. When she returned, the defendant verbally abused her and kicked her. Her pocketbook and some papers were found on the ground outside her apartment window. At trial for burglary and criminal contempt, the court rejected defense counsel’s request to charge the jury that burglary required evidence of intent to commit a crime other than trespass (or violating an order or protection). The jury convicted the defendant of contempt, but asked if criminal contempt could be the basis for the intent to commit a crime therein element of burglary. The court answered affirmatively based on language provided by defense counsel. The burglary conviction was affirmed on appeal.

Holding: Defense counsel’s proffered jury instruction waived his earlier objection to contempt as a basis for burglary. The do-not-enter provision of an order of protection alone was not a predicate for burglary. However, evidence at trial showed that the defendant intended to commit crimes in violation of the order of protection other than trespass. *See People v Mackey*, 49 NY2d 274, 278-281.

Evidence of intent to a commit a crime, not a specific crime, was sufficient. *See People v Mahboubian*, 74 NY2d 174, 193. Order affirmed.

Dissent: [Smith, RS, JJ] Entering a dwelling in violation of an order of protection alone did not support burglary. The defense attempt to ameliorate the erroneous instruction with better language did not waive his original objection. *See People v Mezon*, 80 NY2d 155, 160-161. The better approach would have been for counsel to reiterate his objection and then offer the proposed instruction.

Defenses (General) DEF; 105(31)

Robbery (Defenses) ROB; 330(5)

People v Green, No. 153, 11/21/2005

The defendant was charged with robbery and possession of stolen property for taking a CD player from the complainant. At trial, the defendant claimed that he approached the complainant because the complainant was carrying a disc player that resembled one stolen from the defendant earlier. The court rejected the defendant’s request to instruct the jury on the claim-of-right defense. His conviction was affirmed on appeal.

Holding: The good-faith claim-of-right defense available on charges of larceny by trespass or embezzlement may not be offered for crimes involving the use of force. *See Penal Law 155.15 (1)*. In *People v Reid* (69 NY2d 469, 475) a similar defense was rejected; the *Reid* defendant had sought to retrieve money owed to him. Here, the defendant claimed the right to specific property, not fungible money. Although a claim-of-right defense might be persuasive with the jury, an instruction on this point was not required. The rightfulness of ownership was an element of the offense and part of the standard jury instruction. There was no legislative authorization for self-help remedies by means of force for robbery or larceny—unlike the justification defense. *See Penal Law 35.15*.

The court’s refusal to charge petit larceny became irrelevant after the jury’s verdict on second-degree robbery, since the jury had already rejected the third-degree robbery option and any remote lesser-included offenses. Order affirmed.

Narcotics (Sale) NAR; 265(59)

People v Robbins, No. 162, 11/22/2005

The defendant was charged with selling drugs to an undercover police officer near school grounds. Penal Law 220.44 (2). The location of the sale was less than 1000 feet from a grade school when measured in a straight line. Due to interceding buildings, the walking distance between these two points exceeded 1000 feet. Defense counsel

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claimed that the proper calculation was by the pedestrian method, putting the sale outside the statutory limit. Conviction affirmed on appeal.

Holding: The purpose of the statute was to create a drug-free buffer zone by extending the boundaries of schools to encompass a thousand feet from their boundary lines to include public areas within that circle. Penal Law 220.00[14]. The straight-line method was intended by the legislature in enacting the law and is used in other federal and state jurisdictions. Relying on a pedestrian method would introduce uncertainty in interpretation of the statute. *US v Watson*, 887 F2d 980, 980-981 (9th Cir 1989). It would also allow drug dealers to frustrate the law by setting up obstacles to the footpath approach to the school. *US v Clavis*, 956 F2d 1079, 1088 (11th Cir 1992) *cert den* 504 US 990. Judgment affirmed.

Jurisdiction (General)**JSD; 227(3)****People v Carvajal, No. 154, 11/22/2005**

The defendant was charged with conspiracy to smuggle cocaine from San Francisco, CA to Queens, NY and first-degree possession of a controlled substance. He oversaw the West Coast portion of an operation that involved hiding the drugs inside cars driven cross-country. A task force intercepted phone calls among the defendants and discovered the stash house in California, arresting the defendant there. No objections were made to New York's territorial jurisdiction. The conviction was affirmed on appeal.

Holding: New York State had jurisdiction to adjudicate drug possession and conspiracy charges where the defendant was found to possess drugs in California to be shipped to New York. The defense waived the court's failure to give a jury instruction on this issue. *See People v Gray*, 86 NY2d 10, 22. The defendant did not forfeit review of the territorial issue, which goes to the court's power to hear the case. *See People v Greenberg*, 89 NY2d 553. The statute (CPL 20.20) requires some alleged conduct or a consequence of that conduct to have occurred in the state. Jurisdiction over a possessory offense was established under CPL 20.20(1)(c). There was sufficient evidence to show the defendant's participation in a conspiracy rooted in New York. He was in New York for some parts of the operation, and shipped drugs here. His telephone calls to New York from California were considered conduct within each state. *See CPL 20.60 (1); People v Giordano*, 87 NY2d 441, 449. Order affirmed.

Dissent: [Smith, GB, JJ] The state and federal constitutions prohibited convictions based on constructive possession of drugs in another state. US Const art III, sec 2; 6th amend; NY Const art I, sec 2. There was no completed

crime of possession committed within the borders of New York State. *See People v Kassebaum*, 95 NY2d 611.

Accomplices (Accessories)**ACC; 10(5)****Matter of Kadeem W, No. 161, 11/21/2005**

Evidence was legally sufficient to hold the respondent responsible as an accessory for another's conduct in possessing a weapon and menacing a security guard with an air gun. The Appellate Division erred in reversing Family Court's determination for legal insufficiency. Judgment reversed and remanded.

Dissent: [Smith, GB, JJ] The respondent, along with two friends, had taunted a housing authority peace officer. One companion pulled out a concealed air gun. The family court found the respondent guilty of possession and the other offenses. After viewing the evidence in the light most favorable to the presentment agency, any rational trier of fact would not have found the acts alleged beyond a reasonable doubt. *See People v Contes*, 60 NY2d 620, 621. No evidence showed that the respondent knew the other boy had the air gun, that he intended to use it unlawfully or act recklessly or in a threatening way. *See Penal Law 20.00; People v Hafeez*, 100 NY2d 253, 258.

Counsel (Competence/Effective Assistance/Adequacy)**COU; 95(15)****People v Jacobs, No. 180, 12/15/2005**

In a felony bench trial, the defendant was represented by two people from a public defense office. He was convicted of grand larceny, and acquitted on other counts. Later it was discovered that one person representing the defendant was not a licensed attorney, having graduated from an accredited law school and passed the bar exam but failed to appear before the Committee on Character and Fitness. This was unknown to co-counsel. The defendant's conviction was affirmed on appeal.

Holding: Participation by a non-attorney as co-counsel with an admitted lawyer did not require per se reversal of the client's conviction absent a showing of prejudice. Effective assistance of counsel required at a minimum a licensed attorney. US Const Amend VI; NY Const, art I, § 6; *People v Felder*, 47 NY2d 287, 291. The presence of a licensed lawyer as lead counsel, who handled pretrial motions, cross-examination and closing arguments, and was present during co-counsel's actions, was sufficient to protect the defendant's rights. *See US v Novak*, 903 F2d 883, 890-891 (2nd Cir 1990). The defendant did not identify any errors attributed to the nonlawyer. Order affirmed.

Dissent: [Smith GB, JJ] The defendant was denied the right to counsel because a nonlawyer significantly participated in his trial—opening, presenting the defense case, and making a motion to dismiss. The licensed attorney

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was unaware of the unadmitted status of co-counsel and therefore not in a position to safeguard the defendant's rights at critical stages.

Burglary (Elements) (Evidence) BUR; 65(15) (20)

People v Devonish, No. 196, 12/15/2005

The defendant was convicted of third-degree burglary.

Holding: Evidence that the defendant entered a church and was later found inside with burglar's tools did not prove intent to commit a crime before going into the building. *See People v Scarborough*, 49 NY2d 364, 373. At trial, a general contractor for the church testified that he stored his tools in the basement of the building; one of them was discovered in the defendant's possession. Viewing the evidence in the light most favorable to defendant, *see People v Discala* (45 NY2d 38, 42), the jury was entitled to infer that the defendant did not bring the tools with him to the church. The trial court also erred by not giving a charge for the lesser-included offense of second-degree criminal trespass. *See CPL 300.50*. Order reversed and remanded for new trial.

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

People v Buonincontri, No. 198 SSM 28, 12/15/2005

Holding: The court advised the defendant of her right to be present during questioning of a prospective juror about the ability to be fair and impartial. The defendant did not present an adequate record to overcome the presumption of regularity. *People v Velasquez*, 1 NY3d 44, 48. Order affirmed.

Juries and Jury Trials (Challenges) JRY; 225(10) (30) (50) (Discharge) (Qualifications)

People v Hicks, No. 183, 12/20/2005

During deliberations in a trial for rape and related offenses, the foreperson informed the judge that a juror had revealed that her boyfriend had forcibly raped her. The court questioned the juror, who denied she had been the victim of a rape, and allowed her to continue her service. The defendant's motion for mistrial was denied. His conviction of attempted rape and attempted sodomy was affirmed on appeal.

Holding: The juror was not grossly unqualified to serve since she unequivocally stated that she had never been the victim of a crime or had been raped. She told the trial judge that she could reach an impartial verdict. Her responses to the court's inquiry did not establish that she had lied or given misleading answers during voir dire.

Defense counsel did not preserve challenges to the scope or intensity of the court's inquiry. *See People v Buford*, 69 NY2d 290. There were no objections to the sufficiency of the questions, no additional areas of inquiry were suggested, and the defense did not ask for other jurors to be questioned. *See CPL 470.05 [2]; People v Kelly*, 5 NY3d 116, 120 n 2. Order affirmed.

Evidence (Hearsay) EVI; 155(75)

Witnesses (Confrontation of Witnesses) WIT; 390(7)

People v Goldstein, No. 155, 12/20/2005

During the defendant's second trial for pushing the decedent in front of a moving subway train, the prosecution's forensic psychiatrist testified that the defendant used schizophrenia to minimize his misconduct and avoid punishment. Her opinion relied on clinical records and interviews with third parties. Over defense objection, she testified about statements made by the interviewees. One account concerned the defendant's assault on a woman at Waldbaum's, for which he used his mental illness as an excuse. Another interview revealed that shortly before the homicide a woman who resembled the decedent and worked in a strip club had teased the defendant, establishing he was being sexually frustrated. His landlady remembered that the defendant had once been lying on his bed exposed when her maid went to his room, showing that he was sexually inappropriate with women. His roommate described him as a little weird, immature, ambitious, and not disrespectful or violent—a relatively mild schizophrenic. The defendant's murder conviction was affirmed on appeal.

Holding: The prosecution's forensic psychiatrist was entitled to give an opinion based in part on interviews with third parties, a practice accepted in the profession as reliable. *See People v Sugden*, 35 NY2d 453, 460-461. While the opinion was admissible, the hearsay statements of interviewees were not. Under the confrontation clause, testimonial hearsay could not be admitted, even if reliable, without an opportunity to cross-examine the source. *See US Const amend VI; NY Const art I § 6; Crawford v Washington*, 541 US 36 (2004). The interviewees' statements were hearsay, made out of court, and offered for the truth of the matter asserted. *See People v Romero*, 78 NY2d 355, 361. The interviewees responded to questions from a state agent who was preparing for trial; their statements were testimonial. Admission was not harmless. The prosecution's case for sanity, minimizing the defendant's mental illness, relied on points raised by the interviews. Order reversed and remanded for new trial.

Dissent: [Read, J] The four hearsay comments alone did not cause the jurors to reject the defendant's affirmative defense. *People v Schaeffer*, 56 NY2d 448, 455.

First Department

Continuances (Counsel) (Good Cause) CTN; 90(5) (15)

People v Jones 15 AD3d 208, 789 NYS2d 476
(1st Dept 2005)

Holding: The defendant was charged with violating his plea agreement in a drug possession case. On the date of his sentencing, his attorney was unavailable due to an illness. Substitute counsel, unfamiliar with the case, requested an adjournment. The judge sentenced the defendant as a second felony offender to a term of 4 to 8 years, the agreed-upon penalty for violating the plea agreement conditions. The court's refusal to grant an adjournment to allow counsel of record, who was knowledgeable about the case, to appear for sentencing was an abuse of discretion depriving the defendant of effective assistance of counsel. *See People v Foy*, 32 NY2d 473, 476-477. Judgment vacated and remanded for resentencing. (Supreme Ct, New York Co [Irizarry, J at plea, Cataldo, J, at sentence])

Rape (Evidence) RAP; 320(20)

Witnesses (Experts) WIT; 390(20)

People v Lewis, 16 AD3d 173, 790 NYS2d 132
(1st Dept 2005)

Holding: The court permitted a nurse practitioner and sexual assault forensics examiner to give expert testimony at the defendant's rape trial concerning circumstances under which a sexual assault would not be likely to cause physical trauma. Given the witness's extensive training and experience, admitting the testimony was a proper exercise of discretion. *See People v Rogers*, 8 AD3d 888, 892. Judgment affirmed. (Supreme Ct, NY Co [Solomon, JJ])

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

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

People v Hunter, 16 AD3d 187, 791 NYS2d 41
(1st Dept 2005)

Holding: The trial court misstated the law concerning *Batson v Kentucky* (476 US 79 [1986]) challenges when it declared that the defendant could not establish a prima facie case of racial discrimination in jury selection based on the prosecutor's peremptory challenge of one panelist of a particular class. *See People v Smocum*, 99 NY2d 418, 421-422. The defendant failed to preserve the error through a proper and complete objection. Defense counsel did not state a sufficient basis, aside from the panelist's

membership in a suspect class, to show prima facie discrimination and failed to seek to complete the defense argument when the court indicated that the objection would be overruled. The other issues raised on appeal are without merit. Judgment affirmed. (Supreme Ct, New York Co [Allen, JJ])

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

People v Fong, 16 AD3d 179, 791 NYS2d 53
(1st Dept 2005)

Holding: The trial judge's impromptu *Allen* charge (*Allen v US*, 164 US 492 [1986]) implied that the jury had failed in their duty. The court attempted to shame jurors into reaching a verdict. These actions resembled the same judge's actions in *People v Aponte* (2 NY3d 304, 307. "[E]ach time a judge declines to employ the carefully thought-out measured tone of the standard jury charge in favor of improvised language, an additional risk of reversal and a new trial is created." Defense counsel failed to preserve the error. Counsel's positions before and after the charge were insufficient to alert the court to the coercion claim. Counsel rejected the court's offer to give an amended charge, insisting instead on a mistrial. The issue is not reviewed. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

Assault (Instructions) (Lesser Included Offenses) ASS; 45(45) (50)

Lesser and Included Offenses (Instructions) LSO; 239(10)

People v Edwards, 16 AD3d 226, 792 NYS2d 394
(1st Dept 2005)

Holding: The defendant's convictions for second- and third-degree assault were supported by sufficient evidence. The defendant kicked the fallen complainant in the elbow with great force causing dislocation and severe damage. The defendant's shoe was a dangerous instrument the way he used it. *See Penal Law 10.00 (13); People v Carter*, 53 NY2d 113, 116. The court did not abuse its discretion by submitting a charge of second-degree assault as a lesser included of assault first, the original charge. Although both defense counsel and the prosecution objected, the court was authorized to offer the instruction on its own. Criminal Procedure Law 300.50(1), (2). There was a reasonable view of the evidence that the defendant intended to cause physical injury, but not serious physical injury. *See People v Richardson*, 215 AD2d 222. The jury charge did not result "in surprise, interference with strategy, or any other prejudice to defendant." Judgment affirmed. (Supreme Ct, New York Co [Stackhouse, JJ])

First Department *continued*

Evidence (Hearsay) EVI; 155(75)

People v Coleman, 16 AD3d 254, 791 NYS2d 112 (1st Dept 2005)

Holding: The tape of a 911 call from an unidentified caller describing an attack in progress and including a description of the assailant was admissible under hearsay exceptions for excited utterance (*see People v Edwards*, 47 NY2d 493, 497) and present sense impression (*see People v Brown*, 80 NY2d 729). It did not violate the defendant's confrontation rights under *Crawford v Washington* (541 US 36 [2004]). Not every report of criminal activity to authorities is testimonial. *See Stancil v US*, 866 A2d 799. The 911 call was to solicit help, and not part of formal police questioning. *See eg People v Conyers*, 4 Misc3d 346. The only query posed by the 911 operator was for a description of the attacker, which was intended to help the police arrest the right person. *See Mungo v Duncan*, 393 F3d 327, 336 n 9 (2nd Cir 2004). Judgment affirmed. (Supreme Ct, New York Co [Uviller, JJ])

Sentencing (General) (Second Felony Offender) SEN; 345(37) (72)

People v Camble, 17 AD3d 235, 793 NYS2d 393 (1st Dept 2005)

Holding: Since the prosecution failed to file a predicate felony statement and the court did not adjudicate the defendant a second felony offender, her sentence to concurrent terms of 4½ to 9 years is vacated in the interest of justice. *Compare People v Bouyea*, 64 NY2d 1140. Also, the crime occurred before the effective date of the DNA databank fee law and this portion of her sentence must also be vacated. *See Penal Law 60.35(1)(e)*. Judgment modified and remanded for resentencing. (Supreme Ct, New York Co [Collins, JJ])

Parole (Board/Division of Parole) (Release [Consideration for]) PRL; 276(3) (35[b])

Matter of Wallman v Travis, 18 AD3d 304, 794 NYS2d 381 (1st Dept 2005)

The petitioner was sentenced to three concurrent terms of three and a half to 10 years for grand larceny after he used client escrow account funds for law firm expenses and personal use. He was denied release after serving five-sixths of his minimum, despite eligibility under Correction Law 805, and again upon serving his minimum. An administrative appeal and Article 78 relief were denied.

Holding: Correction Law 805 "creates a presumption

in favor of parole release of" prisoners with a certificate of earned eligibility who have "completed a minimum term of imprisonment of eight years or less (*Matter of Marino v Travis*, Sup Ct, Queens County, 2003, Index No. 15788/02, *affd* 13 AD3d 453 [2004]). . ." Efforts to distinguish *Marino* were erroneous or unsubstantiated. Board action is subject to judicial intervention upon a "'showing of irrationality bordering on impropriety' (*Matter of Russo v New York State Bd. Of Parole*, 50 NY2d 69, 77)." The denial of parole here was irrational. It was based almost exclusively on "the nature and seriousness of the offense." Exclusive reliance on the offense contravenes the statutory scheme and amounts to an unauthorized resentencing. *See Matter of King v New York State Div. Of Parole*, 190 AD2d 423, 432 *affd* 83 NY2d 788. The record does not support the Board's conclusion that the petitioner's insight into his crimes was "limited." He made many statements demonstrating his understanding of the harm he caused and his remorse; the record contains no basis for the Board to discredit nearly every word. Characterizations by Supreme Court of the petitioner's comments were based on distortions of the hearing record that turned responses to specific questions into willful minimization of misconduct. Order and judgment reversed, petition granted, matter remanded. (Supreme Ct, New York Co [Madden, JJ])

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

People v Garcia, 19 AD3d 17, 795 NYS2d 216 (1st Dept 2005)

After the initial indictment was dismissed for violation of the defendant's right to testify at the grand jury, a plea offer was made of 16 years to life on a C felony. The offer was good only until the matter was re-presented to a grand jury. The sentence offer was based on the incorrect assumption that the defendant would be sentenced as a persistent rather than second violent felony offender. The correct offer to a C felony would have been a determinate term of between seven and 15 years. *See Penal Law 70.04(3)(b)*. The defendant rejected the offer and was convicted at trial of first-degree robbery and other counts. His conviction and sentence to a determinate term of 25 years was affirmed. His motion to vacate was denied.

Holding: During plea negotiations, the prosecutor and the trial court misapprehended the defendant's status for sentencing purposes. Defense counsel failed to discover and correct this misapprehension, denying the defendant effective assistance of counsel. A plea offer in line with the defendant's true sentencing status "would have been a substantial improvement over the erroneous offer of 16 years to life imprisonment, a term substantially in excess of the term which could have been offered had defense counsel pointed out the error." Counsel's repre-

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sentation fell below an objective standard of reasonableness. *See Mask v McGinnis*, 28 FSupp2d 122 (1998) *aff'd* 233 F3d 132 (2000) *cert den* 534 US 943 (2001). As for prejudice, the motion court should have directed a hearing to determine whether there was a reasonable probability that a plea agreement acceptable to the defendant would have been struck but for counsel's error. Order reversed, matter remanded for an evidentiary hearing. (Supreme Ct, New York Co [Ambrecht, JJ])

Counsel (Competence/Effective Assistance/Adequacy) (General) **COU; 95(15) (22.5)**

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

People v Sims, 18 AD3d 372, 797 NYS2d 8 (1st Dept 2005)

Holding: The defendant was sentenced after conviction of first-degree robbery and second- and third-degree possession of a weapon to consecutive terms of 25 years and 15 years plus a concurrent term of seven years. Defense counsel and the prosecutor agreed that consecutive sentences were prohibited because the convictions were not based upon separate acts. The court disagreed, finding that the defendant had pointed a gun at a police officer after the robbery was complete. *See People v Okafore*, 72 NY2d 81. However, the officer testified that the defendant was first seen walking toward the officer with the gun held "straight out;" when the officer turned toward him the defendant took a few steps back before dropping the gun. Despite repeated questions about whether or not the gun was pointed "at" the officer, he never testified definitively that it was. There are no identifiable facts to support a finding that the defendant pointed a gun at an officer or acted with intent to do so.

The court properly refused to entertain the defendant's request for new assigned counsel only days after another justice had denied such a request, there being no showing of changed circumstances warranting reconsideration of the request. *See gen People v Evans*, 94 NY2d 499. Original counsel provided effective assistance at the suppression hearing, and there was new counsel at trial. (Supreme Ct, New York Co [Snyder, JJ])

Accusatory Instruments (Sufficiency) **ACI; 11(15)**

People v Williams, 20 AD3d 72, 795 NYS2d 561 (1st Dept 2005)

Holding: The defendant's failure to include in her statement to police the identity of the person who had robbed the fast-food restaurant where the defendant

worked constituted prima facie evidence of "deception" for the purpose of preventing the discovery or apprehension of a known felon within the meaning of Penal Law § 205.50(4)." The robber was the defendant's boyfriend. The defendant had called 911 and reported the robbery, described the incident to police, described the robber, and provided the restaurant's surveillance tape. She did not disclose the robber's identity until two days later, after police picked her up and took her to the precinct for questioning. She said she had waited because she had been scared, and denied prior knowledge of the robbery. The court erred in dismissing the indictment. Its finding that the defendant's actions were not intended to hinder apprehension of the robber was a factual finding regarding intent, usurping the grand jury's role as exclusive judge of the facts. *See Criminal Procedure Law* 190.25(5); *People v Pelchat*, 62 NY2d 97, 105. The legal question of whether the charged conduct met the statutory requirement of willful deception is a matter of first impression. The conduct did prevent or obstruct by means of deception police efforts to apprehend the perpetrator of the robbery, fitting neatly into the statutory definition if done with the requisite intent. Affirmatively concealing the identity of a known felon by material omission is distinguishable from mere failure to report the commission of a felony. Refusal to give knowledge about the commission of a crime when it is sought amounts to an affirmative act tending toward concealing the crime. *See Davis v State*, 96 Ark 7, 13 (1910). Order reversed, indictment reinstated and remanded for further proceedings. (Supreme Ct, Bronx Co [Bernstein, JJ])

Juries and Jury Trials (Challenges) (Deliberation) **JRY; 225(10) (25)**

People v Ordenana, 20 AD3d 39, 795 NYS2d 582 (1st Dept 2005)

After a jury acquitted the defendant of some charges and failed to reach a verdict on others, a retrial was held on the unresolved counts. Jurors were instructed at the beginning not to discuss the case until formal deliberations began. After final jury instructions, two alternate jurors were discharged. One of them told defense counsel that "the jurors have been discussing the case all along." Defense counsel moved for a mistrial. The prosecution objected, saying that the motion was premature and the other alternate had denied discussing the case. When the deliberating jury then announced it had reached a verdict, counsel asked what the court planned to do about the jurors' discussing of the case before deliberations had begun. The court, over objection, declined to take any action and received the verdict of guilty.

Holding: The defense allegations of juror misconduct were not vague or generalized, in contrast to those in

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People v Redd, 164 AD2d 34, 37. The prosecution’s argument that defense counsel waived the claim by trying to cultivate error for appeal is unpersuasive. A court should make “reasonably thorough inquiry” about alleged juror misconduct and discharge a juror when warranted or declare a mistrial if no alternate is available. See Criminal Procedure Law 270.35. No inquiry having been made, no determination can be made about whether premature deliberations affected other jurors or the verdict. See *People v McClenton*, 213 AD2d 1 *app dsmd* 88 NY2d 872. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Bradley, JJ])

Arrest (Resistance) **ARR; 35(45)**

Flight (General) **FLI; 170(6)**

Matter of Manuel D., 19 AD3d 128, 796 NYS2d 345 (1st Dept 2005)

The appellant was adjudicated a juvenile delinquent for resisting arrest. At the hearing, a uniformed officer testified that he had no memory of any description of suspects in a radio communication he received about a burglary in progress involving four males. Arriving at the scene, the officer and his partner approached the appellant and two other males near a parked car, asking them “what’s going on, guys.” One answered “nothing” and the appellant fled. He was arrested for and convicted of resisting arrest. Police did not go into the building where a burglary had been reported and did not investigate that complaint further.

Holding: Flight may give rise to reasonable suspicion that criminal activity is at hand when there are other specific circumstances showing the suspect may be involved in crime. See *People v Woods*, 98 NY2d 627, 628. No such circumstances existed here, where police had no description of perpetrators, no information about where in the premises a burglary was said to have occurred, no information about the reliability of the burglary report, and no evidence that the appellant had burglary tools. Flight alone or coupled with equivocal circumstances that might justify inquiry does not justify pursuit. See *People v Holmes*, 81 NY2d 1056, 1058. The evidence was insufficient to show that the appellant “intentionally prevented or attempted to prevent a police officer from effecting an authorized arrest (Penal Law § 205.30)” [emphasis in opinion]. Order reversed, petition dismissed. (Family Ct, New York Co [Rand, JJ])

Accomplices (General) **ACC; 10(22)**

Evidence (Circumstantial Evidence) EVI; 155(25) (130) (Sufficiency)

Matter of Lamar McL., 19 AD3d 234, 797 NYS2d 462 (1st Dept 2005)

Holding: Testimony indicated that another juvenile grabbed the complainant around the neck. After the complainant broke free, the complainant saw the appellant running toward him, approaching to about 15 feet away, then run away when the complainant yelled to a security guard to call police. Convictions have been reversed when defendants took a greater part than was shown here. See *eg People v Johnson*, 193 AD3d 495. The appellant did not take any action or make any threats to the complainant or otherwise speak to him. That the appellant ran away when the complainant loudly asked that police be called did not prove guilt, flight being only a form of equivocal circumstantial evidence. See *People v McLean*, 107 AD2d 167, 169-170 *affd* 65 NY2d 758. There was no evidence allowing an inference that the appellant intentionally aided the person who grabbed the complainant or had the requisite mens rea to be liable for the other’s acts. Order reversed, petition dismissed. (Family Ct, Bronx Co [Cordova, JJ])

Evidence (Hearsay) EVI; 155(75)

People v Diaz, 21 AD3d 58, 798 NYS2d 21 (1st Dept 2005)

Three men were indicted and tried for assaulting two complainants, Espejo and Carillo. Only the defendant was convicted. Police arriving at the scene found the complainants bloody and dazed. Carillo appeared to be the more seriously injured. Police brought two suspects found nearby to where Carillo lay on a stretcher. Over objection, testimony was allowed at trial that, when the defendant and another were brought near Carillo, his face “lit up” and he said, “That’s them.” Carillo did not testify at trial. The complainant who did appear could not identify the defendant.

Holding: Under *Crawford v Washington* (541 US 36 [2004]), decided after this trial, “testimonial” hearsay statements are constitutionally barred. Some of the factors used in determining whether a statement constitutes an excited utterance, the hearsay exception under which Carillo’s identification of the defendant was admitted at trial, may be used to find such statement “testimonial.” See *People v Coleman*, 16 AD3d 254. Carillo’s identification was a volunteered, visceral response made as he was being treated for injuries sustained in an attack less than thirty minutes before. There was no *Crawford* violation.

The defendant was not entitled to a missing witness charge. Evidence indicated that the defense appeared to know before the prosecution that Carillo would not appear and that the defendant and his family were con-

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nected to Carillo's absence. Police sought Carillo at his last known address and spoke to people in the area. The other complainant testified that he did not know where Carillo was. Judgment affirmed. (Supreme Ct, New York Co [White, JJ])

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

People v Reed, 19 AD3d 312, 798 NYS2d 47
(1st Dept 2005)

Holding: Upon remand, Supreme Court properly denied a previously undecided speedy trial motion. The 33 days prior to the defendant's filing of an omnibus motion were excludable. The prosecution had announced ready eight days before a calendar call at which matters were adjourned, and a fair reading of the record shows that the adjournment was for filing motions. The defendant did subsequently file an omnibus motion. *See People v Alvarado*, 281 AD2d 318, 319 *lv den* 96 NY2d 859. Counsel did not object when the court said in adjourning the matter, "'Time [is] excluded . . .'" Also excludable was the adjourned period after decisions were dictated on defense pretrial motions, *Wade* and *Huntley* hearings were ordered, and the prosecution agreed with the court suggestion to file motions to consolidate the defendant's case with another. *See* CPL 30.30(4)(a); *People v Moolenaar*, 262 AD2d 60 *lv den* 94 NY2d 826. The provisions on pretrial motions apply to all motions concerning a defendant, not just defense motions. *See People v Batts*, 227 AD2d 224 *lv den* 88 NY2d 964.

Multiple indictments were returned against the defendant. The prosecution expressed no preference as to the order in which those should be tried, but defense counsel did. When asked on May 12 if he wanted to go forward with the homicide case before June 16, counsel replied, "'We can try for May 19.'" The prosecution was not ready to proceed on either matter on May 19. The agreement to try the homicide first rendered the time after the May 19 adjournment excludable as to the robbery case. Other periods were excludable on that and other grounds. Judgment affirmed. (Supreme Ct, Bronx Co [Silverman, J at *Wade* hearing; Boyle, J at motion, trial and sentence])

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

Auxiliary Services (Interpreters) **AUX; 54(30)**

People v Rosario, 19 AD3d 333, 798 NYS2d 414
(1st Dept 2005)

Holding: Appellate counsel's letter to the defendant properly explained the brief counsel filed with a motion to

be relieved (*see People v Saunders*, 52 AD2d 833) and advised the defendant of his right to file a pro se brief. However, the letter was in English and the record shows that the defendant was aided by a Spanish interpreter at plea and sentencing proceedings. There is no indication that the defendant understood counsel's letter, or that steps were taken to communicate its contents in Spanish. *See US v Leyba*, 379 F3d 52 (2nd Cir 2004). The defendant's letter to counsel asserted an inability to communicate with counsel and did not refer to counsel's letter. Appeal held in abeyance, motion to be relieved denied without prejudice, counsel directed to communicate the information in his letter to the defendant in Spanish.

Evidence (Hearsay) **EVI; 155(75)**

Witnesses (Confrontation of Witnesses) **WIT; 390(7)**

People v Paul, __ AD3d __, 803 NYS2d 66
(1st Dept 2005)

Two witnesses who knew the decedent testified at the defendant's murder trial that after the shooting they went to the decedent and heard him say repeatedly that he was dying and that someone called "Jermaine" or "Dreds" had shot him.

Holding: The decedent's statements met the requirements for the dying declaration exception to the rule against admission of hearsay. The defendant failed to preserve a Confrontation Clause claim as to the decedent's statements. If reviewed, the claim would not warrant reversal. Since the decision in *Crawford v Washington* (541 US 36 [2004]), two analytical views have developed as to what constitutes "testimonial" out-of-court statements within the meaning of that landmark Confrontation Clause decision. The Friedman view is that a statement made with the expectation that it will be used in prosecution or investigation of a crime is "testimonial." The Amar view is that only statements prepared by the government for use in court are "testimonial." New York courts have tended toward the latter. *See eg People v Bradley* (22 AD3d 33). The *Bradley* court relied on *People v Newland* (6 AD3d 330, 331 *lv den* 3 NY3d 679). *See also People v Diaz*, 21 AD3d 58. The statements here "were not elicited through structured questioning by an investigator" but were volunteered to people known to the decedent. Even under the Friedman view, statements are admissible if the maker of the statement is unable to testify due to wrongdoing by the accused. The Confrontation Clause is not violated by allowing witnesses to repeat the decedent's identification of the defendant as the person who shot him. The question of whether dying declarations are per se exceptions to the *Crawford* ruling is not addressed.

The prosecution concedes error in the sentencing. Judgment modified as to sentence and otherwise affirmed. (Supreme Ct, Bronx Co [Webber, JJ])

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Impeachment (Of Defendant [Including Sandoval]) IMP; 192(35)

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

People v Grant, 802 __AD3d__, NYS2d 686 (1st Dept 2005)

Holding: The court abused its discretion by issuing a *Sandoval* ruling that would allow the prosecution to introduce the defendant’s six prior criminal contempt convictions at his trial on contempt charges. *See People v Hayes*, 97 NY2d 203. The crime of contempt was relevant to credibility since it involved a defiance of a court’s authority. The court made no attempt to limit the number of convictions to be used or balance the prejudicial effect of using them against their probative value. Admission of the prior contempts was harmless error given the overwhelming evidence of guilt. There was no significant probability that the defendant would have been acquitted had the error not occurred and he had chosen to testify. *See People v Devine*, 276 AD2d 258 *lv den* 95 NY2d 933. A consecutive sentence for one of the contempt counts was improper as they all occurred through a single act. *See Penal Law 70.25(2); People v Parks*, 95 NY2d 811, 815. Judgment modified as to sentence. (Supreme Ct, Bronx Co [Williams, JJ])

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

People v McCollum, __AD2d__, 803 NYS2d 80 (1st Dept 2005)

The defendant was indicted for attempted second-degree murder and related charges for allegedly robbing the complainant at gunpoint and then, after a struggle, stabbing the complainant. The court promised a sentence of 12 years in prison in exchange for a plea to the top count. In the defendant’s allocution to the attempted murder count he stated that while drunk, he tried to rob the complainant, who then jumped him and pulled out a gun. The defendant then stabbed the complainant to get free. The defendant expressed regret, saying it was not his intention to kill. Defense counsel’s request that the defendant be allowed to allocute to first-degree assault instead was denied. Advised of his right to trial, the defendant pled guilty to attempted murder and was sentenced as promised.

Holding: The defendant’s plea allocution did not contain facts to satisfy the intent element of attempted second-degree murder. He denied an intent to kill or injure, claimed intoxication, and raised a self-defense issue. This statement negated the intent element of the crime; the

court was required to inquire further to make certain that he understood the nature of the charge and that the plea was being entered intelligently. *See People v Lopez*, 71 NY2d 662, 666. The plea colloquy showed that the defendant’s plea was not knowingly, voluntarily and intelligently made. *See People v Fiumefreddo*, 82 NY2d 536, 543. Judgment reversed. (Supreme Ct, New York Co [Berkman, JJ])

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

In re James C., No. 6784 (1st Dept 11/17/2005)

Holding: The appellant, a juvenile, was found guilty of third-degree criminal trespass. At the fact-finding hearing, the Presentment Agency showed that the appellant was in the lobby of a public housing project for about one minute before being approached by a police officer. The agency failed to prove that the appellant remained in the lobby in violation of any “conspicuously posted rules or regulations” *See Penal Law 140.10[e]*. That there were “No Trespassing” signs in the lobby was established, but not that the signs were “conspicuously posted.” Moreover, there was no showing that the appellant remained in the lobby “in violation of conspicuously posted rules or regulations governing entry and use thereof.” [Emphasis in opinion.] *See Penal Law 140.10*. Lobby signs (as opposed to signs on the entry door) stating only “No Trespassing” were inherently equivocal and not “rules or regulations governing entry and use” of the lobby. The appellant was not obliged to explain his presence there. *See Matter of Daniel B*, 2 AD3d 440, 441. Judgment reversed. [Family Ct, Bronx Co (Lynch, JJ)]

Narcotics (Penalties) NAR; 265(55)

People v Smith, No. 6858 (1st Dept 11/22/2005)

Holding: The drug sale for which the defendant was convicted occurred before the effective date of the Drug Law Reform Act (L 2004, ch 738). He was sentenced after that date. The sentencing court erred by using the amelioration doctrine of *People v Behlog* (74 NY2d 237) to impose the lower sentence allowed by the new law. The Legislature intended the Reform Act to negate the amelioration doctrine. *See People v Nelson*, 21 AD3d 861. Judgment modified and remanded for resentencing. (Supreme Ct, New York Co [Pickholz, JJ])

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

People v Muslim, No. 7177 (1st Dept 11/29/2005)

Holding: The defendant’s adjudication as a second felony offender based on a prior conviction under New Jersey law for aggravated assault (NJ Stat Ann § 2C:12-

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1[b][1]) was in error. The New Jersey crime could have been committed through non-intentional conduct, which was not the equivalent of New York's reckless first-degree endangerment (Penal Law 120.25) requiring grave risk of death. Judgment modified and remanded for resentencing. (Supreme Ct, New York Co [Kahn, JJ])

Guilty Pleas (General [Including GYP; 181(25) (55) (65) Procedure and Sufficiency of Colloquy]) (Vacatur) (Withdrawal)

Misconduct (Judicial) MIS; 250(10)

People v Sirino, __AD3d__, 804 NYS2d 320 (1st Dept 12/1/2005)

Holding: The court's refusal to allow the defendant to accept a plea offer due to defense counsel's unpreparedness was improper. The defendant pled guilty to attempted third-degree criminal possession of a controlled substance, a Class C felony, agreeing that it would be dismissed if she successfully completed a drug program. Although the defendant did not finish the program, the prosecutor was willing to allow her to plead guilty to a class D felony with a promised sentence of 2 to 4 years. The defendant requested an adjournment because counsel, only recently aware that the defendant's case had been restored to the calendar, was unprepared. On the next court date, the plea was still available, but the court rejected it and sentenced the defendant on the C felony. A court's power to control its calendar does not encompass punishing defendants because their attorneys are not ready to proceed. *See People v Jones*, 15 AD3d 208. The prosecution on appeal conceded that the defendant was entitled to consider the prosecution's plea offer. Matter remanded to permit the defendant to withdraw her plea and accept the deal. (Supreme Ct, New York Co [Altman, JJ])

Contempt (Elements) CNT; 85(7)

People v Demisse, No. 6999 (1st Dept 12/1/2005)

The defendant was jury convicted of first-degree criminal contempt and other offenses.

Holding: The defendant's repeated declarations of love by telephone and in writing to the complainant, who had an order of protection, caused the complainant great emotional distress but did not put her in "reasonable fear of physical injury." While the "defendant's long history of inappropriate comments and behavior was extremely upsetting" there was not legally sufficient evidence that the defendant "intentionally placed or attempted to place the victim 'in reasonable fear of physical injury,' let alone 'serious physical injury or death . . .'" as required for first-

degree contempt. *See* Penal Law 215.51(b) (iii). The fear had to be objectively reasonable. *See* Donnino, *Practice Commentaries*, McKinney's Cons Laws of NY, Book 39, Penal Law 240.25. The defendant "never threatened, cursed, or yelled at" the complainant. The defendant's actions were not threatening, abusive or hostile. *See People v Corichi*, 195 Misc2d 518. Judgment modified by reducing first-degree criminal contempt to second-degree criminal contempt and reducing the sentence, and otherwise affirmed. (Supreme Ct, New York Co [FitzGerald, JJ])

Third Department

Admissions (General) (Instructions) ADM; 15(17) (20)

Confessions (General) (Instructions) CNF; 70(32) (40)

Misconduct (Prosecution) MIS; 250(15)

People v De Vito, 21 AD3d 696, 800 NYS2d 250 (3rd Dept 2005)

During police questioning, the defendant admitted sexual contact with the two minor complainants in 1995. The indictment alleged the abuse occurred in 1997 and 1998. At a *Huntley* hearing, the court found that the defendant's confession was voluntary and the date discrepancy inconsequential. The statement was introduced at trial.

Holding: The court improperly allowed the jury to speculate about whether the defendant's statement was a confession or evidence of prior uncharged offenses. *See People v Christie*, 241 AD2d 699, 700. The pre-trial *Ventimiglia/Molineux* hearing was insufficient because no evidence was offered to establish the dates when the crimes occurred. It was unclear that the defendant's statement about acts in 1995 was a confession to events taking place in 1997 and 1998. On remand, if the statement is found to be an admission to a prior uncharged crime, it cannot be used as propensity evidence. *See People v Hudy*, 73 NY2d 40, 55. It can be admitted if legally relevant and material and its probity outweighs its prejudice, *see People v Higgins* (12 AD3d 775, 777), *eg*, by rebutting the defendant's theory of lack of opportunity and feasibility. *See People v Rojas*, 97 NY2d 32, 38-39.

The prosecution's malevolence and impropriety during cross and on summation denied the defendant a fair trial. The prosecutor focused on the defendant's sexual conduct with homosexual partners and used derogatory, denigrating and inflammatory references. This appeal to jury fears and prejudices had no connection to the offense or the defendant's credibility, and diverted the jury's attention. *See People v Calabria*, 94 NY2d 519, 523. Curative instructions were insufficient. Judgment reversed and remanded. (County Ct, Montgomery Co [Catena, JJ])

Burglary (Elements) (Evidence) BURG; 65(15) (20)

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People v Green, __ AD3d __, 803 NYS2d 225 (3rd Dept 2005)

The defendant got into an argument with his sister, the complainant, during her son’s birthday party. This escalated into a fight, with the complainant being uncertain who started grabbing whom first. The defendant struck the complainant with a floor lamp and trashed the apartment, resulting in burglary and criminal mischief charges. The defendant was tried for first-degree burglary (Penal Law 140.30 [2]), alleging physical injury to the complainant, but was found not guilty on these counts. He was convicted of second-degree burglary.

Holding: The evidence was insufficient to support conviction for second-degree burglary, which would require proof that the defendant unlawfully and knowingly remained in the complainant’s apartment with the intent to commit a crime. *See* Penal Law 140.25 (2). The evidence did not show that the defendant intended to commit a crime after the complainant ordered him to leave the premises. *People v Bowen*, 17 AD3d 1054. The defendant’s actions after being asked to depart did not convert a misdemeanor trespass into a felony burglary. *See People v Konikov*, 160 AD2d 146. It was not the legislature’s intent to expansively apply the “remains unlawfully” element of the burglary statute to such situations. *See People v Gaines*, 74 NY2d 358, 362. The defendant did not plan or intend to assault his sister when she demanded he leave; it was the result of an escalating situation and his combative behavior was spontaneous. The evidence did meet the requirements of second-degree criminal trespass. *See* Penal Law 140.15; *People v Bigwarfe*, 219 AD2d 775. Judgment modified and reduced from second-degree burglary to second-degree criminal trespass and remanded for resentencing. (Supreme Ct, Albany Co [Lamont, JJ])

Unlawful Imprisonment (Elements) (Evidence) UNI; 377(10) (15)

Assault (Evidence) ASS; 45(25)

People v Swansbrough, __ AD3d __, 802 NYS2d 777 (3rd Dept 2005)

The defendant was convicted of first-degree unlawful imprisonment, second-degree assault, third-degree assault and second-degree aggravated harassment. She was acquitted of committing a hate crime. Testimony indicated that the defendant punched and kicked the complainant and pulled out her hair. The male co-defendant held the complainant down, while the other two kicked her. During trial, the defense learned that the prosecution did not turn over a police report about a verbal altercation involving the complainant and someone else six months

after the date of the offense. The court allowed the defendant to reopen evidence and cross-examine the complainant on that information.

Holding: The unlawful imprisonment charge merged with the assault since it was an integral part of that crime. *See People v Geaslen*, 54 NY2d 510, 517. Restraint of the complainant was incidental to and inseparable from the simultaneous assault. *See People v Malone*, 3 AD3d 795, 798. Without the unlawful imprisonment charge there was no underlying felony for second-degree assault, *ie*, an assault in the furtherance of a felony. *See* Penal Law 120.05 (6). The unlawful imprisonment was committed to facilitate the assault, not vice versa. *See People v Suggs*, 296 AD2d 559, 559. The *Brady* violation in failing to disclose the police report with information on the complainant’s credibility did not mandate reversal, since the trial court gave the defense a meaningful opportunity to use the material. *See People v Monroe*, 17 AD3d 863, 864. Judgment modified by dismissing the unlawful imprisonment and second-degree assault counts and remanded for resentencing. (County Ct, Tompkins Co [Rowley, JJ])

Defenses (Justification) DEF; 105(37)

People v Walrad, 22 AD3d 883, 802 NYS2d 535 (3rd Dept 2005)

Holding: The defendant was tried on charges of first-degree aggravated unlicensed operation of a motor vehicle and driving while intoxicated. The trial court’s charge on the defense of justification did not unfairly shift the burden of proof to the defendant. *See* Penal Law 35.05 [2]; *People v Craig*, 78 NY2d 616, 622-624. The defendant had claimed that he acted under necessity when he drove his girlfriend to the hospital for treatment of a life-threatening illness. The jury was instructed that the prosecution had the burden of proving each element of the crime as well as disproving the defense of justification. Defense counsel effectively advanced the justification defense. Judgment affirmed. (County Ct, Tompkins Co [Rowley, JJ])

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

People v McAdams, __ AD3d __, 802 NYS2d 531 (3rd Dept 2005)

The defendant was charged with first-degree assault based on an incident during which he assailed a drinking companion. He was convicted of the lesser-included offense of third-degree assault.

Holding: The defendant was not present during a critical sidebar conference about the bias of a deliberating juror. *See People v Antommarchi*, 80 NY2d 247. Neither the defendant nor his defense attorney waived his right to be present at this material stage of his trial. *See People v*

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Velasquez, 1 NY3d 44, 48. The trial judge's general, cursory invitation to the defendant to join the sidebars was insufficient. Neither the court nor defense counsel explained to the defendant his right to be present at sidebar conferences under *Antommarchi*. See *People v Jackson*, 296 AD2d 658, 659. The record did not show a knowing and voluntary waiver of the defendant's rights. Judgment reversed, indictment is dismissed without prejudice to the prosecution to re-present any appropriate charges to another grand jury (County Ct, Broome Co [Mathews, JJ])

Sex Offenses (Sentencing)**SEX; 350(25)****People v Whalen, __ AD3d __, 803 NYS2d 213
(3rd Dept 2005)**

The defendant pled guilty to attempted promoting a sexual performance by a child. A risk level determination hearing was conducted at sentencing. See Sex Offender Registration Act; Correction Law art 6-c. The prosecution recommended level III classification. The defendant's request for permission to introduce expert testimony to show that he was at low risk to commit another sex crime was denied, but the court considered the experts' reports. The defendant was classified as a level II sex offender.

Holding: The court's order did not sufficiently state the findings of fact and conclusions of law on which the classification was based. See Correction Law 168-d [3]; *People v Sanchez*, 20 AD3d 693. The oral findings from the hearing did not support the stated assessment of 100 points. The points set forth—30 points for three victims, 20 points for a continuing course of sexual misconduct, 20 points for the age of the victims and 10 points for failing to accept responsibility—equaled only 80 points. Furthermore, 30 points were improperly assessed. The prosecution did not provide clear and convincing evidence of a "continuing course of sexual misconduct" to support 20 points; there was no evidence of actual sexual contact on three or more occasions over a period of at least two weeks. The defendant admitted guilt in a letter to the court and at sentencing, apologized to the victims, and his psychologist's letter indicated that the defendant was remorseful. This does not support a finding of failure to take responsibility. See *People v Mallory*, 293 AD2d 881. With the score reduced to 50 points, the defendant should be classified to level I. Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 3. Judgment reversed, classification reduced. (County Ct, Saratoga Co [Scarano Jr., JJ])

**Parole (Release (Consideration for
Includes Guidelines))****PRL; 276(35[b])****Matter of Friedgood v NYS Board of Parole, __AD3d __,
802 NYS2d 268 (3rd Dept 2005)**

The petitioner was sentenced to 25 years to life for murder and grand larceny in the death of his wife and the theft of property from her estate. The Board of Parole twice denied his application for parole. His Article 78 challenge to the decision was denied.

Holding: The Board's denial of release based solely on the petitioner's propensity for violence was an abuse of discretion. The Board knew of the 87-year-old petitioner's rehabilitation, his positive contributions to his prison community, his debilitating medical conditions, including terminal cancer, a colostomy and incontinence, his expressions of remorse, and his good disciplinary record. These factors were ignored, and the Board focused on his crime as evidence of a tendency to violence. The petitioner's physical limitations and need for continuous medical care undermined the conclusion that he posed a danger upon release. The Board's decision was so irrational as to border on impropriety. See *Matter of Silmon v Travis*, 95 NY2d 470, 476. Judgment reversed and new hearing ordered. (Supreme Ct, Albany Co [McCarthy, JJ])

**Instructions to Jury (Cautionary
Instructions) (Witnesses)****ISJ; 205(25) (55)****People v Montgomery, __ AD3d __, 803 NYS2d 228
(3rd Dept 2005)**

The defendant was tried on sodomy and related charges involving a 15-year-old complainant. The defendant's girlfriend was with the defendant and the complainant that evening and she gave police inconsistent statements about the defendant's conduct. On the stand, she testified for the prosecution. Finding that defense counsel then exceeded the scope of direct, the court permitted the prosecution to impeach the witness with her prior statement inculcating the defendant.

Holding: The prosecution witness's prior statement incriminating the defendant or showing his propensity to commit the crime was only admissible as impeachment evidence. The prosecutor's closing remarks could have led the jury to believe it should consider the statement as evidence of guilt. The court failed to properly instruct the jury on the testimony's limited use. Despite the absence of a defense objection, the trial court was required to give a limiting instruction. See *People v Carroll*, 37 AD2d 1015, 1016. Without the instruction, the jury was free to consider the girlfriend's statements as evidence of guilt or propensity. Since credibility of the complainant and the defendant were key issues, the error was not harmless. See *People v Intelisano*, 188 AD2d 881, 883. Judgment reversed. (County Ct, Tioga Co [Sguelgia, JJ])

Third Department *continued*

Criminal Law and Procedure (General) CLP; 98.8(17)

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

People v Donnelly, No. 15990 (3rd Dept 11/23/2005)

By felony complaint, the defendant was charged with first-degree criminal contempt for violating an order of protection. With grand jury proceedings pending, he orally waived prosecution by indictment, consented to prosecution by superior court information, and pled guilty. The court promised a one-year jail term and indicated it would look favorably upon the defendant successfully completing a treatment program before sentencing. The treatment program discharged the defendant for misconduct. The court found him in violation of the plea agreement and sentenced him to 1 to 3 years in prison.

Holding: The waiver of indictment was invalid. While the defendant orally waived the indictment in court, then signed a written waiver, the record did not show that he signed the waiver in open court in the presence of his attorney. *See* NY Const, art I, § 6; CPL 195.20; *People v Boston*, 75 NY2d 585, 588. The knowing and intelligent waiver of indictment was a jurisdictional issue that survived a guilty plea, appeal waiver, or failure to preserve by moving to withdraw the plea. *See People v Libby*, 246 AD2d 669, 670. Additionally, the waiver of indictment listed the offense as having occurred on July 19, 2004, while the Superior Court Information said Aug. 3, 2003. *See* CPL 195.20.

The court imposed an enhanced sentence without affording the defendant an opportunity to withdraw his plea. Completion of the treatment program was not a condition of the plea bargain, only a persuasive factor that might have yielded a lesser sentence. *See People v Kinch*, 15 AD3d 780, 781. Judgment reversed and remanded, plea vacated. (County Ct, St. Lawrence Co [Rogers, JJ])

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

People v Heath, No. 11027 (3rd Dept 12/8/2005)

The defendant, a state prisoner accused of slashing a correction officer with a razor blade, claimed that he acted in self-defense. After a prison disciplinary hearing, he was sent to the special housing unit. The prosecutor filed first-degree assault and promoting prison contraband charges. The defendant was convicted of promoting prison contraband but acquitted on most assault counts. The jury deadlocked on one assault charge. Upon retrial the defendant was convicted.

Holding: The trial court improperly denied the defendant's challenge for cause to a juror at his first trial. The juror stated several times that she would believe the testimony of a corrections officer over an inmate. No court inquiry was conducted to assess her ability to be fair and impartial. *See People v Chambers*, 97 NY2d 417, 419. The juror never provided an unequivocal assurance that she could put this bias aside and render an impartial verdict. *See People v Davis*, 19 AD3d 1007. Despite the evidence against the defendant, improper denial of a challenge for cause required a new trial. *See People v Hausman*, 285 AD2d 352 *lv den* 97 NY2d 656. Judgment reversed as to prison contraband and affirmed as to assault. (County Ct, Greene Co [Pulver Jr., JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Kwiatkowski, No. 13524 (3rd Dept 12/8/2005)

The defendant pled guilty to offenses related to possession of sexually explicit materials involving underage boys, as well as an incident of sexual contact with minor boys. After being released on parole, he was presumptively classified as a risk level I sex offender in accordance with the Sex Offender Registration Act. Correction Law art 6-C. The Board of Examiners of Sex Offenders recommended that the defendant be rated as a risk level II threat to reoffend. At a classification hearing, the court presumptively assessed the defendant as a risk level II sex offender, but concluded an upward departure to a risk level III was necessary.

Holding: An upward departure from a presumptive risk level is warranted for aggravating or mitigating factors not considered by the risk assessment guidelines. *See People v Mount*, 17 AD3d 714, 715. The court's upward departure to a level III risk classification was based on clear and convincing evidence, including that the defendant wanted to be a spokesperson for an organization advocating sexual contact between adult men and minor boys and that he was indifferent to the risk level assignment. *See* Correction Law 168-d [3]; *People v Hoppe*, 12 AD3d 792, 793-794. Judgment affirmed. (County Ct, Fulton Co [Giardino, JJ])

Appeals and Writs (Notice of Appeal (Preservation of Error for Review)) APP; 25(60) (63)

People v Williams, No. 13677 (3rd Dept 12/8/2005)

Holding: The defendant waived his right to appeal all issues save excessive sentence after his jury trial convicting him of escape and petit larceny. The sentencing issue was not raised on appeal, and therefore abandoned. *See People v Walrad*, 22 AD3d 883, 883 n1. Appellate counsel briefed a claim that the verdict was against the weight of the evidence. The defendant raised other claims pro se.

Third Department *continued*

Given the limited notice of appeal, no issue besides the harshness of the sentence can be reached. If the defendant's other arguments were considered, they would be found to be without merit. Judgment affirmed. (County Ct, Essex Co [Halloran, JJ])

Sex Offenses (Sentencing)**SEX; 350(25)****People v Miranda, No. 97114 (3rd Dept 12/8/2005)**

The defendant pled guilty to third-degree rape for sexual intercourse with a 14-year-old girl. Before sentencing, he was arrested for weapons possession to which he later pled guilty. The Board of Examiners of Sex Offenders presumptively classified him as a risk level II. *See* Sex Offender Registration Act; Correction Law art 6-C. They later recommended an upward departure to risk level III. This was based on a likelihood of re-offending given the defendant's propensity to associate with teenaged girls, citing a previous marriage to a 12-year-old girl in 1988 and the defendant's involvement with three other 14-year-old girls, and his disregard for authority. At the classification hearing, defense counsel challenged 15 points assigned for drug and alcohol abuse, asserted that the defendant's wife had actually been 17 years when they married in 1993, and pointed out inaccuracies in the presentence report. The defendant was assigned a risk level III.

Holding: The trial court did not state findings of facts and conclusions of law to support the level III classification. *See* Correction Law 168-n [3]; 168-d [3]. The court mistakenly noted the crime as third-degree sodomy, and made no findings aside from adopting the Board's risk assessment of 85 points. The generic factors stated did not provide sufficient information for appellate review. *See* *People v Marr*, 20 AD3d 692, 693. On rehearing, it must be determined whether the criminal history points for upward departure duplicated five points already assigned under the criminal history category. *See* *People v Mount*, 17 AD3d 714, 715. Arrests without convictions cannot be used to assess additional points. *See* SORA: Risk Assessment Guidelines and Commentary, at 6; No. 10. The recency factor only applied to prior felony or sex crimes, not a post-plea weapons conviction. Judgment reversed. (County Ct, Montgomery Co [Catena, JJ])

Sex Offenses (Sentencing)**SEX; 350(25)****People v Crawford, No. 97385 (3rd Dept 12/8/2005)**

The defendant pled guilty to first-degree sexual abuse and was sentenced to two and one half to five years in prison. The Board of Examiners of Sex Offenders recommended he be classified a risk level III based solely on the

existence of a presumptive override factor, his prior conviction of a sex crime. They did not prepare a completed risk assessment instrument. The classification recommendation was confirmed by the trial court.

Holding: A trial court is required to make a sex offender risk classification based on a completed risk assessment instrument in all cases. *People v Sanchez*, 20 AD3d 693. The presence of a presumptive override factor did not eliminate this requirement. Judgment reversed. (County Ct, Broome Co [Smith, JJ])

Fourth Department**Burglary (Elements) (Evidence)****BUR; 65(15) (20)****Evidence (Sufficiency)****EVI; 155(130)****People v Bowen, 17 AD3d 1054, 794 NYS2d 203 (4th Dept 2005)**

Holding: The evidence was legally insufficient to support the conviction of second-degree burglary. *See* Penal Law 140.25(2). The defendant's girlfriend, who was the complainant, testified that she gave the defendant permission to enter her home and expected him to spend the night. They argued, and he hit her with a telephone and his fists. This conduct, even after she asked him to leave, "did not convert his status from that of a licensee to that of a trespasser who 'remains unlawfully' on the premises within the meaning of the burglary statute." The defendant's other contentions are not preserved or lack merit. Judgment modified, burglary count dismissed, and as modified, affirmed. (County Ct, Seneca Co [Bender, JJ])

Admissions (Miranda Advice)**ADM; 15(25)****People v Hamilton, 17 AD3d 1052, 793 NYS2d 653 (4th Dept 2005)**

Holding: The court properly suppressed oral statements made by the defendant without *Miranda* warnings. The defendant's first written statement reduced those oral statements to writing. Without admitting culpability, the defendant in those statements did admit he had been with one codefendant at the crime scene. His second written statement, admitting participation, was given after a break of 10 to 15 minutes. The two written statements should have been suppressed, as they were given in "a single continuous chain of events . . ." (*People v Chapple*, 38 NY2d 112, 114. . . .) Judgment reversed, *Alford* plea vacated, statements suppressed, and matter remitted. (County Ct, Wayne Co [Nesbitt, JJ])

Fourth Department *continued*

Search and Seizure (Consent [Third Persons, by]) SEA; 335(20[p])

People v Loomis, 17 AD3d 1019, 794 NYS2d 220 (4th Dept 2005)

Holding: Physical evidence in a dresser at the home of the defendant’s sister, with whom he had stayed, was found after the sister gave consent for the police to search it. The defendant and his sister had common authority over the dresser and the court did not err in refusing to suppress the evidence found therein. *See US v Matlock*, 415 US 164, 172 n. 7 (1974). The remaining contentions are unpreserved or lack merit. Judgment affirmed. (County Ct, Ontario Co [Harvey, JJ])

Dissent: The dresser had been put in the living room, where the defendant slept on a pull-out couch, for his exclusive use. The prosecution failed to meet its burden of showing mutual use, joint access or control that would support a reasonable belief that the sister had common authority as to the dresser.

Motor Vehicles (Driver’s License) MVH; 260(5)

Witnesses (Confrontation of Witnesses) WIT; 390(7)

People v Pacer, 21 AD3d 192, 796 NYS2d 787 (4th Dept 2005)

Holding: The defendant was convicted of first-degree aggravated unlicensed operation of a motor vehicle (Vehicle and Traffic Law 511[3][a][i]) and other charges. An “affidavit of regularity/proof of mailing” sworn to by a Department of Motor Vehicles employee was admitted into evidence at his trial, pursuant to Vehicle and Traffic Law 214, to establish the statutory requirement that the defendant knew or had reason to know that his license had been revoked. The record does not show that the employee who signed the affidavit was unavailable to testify or that there had been any opportunity for the defendant to cross-examine her. The defendant’s constitutional right to confront the witnesses against him was violated. The new confrontation rule of *Crawford v Washington* (541 US 36 [2004]) had not yet been announced at the time of trial, but must be applied because the case was pending on direct review when *Crawford* was decided. Affidavits are in the core class of “testimonial” statements that cannot be admitted without an opportunity for confrontation under *Crawford*. The affidavit here cannot qualify as a business records exception to the bar on hearsay; it relates to the mailing of a revocation order in 1987 and was sworn to in 2003, not in the course of routine business activity. *See People v Capellan*, 6 Misc3d 809.

The court also erred in refusing to instruct the jury on

the lesser-included offense of unlicensed operation of a motor vehicle under Vehicle and Traffic Law 509(1). The defendant testified that he did not get the order of revocation, mailed after he had moved out of state, that he did not know his New York license had been revoked, and had gotten a Georgia license. A reasonable view of the evidence would support a conclusion that he committed the lesser offense but not the greater. Judgment modified, first-degree aggravated unlicensed operation reversed and new trial granted on that count. (County Ct, Ontario Co [Harvey, JJ])

Misconduct (Prosecution) MIS; 250(15)

Sentencing (Appellate Review) (General) (Resentencing) (Restitution) SEN; 345(8) (37) (70.5) (71)

People v Vogel, Jr., 20 AD3d 865, 798 NYS2d 640 (4th Dept 2005)

Holding: The prosecution failed to honor an agreement to make no sentencing recommendation following the defendant’s guilty plea. The sentence must be vacated. *See People v Oakes*, 252 AD2d 661. This unpreserved error is reviewed as a matter of discretion in the interest of justice. Resentencing must be by a different judge. *See People v Tindle*, 61 NY2d 752, 754. The defendant has stipulated to the amount of restitution, thereby waiving his right to challenge that amount. *See People v Huffman*, 288 AD2d 907, 908 *lv den* 97 NY2d 755. Judgment modified, sentence of imprisonment vacated, restitution amount affirmed, matter remitted for resentencing. (County Ct, Wayne Co [Dadd, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Santiago, Jr., 20 AD3d 885, 798 NYS2d 612 (4th Dept 2005)

Holding: The court’s finding that the defendant is a level three risk under the Sex Offender Registration Act (Correction Law 168 *et seq*) was an improvident exercise of discretion. Even if the presumptive risk level was properly determined to be a level three, the record supports a finding that a downward departure is appropriate. While the defendant was 21 years old or more when he engaged in sex with a complainant under 17 (Penal Law 130.35[2]), the complainant was only a few months from 17 and willingly engaged in the sexual activity. The defendant’s efforts to complete sex offender treatment were forestalled by his discharge from prison. He has no prior record of sex crimes. These special circumstances warrant a downward departure. *See People v Guaman*, 8 AD3d 545. The claim that the statute is unconstitutional is unpreserved.

Fourth Department *continued*

Order reversed, the defendant determined to be a level two risk. (County Ct, Genesee Co [Noonan, JJ])

Identification (Expert Testimony) **IDE; 190(5) (30)**
(Lineups)
People v Young, 20 AD3d 893, 798 NYS2d 625
(4th Dept 2005)

Holding: The defendant's robbery convictions were reversed because of an illegal arrest that tainted the lineup at which he was identified. A new trial was ordered, at which the prosecution was to be given a chance to establish an independent basis for one of the complainant's in-court identification of the defendant. That witness testified that while the defendant's face had been partly covered, she had a clear view of his eyes in good lighting for five to seven minutes, during which she studied him carefully trying to determine if she knew him. *See gen People v Conner*, 15 AD3d 843, 844. This was clear and convincing evidence of an independent basis for that witness's identification of the defendant. The court did not abuse its discretion by refusing to permit expert testimony on the subject of eyewitness examination. *See People v Lee*, 96 NY2d 157, 160. Judgment affirmed (Supreme Ct, Monroe Co [Ark, JJ])

Dissent: [Hurlbutt, JP and Gorski, JJ] One complainant could not identify the intruder. The other acknowledged that there were no distinguishing characteristics about the intruder's forehead, eyebrows, or eyes, which were the only visible parts of his face. She failed to select the defendant's photo from an array a month after the crime, then chose him from the lineup based on his eyes and voice. Any in-court identification was derived from the illegal arrest and subsequent lineup.

Arrest (Warrantless) **ARR; 35(54)**
People v Kilgore, 21 AD3d 1257, 801 NYS2d 458
(4th Dept 2005)

The defendant was convicted of possessing drugs.

Holding: The police entered the defendant's apartment without a warrant after a woman reported that she had been raped in that apartment, had waited until her attacker had fallen asleep, and had left. There was no indication that the defendant was armed or that he would escape if not swiftly taken into custody. Warrantless entry was not justified by any exigent circumstances. Physical evidence seized from the apartment after the illegal entry should have been suppressed. Judgment reversed, suppression granted, indictment dismissed, and matter remitted. (County Ct, Onondaga Co [Fahey, JJ])

Dissent: [Hayes, JJ] These were exigent circumstances. Police responding to a report of a violent crime entered the apartment through a door already ajar after they heard what they thought sounded like someone in respiratory distress. There was no evidence that the defendant was not seeking to escape. *See People v Green*, 103 AD2d 362, 364.

Homicide (Murder **HMC; 185(40[d] [g] [j] [m] [p])**
[Definition] [Degrees
and Lesser Offenses]
[Evidence]
[Instructions] [Intent])
People v Lawhorn, 21 AD3d 1289, 804 NYS2d 517
(4th Dept 2005)

Holding: The defendant was acquitted of intentional murder but convicted of depraved indifference murder for entering a store, stabbing the decedent once, and leaving. The defendant admitted intending to stab the decedent but said he only meant to inflict pain. Testimony by a medical examiner indicated that significant and substantial force would have been used to cause the injury. This is among the large majority of cases in which depraved indifference murder should not have been charged. *See People v Payne*, 3 NY3d 266, 270 *rearg den* 3 NY3d 767. The defendant was not denied the right to present a defense when the defendant was not allowed to include in his testimony about a prior incident in which the decedent broke the defendant's finger the fact that the decedent used a hammer. Judgment modified, second-degree murder reduced to second-degree manslaughter and sentence vacated. (Supreme Ct, Monroe Co [Kehoe, AJ])

Guilty Pleas (General [Including **GYP; 181(25) (55)**
Procedure and Sufficiency
of Colloquy]) (Vacatur)
People v Mayo III, 21 AD3d 1316, 804 NYS2d 163
(4th Dept 2005)

Holding: The prosecution correctly concedes that the defendant's guilty plea to second-degree possession of drugs must be vacated as a nullity. The defendant was originally charged with a Class A felony; he could not validly waive indictment or consent to prosecution by superior court information. *See CPL 195.10(1) (b); People v Trueluck*, 88 NY2d 546, 549-550. Judgment reversed, plea and waiver of indictment vacated, superior court information vacated, matter remitted. (County Ct, Wayne Co [Sirkin, JJ])

Guilty Pleas (Withdrawal) **GYP; 181(65)**
Sentencing (Enhancement) **SEN; 345(32) (71)**
(Restitution)

Fourth Department *continued*

People v Robinson, 21 AD3d 1356, 804 NYS2d 514 (4th Dept 2005)

Holding: Because restitution was not part of the plea agreement, the court erred by enhancing the sentence by including a restitution provision without giving the defendant an opportunity to withdraw his plea. *See People v Therrien*, 12 AD3d 1045, 1046; *People v Delair*, 6 AD3d 1152. This unpreserved error is reviewed as a matter of discretion in the interest of justice. *See CPL 470.15(6)(a); People v Cooke*, 21 AD3d 1339. The court also erred by failing to conduct a hearing on the amount of restitution that should be imposed, relying exclusively on the victim impact statement accompanying the presentence report. Judgment modified, sentence vacated, remanded for imposition of the promised sentence or an opportunity for the defendant to withdraw his plea. (County Ct, Erie Co [Pietruszka, JJ])

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

People v Newman, 21 AD3d 1343, 801 NYS2d 649 (4th Dept 2005)

Holding: The defendant’s waiver of the right to appeal was not knowing, voluntary, and intelligent, as is required, where the court’s reference to that right did not demonstrate an adequate colloquy with the defendant to ensure a voluntary choice. *See People v Brown*, 396 AD2d 860 *lv den* 98 NY2d 767. Even a valid waiver of appeal would not preclude review of the severity of the defendant’s sentence. The court failed to advise him of the potential maximum term of incarceration. *See People v Fehr*, 303 AD2d 1039, 1939-1040 *lv den* 100 NY2d 538. The sentence was not unduly harsh, but as the prosecution concedes, the order of protection must be amended to limit its duration. The court failed to take jail credit into account. *See CPL 530.13(4) (ii); People v Victor*, 20 AD3d 927. This unpreserved issue is addressed in the interest of justice as a matter of discretion. Judgment modified, order of protection amended, matter remitted for the court to determine jail credit and specify an expiration date for the order of protection that is three years from the expiration date of the maximum term of the sentence. (Supreme Ct, Erie Co [Tills, AJ])

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

People v Lott, No. KA 03-00862 (4th Dept 11/10/2005)

Holding: The court failed to make any inquiry as to the defendant’s election to represent himself at a pretrial

stage of this matter and did not warn the defendant of the dangers and disadvantages of proceeding pro se. This deprived the defendant of his right to counsel. *See People v Smith*, 92 NY2d 516, 520. The error was not harmless beyond a reasonable doubt. The defendant, acting as his own counsel, filed a notice of alibi saying he was at a specific address throughout the day in question. At trial, his testimony and that of others showed that he had gone to a shopping mall during that time. The discrepancy between the notice of alibi and the defense proofs, along with other deficiencies in the pro se notice, was exploited by the prosecution on cross-examination and in summation. There is a reasonable possibility that the error as to advising the defendant about proceeding pro se contributed to his conviction. *See People v Slaughter*, 78 NY2d 485, 491. The unpreserved contention that the evidence was legally insufficient to support the attempted murder and first-degree assault convictions is without merit. Judgment reversed, new trial ordered. (Supreme Ct, Erie Co [Wolfgang, JJ])

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

Sentencing (Enhancement) SEN; 345(32)

People v Fortner, __AD3d__, 803 NYS2d 470 (4th Dept 2005)

Holding: Because the defendant was not told at the time of his plea that he must return for sentencing to avoid an enhanced sentence, the court erred by imposing such a sentence without giving the defendant a chance to withdraw the plea. The defendant’s waiver of the right to appeal does not encompass this challenge to the enhanced sentence because that issue was not discussed at the plea. *See People v Hendricks*, 270 AD2d 944, 944-945. While the defendant failed to object to the enhanced sentence or to seek plea withdrawal or vacatur of the conviction, the unpreserved error is reviewed as a matter of discretion in the interest of justice. Judgment modified, sentence vacated, matter remanded for imposition of the promised sentence or an opportunity for the defendant to withdraw the plea. *See People v Spina*, 186 AD2d 9. (Supreme Ct, Erie Co [Wolfgang, JJ])

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

People v Harris, __AD3d__, 803 NYS2d 854 (4th Dept 2005)

Holding: The court erred by denying the defense for-cause challenge of a prospective juror who “indicated that her assessment of defendant’s guilt would be influenced by the number of complainants, thus raising an issue con-

Fourth Department *continued*

cerning her ability to be fair and impartial." No unequivocal assurance was obtained that the juror could render an impartial verdict based only on the evidence presented at trial. See *People v Johnson*, 94 NY2d 600, 614. The defendant exhausted all peremptory challenges, so that the denial of the challenge for cause constitutes reversible error. See *People v Morton*, 271 AD2d 702, 703. The court's improper curtailment of defense questioning of prospective jurors as to their ability to follow instructions on the proper use of *Molineux* evidence also requires reversal. See *gen People v Boulware*, 29 NY2d 135, 142 *cert den* 405 US 995. While courts have broad discretion as to the scope of voir dire, the questions posed by counsel here were exactly the type that should be allowed to discern prospective jurors' fairness and willingness to follow judicial instructions. See *People v Porter*, 226 AD2d 275, 276. Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Affronti, JJ])

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

Narcotics (Possession) NAR; 265(57)

People v Edwards, __AD3d__, 804 NYS2d 525
(4th Dept 2005)

Holding: The court erred in its charge to the jury concerning the presumption set out in Penal Law 220.25(2), that the presence of drugs "'in open view in a room, other than a public place,' is presumptive evidence of knowing possession thereof by any person in 'close proximity' to such" drugs when the drugs were found. Here, police executing a search warrant used a battering ram to enter a locked door from the porch to the stairway leading to the upstairs apartment where the defendant was found. Materials commonly used to package drugs were found in the apartment. The only drugs found were in a baggie on the first step of the stairway leading to the apartment. This did not meet the "'in open view in a room'" requirement, and the defendant was not in close proximity to the drugs when found. The error was not harmless as there is no way to determine whether the jury relied on the statutory presumption or other constructive possession. See *People v Martinez*, 83 NY2d 26, 35 *cert den* 511 US 1137.

The prosecution concedes that a circumstantial evidence instruction was required at trial. The contention that the defendant failed to preserve this issue for appeal as to count three is rejected. The defendant requested the instruction as to all counts, preserving review of the issue as to count three. Judgment reversed, new trial granted. (County Ct, Monroe Co [Marks, JJ])

Due Process (General) DUP; 135(7)

Parole (Rescission)

PRL; 276(30)

Matter of Blanche v Dennison, No. TP 05-01007
(4th Dept 11/10/2005)

Holding: Rescission of the petitioner's parole release was annulled for improper consideration of the petitioner's guilt with respect to two charges that had been reversed and expunged. The matter was remitted for de novo consideration by a different panel of the Parole Board, because it could not be determined whether or not the Board would have reached the same conclusion in the absence of the erroneous information. The remittal order stated that the Board was to consider only the sustained charge that remained in the petitioner's record. On remittal, the respondent filed a new rescission report containing the sustained charge and a new charge. The Board dismissed the charge previously sustained but found the petitioner guilty of the new charge. Proper procedures were not followed for issuing a new rescission report with a new charge. The report was not submitted to a member of the Board to determine whether a rescission hearing was warranted. See 9 NYCRR 8002.5(b) (3), (4). The petitioner was denied due process as to the new charge. Cf *Matter of Jones v Berbery*, 283 AD2d 955. As the charge that supported remittal was dismissed, no further proceedings on it are appropriate. Determination annulled, amended Article 78 petition granted.

Assault (Evidence) (General) ASS; 45(25) (27)

Driving While Intoxicated (General) DWI; 130(17)

People v Rucinski, No. KA 04-01540
(4th Dept 12/8/2005)

Holding: This unpreserved claim that felony driving while intoxicated may not act as the predicate felony for a charge of second-degree assault (Penal Law 120.05[6]), "falls within the rare exception to the preservation requirement (see *People v Lopez*, 71 NY2d 662, 666)." It is established that a DWI conviction does not serve as a predicate felony for first-degree assault. *People v Snow*, 138 AD2d 217, 219 *affd* 74 NY2d 671. As in *Snow*, the DWI here should not be considered a felony for "an 'in the course of and in furtherance of' provision." By dealing statutorily with vehicular assaults and the greater risks posed by intoxicated drivers, the Legislature rendered reliance upon general assault statutes inappropriate in such cases. The felony assault conviction here is based solely on strict liability based on the felony DWI, but proof of intent to commit the underlying offense is a requirement for felony assault. See *People v Huck*, 1 AD3d 935, 937. Judgment modified, second-degree assault reversed and dismissed, and as modified, affirmed. (County Ct, Ontario Co [Reed, JJ]) ⚖

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