



Public Defense Backup Center REPORT

Volume XXI Number 2

April–May 2006

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

State Troopers Told to Stop Negotiating Traffic Pleas

A longstanding but often ignored State Police regulation prohibiting officers from plea bargaining cases received new life recently. The agency announced in early March that beginning Sept. 1, 2006, the policy against troopers engaging in such negotiation will be strictly enforced. News accounts indicated that prosecutors were expressing concern that the new policy would divert prosecution resources away from more serious matters and overburden local courts. A State Police spokesperson said the issue was about making the roads safer, because plea bargaining had undermined the public safety aspect of writing tickets, while the troopers' union said the only issue was reducing overtime costs. (See e.g., www.syracuse.com, 4/10/06, and news items on www.nystpba.org.)

Announcement Indicates Policy is Based on Ethics, Practicalities

An announcement sent to prosecutors noted that forcing motorists to bargain with the officer who charged them creates an appearance of unfairness and duress. The practice can, when defendants perceive that others are getting better deals, lead to allegations of favoritism, prejudice, or even bribery. Accused motorists should have an opportunity to negotiate with an independent prosecutor, not their accuser, the letter said.

A more practical factor cited for enforcing the prohibition was that having officers spend time on "court duty" depletes overtime hours, making fewer hours available for patrol and other duties. All available patrols in a given area may be in court rather than ready to respond to calls. Court duty schedules also require significant amounts of supervisory and administrative time. Troopers on courtroom duty are rarely needed to testify, but rather act as prosecutors to "move" cases and negotiate plea bargains, the letter added.

District Attorneys have several options in dealing with cases no longer handled by troopers, the letter noted. Assistant District Attorneys or local attorneys designated

for the purpose could take over, or a written "mail-in" form could be used as described in Advisory Committee on Judicial Ethics Opinion 99-82.

Courts Have OK'd Police Prosecution

Perhaps ironically, the State Police announcement came just two days before denial of leave to appeal to the Court of Appeals in an unpublished case where prosecution by police had been challenged. *People v Gacha*, 10 Misc3d 136A (Appellate Term 2nd Dept, 12/19/05 [unpublished]) *lv den* 3/3/06). The Appellate Term decision in *Gacha* relied on *People v Soddano*, 86 NY2d 727 (1995), which upheld the prosecution of a speeding ticket by a trooper. [Thanks to Gary Muldoon, who brought the *Soddano* case to our attention after the State Police announcement.]

Bills Introduced to Allow Trooper Bargaining

Assembly Member Joseph Lentol has introduced a bill (A10710A) that would prevent the State Police from ordering troopers not to modify or offer to modify traffic tickets before a court. State Sen. John Bonacic of Mount Hope introduced the bill in the Senate (S 7354). The bills can be found on the Internet, at (for example), <http://assembly.state.ny.us/leg>.

Chief Defenders Discuss Civil Commitment and Other Challenges

On April 7, 2006, nearly 20 public defense offices from across the state were represented at a Chief Defender Convening in Albany. The main agenda item was a thorough discussion of the potential effects on public defense and public defense clients of proposed legislation providing for the civil commitment of felony sex offenders upon completion of their criminal sentence.

Contents

Defender News	1
Conferences & Seminars	7
Book Preview	8
Case Digest:	
US Supreme Court	10
NY Court of Appeals	12
First Department	15
Second Department	18
Third Department	21
Fourth Department	24
Job Opportunities	27

Before the Convening, NYSDA had already joined with others, including mental health advocates, sexual assault victim advocates, sexual abuse treatment providers, and others in pointing out serious legal and policy flaws in the legislation. (See, "From My Vantage Point: On Sex Offender Hysteria," in the last issue of the *REPORT*.) The Chiefs discussed many problems with the proposals, such as the difficulty of negotiating pleas for any client who might face civil commitment and the potential systemic as well as individual consequences of having more clients decline pleas due to this threat.

Developments Around Civil Commitment and other Sex Offense Issues

After the Convening, NYSDA learned that the New York State Psychiatric Association has also issued a position statement opposing legislation to allow civil commitment of sex offenders. (www.nyspsych.org). On May 12, 2006, the New York State Bar Association Criminal Justice Section also voted to oppose civil commitment

Meanwhile, existing civil commitment law may still be used. As noted in the last issue of the *REPORT*, the 1st Department has upheld use of the Mental Hygiene Law to commit prisoners as their sex offense sentences expire. (*People ex rel. Harkavy v Consilvio*, No. 7675 [1st Dept, 3/30/06].) The Winter 2006 issue of *Pro Se*, published by Prisoners' Legal Services, contains at pages 22-23 a checklist of rights under current provisions of the Mental Hygiene Law and Correction Law dealing with civil commitment.

While tabloid-driven civil commitment measures are the highest-profile sex offense issue at the moment, they are not the only ones. Other legislative and administrative proposals have not disappeared, such as limitations on where persons with sex-offense records can live, work, and travel, additional registration requirements, extension of statutes of limitation, etc. (see, for example, items in the August–October and November–December issues of the *REPORT*).

Among recent legal sex offense developments was the 2nd Circuit ruling that the New York State Legislature's amendment of the Sex Offender Registration Act (SORA) extending the registration requirement for level 1 and level 2 offenders could not be applied to members of the class in *Doe v Pataki*. The *Doe v Pataki* challenge to the constitutionality of SORA provisions was settled by a "so ordered" stipulation in 2004. As to the approximately 4,400 class members who gave up certain valuable rights as part of the settlement, the State is bound by the stipulation. Judge Denny Chin's opinion notes: "The State cannot be permitted to unilaterally re-write the contract and ignore a judgment of the Court merely because the contract was with individuals convicted of serious crimes." (*Doe v Pataki*, No. 96 Civ. 1657 [2nd Cir. 4/12/06]; *NYLJ* online, 4/13/06.)

Another 2nd Circuit decision upheld strict conditions set for a federal sex offense probationer. The court approved polygraph testing, a ban on indirect as well as direct contact with minors, and a ban on Internet access for the probationer, an expert computer user who had used the Internet for prior sexual offenses. Recognizing that polygraph results are inadmissible as evidence, the court found they can have a "therapeutic" value and, when not used in the context of a jury trial, pose less of a threat of prejudice. (*timesunion.com*, 5/3/06; *NYLJ* online, 5/3/06; *US v Johnson*, No. 04-4992 [2d Cir. 5/1/06].)

For the latest developments regarding sex offense and sex offenders, check the Megan's Law Hot Topics page on the NYSDA website.

Other Issues Discussed

In addition to civil commitment, the Chiefs discussed other topics at the April 7 Convening, including the need for loan forgiveness programs to attract and keep new lawyers and legal issues arising from the reform legislation regarding level A-II drug offenders. The latter included questions about deportation of noncitizen clients and determining and advocating for clients' eligibility for resentencing.

Kaye Commission Report Anticipated

Anticipation of the final report of the Commission on the Future of Indigent Defense hovered over the April 7 Convening. Concerns about the possible results of that report were only briefly discussed; as noted in the last issue of the *REPORT*, Gideon Day 2006 was postponed in hopes of rescheduling it around release of the Kaye Commission's final recommendations.

Public Defense Backup Center REPORT

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XXI Number 2

April–May 2006

Managing Editor
Editor
Contributors

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

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

THE REPORT IS PRINTED ON RECYCLED PAPER

Eyewitness Evidence Remains a Hot Topic

Eyewitness issues remain in the news. In the latest headlines have been a study purporting to cast doubts on the increased reliability of identifications made in double blind, sequential lineups and new Court of Appeals decisions on admission of expert testimony about eyewitness identification.

Defense lawyers seeking to benefit a client by offering expert testimony about the reliability of eyewitness identification must front-load their efforts rather than waiting to flesh out their arguments on appeal if their initial requests are denied or the testimony is improperly undercut by instructions. The Court of Appeals, in two new cases, provided some guidance on expert testimony concerning eyewitness ID, but essentially left this issue to trial courts for case by case determination. (*NYLJ* online, 5/10/06; *People v Drake*, No. 63, and *People v Young*, No. 64, 5/9/2006 [See case summaries at p. 15].)

Meanwhile, news media recently reported on a new Illinois State Police study purported to cast doubt on lineup reform, specifically the use of sequential, double-blind lineups. The validity and meaning of the study itself instantly became a subject of debate, with “academics, police, prosecutors, and defense attorneys from around the country heatedly discuss[ing] the study and the future of identification practices” at a Chicago symposium after its release. (*nytimes.com*, 4/19/06; *csmonitor.com*, 4/24/06.) The report is posted on the web at www.chicagopolice.org. Comments on the study have also been posted by, among others, Professor Gary Wells, who has done training for NYSDA on eyewitness identification (www.psychology.iastate.edu) and Roy Malpass of the Eyewitness Identification Research Laboratory at the University of Texas at El Paso (<http://eyewitness.utep.edu/documents/NotesOnTheIllinoisPilotProgram.pdf>).

The California Commission on the Fair Administration of Justice recently proposed significant changes in the use of eyewitness identification out west, noting the number of wrongful convictions that involved eyewitness ID. Among their recommendations was implementation of sequential lineups, though dissenters noted the continuing controversy about the efficacy of this procedure. (www.latimes.com, 4/14/06.)

Lineup reform and expert testimony have not replaced traditional challenges to the validity of eyewitness testimony. Investigation and well-prepared cross examination of eyewitnesses and police who solicited the identification are still key. Deliberate or inadvertent tainting of an eyewitness’s selection of a defendant as the perpetrator must be found and challenged. While every case must be prepared individually, materials developed by others may present a starting point. For example, one lawyer posted on his blog in January excerpts from a brief

challenging the identification of a witness told by an officer immediately after the lineup, “Good, you picked out the right guy.” The excerpt summarizes academic research (including that of Gary Wells, mentioned above) on the issue. (www.indignantindigent.blogspot.com.)

Blogging False Confessions, Knowing Confessions Can be False

As with eyewitness identification, issues concerning false confessions abound. Not every client’s confession is false, of course, but the specter hovers over every confession case. When a client says the client was made to confess and the confession is not true, where does the lawyer start?

Keeping Up With Developments

Ideally, the lawyer has already started, by keeping abreast of academic false confession studies, precedent regarding false confessions, and local police, prosecution, and court practices dealing with and revealing (or hiding) false confessions. Minimally, the lawyer must be aware that false confessions *do* occur; a client’s claim cannot be dismissed out of hand without investigation.

Among the many sources of information for lawyers about false confession studies, cases, and strategies, is the Backup Center’s website, www.nysda.org. Check the Innocence/Wrongful Convictions page under NYSDA Resources; false confessions figure prominently in many wrongful convictions. In addition to direct resources, the page contains links to other sites such as the False Confessions page of The Innocence Project, www.innocenceproject.org. Also check the News Resources—New Web Sites page under Defense News. Currently listed there is, among other things, a link to the National Legal Aid and Defender Association’s Forensics Library under Defender Services (www.nlada.org), which includes a False Confessions folder containing articles, pleadings, links, and cases.

The *REPORT* strives to provide timely information on false confessions. We reported on the *Frye* hearing held about expert testimony concerning false confessions in *People v Kogut* (*REPORT*, Nov-Dec 2005) and the acquittal that followed the admission of such testimony. (*REPORT*, Jan-Mar 2006.) For additional information on articles that appear in the *REPORT*, contact the Backup Center.

Among the newest sources of information on false confessions are web logs (blogs). For example, go to www.truthaboutfalseconfessions.com, begun by Alan Hirsch, a visiting professor of legal studies at Williams College, and the Bluhm Blog, named for Northwestern University School of Law’s Bluhm Legal Clinic and operated on the school’s website at <http://blog.law.northwestern.edu/bluhm/>.

Explaining—to jurors, to judges, to the public, and even to defense lawyers—why anyone would confess to a crime they did not commit is at the heart of the problem. One recurring theme is that police interrogation tactics are to blame. “Many social scientists explain that a major cause of false confessions is interrogation tactics that leave an innocent suspect feeling there is no escape except an admission of guilt,” Alan Hirsch wrote recently in an op-ed piece. (latimes.com, 4/25/06.) Similarly, an attorney submitting to Hirsch’s blog said lawyers need to “be aware that the Reid method of interrogation taught to law enforcement officers seems to encourage false confessions in stressing the importance of cutting off denials by the suspect in custody.” (www.truthaboutfalseconfessions.com, 4/19/06.)

Reid Technique: Was it Used—or Ignored—to Get the Confession?

The “Reid method” mentioned in the blog is named for the founder of John E. Reid and Associates, the leading interrogation training firm in the US. The technique was initially developed in the 1930s and 40s. The first published description of it appeared in 1962; a second edition was published soon thereafter to incorporate references to the *Miranda* warnings. The fourth edition of the book, *Criminal Interrogation and Confessions*, came out in 2001. Last year, a softcover, short version appeared, entitled *Essentials of the Reid Technique—Criminal Interrogation and Confessions*. (See p. 8.)

The Reid firm “often consults with police departments on interrogations and has testified in defense of police departments in civil cases,” according to a recent post on the Bluhm Blog. The posting announced that Joseph P. Buckley III, President of Reid & Associates, had testified for the *plaintiff* in a wrongful conviction civil case arising from a false confession. “Mr. Buckley testified that Earl [Washington]’s interrogators did not follow the Reid technique and made crucial mistakes that Reid specifically cautions against, including [sic] using leading questions, revealing to Earl facts that only the true perpetrator would have known, failing to hold back key information from Earl to see if he could provide it independently, and failing to corroborate the confession.” (<http://blog.law.northwestern.edu/bluhm>, 5/3/06.)

Beware “Only the Perpetrator Knows” Facts

Interrogators deliberately or inadvertently revealing to a person being questioned facts that could only be known to one involved in the crime may be a primary factor in false confessions. The wrongful conviction of Douglas Warney in Monroe County, recently overturned through DNA evidence and the confession of the actual killer, rested at least in part on such revelation of key facts, according to Warney and his attorneys. While there is a

call for investigation into how Warney was questioned, the officer who questioned him has died. (www.democratandchronicle.com, 5/16/06; www.nytimes.com, 5/16/06.)

Videotape the Questioning: Jurisdictions Consider, Adopt the Practice

The Warney matter led a local newspaper to call for videotaping of major felony interrogations. (www.democratandchronicle.com, 5/18/06.) If all questioning of suspects was videotaped, the use, misuse, or nonuse of the Reid technique and any occurrences that could coerce confessions would be available to the defense—and the lack of coercion would be readily provable by the prosecution. So argue proponents of routine, mandated recording of police interrogation in New York and elsewhere. The argument is not new. The New York Civil Liberties Union asked the New York City Police Department (NYPD) to begin such taping after the wrongful convictions of several teenagers in the Central Park jogger rape case came to light. (*REPORT*, Sept–Oct 2002.) While not yet universally adopted, the practice, and calls for its implementation, continue to grow. In New York State, among budget items for which the Legislature overrode Governor Pataki’s veto was \$100,000 funding for a New York State Bar Association pilot project supporting an experiment in which custodial interrogations will be videotaped. (*NYLJ* online, 4/27/06.) The State Bar has made videotaping of interrogations a 2006 legislative priority. (www.eisinc.com [Empire Information Services], 3/1/06.)

In neighboring New Jersey, regulations went into effect the first of this year requiring recording (audio or video) of interrogation. Originally pushed by the state Public Defender’s Office to protect defendants from falsely admitting guilt under duress, the measure was welcomed by the state Attorney General’s Office as a way of preventing police from being wrongly accused of coercing confessions. (philly.com [*Philadelphia Inquirer*], 11/22/05.)

As part of a settlement in a civil suit for the wrongful rape and murder conviction of Eddie Joe Lloyd, who spent 17 years in prison, the Detroit Police Department will begin videotaping interrogations of suspects facing life without parole, joining about 450 other police departments nationwide. (www.nytimes.com, 4/11/06; www.detnews.com, 5/8/06.) In Japan, a small step has been taken in that direction, with the Supreme Public Prosecutors Office deciding to allow, on a trial basis, the recording of some aspects of interrogation. (www.yomiuri.com, 5/11/06.)

Highlights and Shadows from High Courts

The US Supreme Court and New York’s Court of Appeals decided several cases of note recently in addition to those mentioned above. Summaries of some cases

appear in this issue beginning on p. 10. A few of the most notable decisions are listed below; also, check the "Courts—Federal" and "Courts—New York" Hot Topics areas of the Association's website, www.nysda.org.

Police who saw, through a window, a fight between a youth and adults, were justified in entering a home without a warrant. (*Brigham City v Stuart*, No. 05-502, USSupCt, 5/22/06.)

An evidence rule barring a defendant from presenting evidence of a third party's guilt when there is strong forensic evidence of the defendant's guilt violates the defendant's constitutional rights. *Holmes v South Carolina*, No. 04-1327 (USSupCt, 5/1/06).

Standing to seek suppression of physical evidence can be established by citing the affidavit of a police officer indicating the evidence was found on the defendant's person. The defense need not directly allege the defendant's possession of the evidence. *People v Burton*, No. 55 (CtApps, 5/2/2006).

When defendants deliberately cause the unavailability of prosecution witnesses, not only may the prosecution introduce the missing witnesses' prior testimony, but the defendants may be precluded from offering contradictory testimony given by the witnesses at other proceedings. Depriving the defendant of the opportunity to show inconsistency in the particular witness's testimony about whether or not the witness had seen the defendant before did not deny the defendant a fair trial. *People v Bosier*, No. 43 (CtApps, 4/4/2006).

Deprivation of the right to counsel at a pretrial proceeding does not require reversal where the outcome of the proceeding can be deemed harmless as to the ultimate resolution of the case. As noted by the dissent, "It is a sad day when the Court of Appeals deviates from its heretofore robust protection of the right to counsel as conceived under the State's Constitution solely because of the proof of guilt and the heinousness of the crimes alleged." *People v Wardlaw*, No. 40 (CtApps, 4/4/2006).

Possession of Hypodermic Needles: Health Law Being Ignored?

In at least one county in upstate New York, prosecutions are still being brought against adults for possession of a hypodermic needle without a prescription (Penal Law 220.45 and 220.00 [2], and Public Health Law 3381 [2]) despite the provisions of Public Health Law 3381 (6). The latter provision makes possession of hypodermic instruments lawful for persons 18 years or older when possession is limited to a quantity of 10 or less and the needles were purchased from a pharmacy meeting certain specifications regarding licensing, safety inserts, location of the hypodermics within store, and advertising. A vagueness challenge to the statutes' provisions was rejected by inter-

preting them to exempt from prosecution a defendant who had purchased hypodermic instruments from a pharmacy "without regard to whether the pharmacy was in compliance with the requirements of Public Health Law § 3381 (6)." *People v Lobianco* (2 Misc. 3d 419, 423 [Crim Ct, Kings Co 2003]). While the question of whether a defendant purchased the needles in question at a pharmacy is a factual one for trial (*Id.* at 425), the burden is on the prosecution to show that the defendant acquired the needles unlawfully.

In contesting a needle prosecution, Essex County Assistant Public Defender Brandon Boutelle obtained a copy of a State Police Counsel's memo, which indicates that "any police officer contemplating a summary arrest for this offense, should take this legislation into account, and document the investigatory steps taken which led to the determination that the needles were indeed contraband." [All-caps format omitted.]

The memo, dated Dec. 29, 2000, also indicates that "unlawful possession of a controlled substance contained within a 'legal' syringe, remains a criminal offense." [All-caps format omitted.] However, in 2002 a federal court ordered New York City Police to stop arresting and charging drug users participating in a state-sanctioned needle exchange program. Considering the apparent conflict between the Penal Law and the Public Health Law, the court found that participants in a needle exchange program were expected to possess "dirty" needles. (NYLJ online, 11/20/02, reporting on *Roe v The City of New York*, 232 FSupp2d 240 [SDNY 2002]) ["For the foregoing reasons, declaratory judgment will issue to the effect that in the course of authorized participation in a needle exchange program as envisioned in 10 N.Y.C.R.R. § 80.135, there is no criminal liability under Penal Law § 220.03 for possession of a controlled substance based upon the drug residue remaining in a used needle or syringe."]

State Bar to Recognize Caruso and Shanks

Two members of NYSDA will receive the New York State Bar Association's 2006 Dennison Ray Criminal Defender Awards. These awards honor extraordinary commitment to the provision of creative, skilled and zealous representation of low-income and/or disadvantaged clients; courageous advocacy of defense rights; and/or efforts to inspire, mentor, and support colleagues.

Laurie Shanks, partner in Kindlon and Shanks and Clinical Professor of Law and Director, Field Placement Clinic at Albany Law School, has been a long-time faculty member of NYSDA's Defender Institute Basic Trial Skills Program. Through her work at the law school she has assisted both student interns and intern-receiving offices such as NYSDA to make the most of internships. From her

seat on the Commission on the Future of Indigent Defense Services she asked probing and knowledgeable questions at hearings, eliciting important information about the quality of public defense in New York State. Her own knowledge of the system, gained through zealous and effective representation of her own clients and keen observation of the representation offered by others, helped ensure that the Commission's deliberations would include a client-centered viewpoint. Laurie contributes to the improvement of public defense in many other ways, from comments in the press helping the public understand criminal justice issues to being a stellar CLE trainer in New York and around the country.

Mark Caruso became Schenectady County Public Defender just over two years ago. The appointment of a former assistant district attorney to the position met with resistance, but Mark's dedication to giving public defense clients quality representation quickly won over the skeptics. A respected trial attorney, he quickly expanded his skills to meet the many duties of a public defense manager, calling on NYSDA and other institutions for help. Creatively working to improve the representation offered by his underfunded office and simultaneously taking on the task of increasing office resources, he instituted "jail night" at which attorneys regularly meet with clients, negotiated a new phone procedure at the jail that allows clients to call attorneys directly (saving the cost of collect calls that could make attorney-client communications prohibitively expensive), and convinced the County Legislature to fund two more part-time lawyers. Providing help as well as seeking it on behalf of his clients and office, Mark has participated in NYSDA Chief Defender Convenings, offered testimony at the Kaye Commission hearings, and been an asset to the whole community. He recently also received an Arthur Chaires Lifetime Achievement Award from the Schenectady Chapter of the NAACP.

Congratulations Laurie and Mark!

News in Brief and Follow-up Items

Federal Defender for No. District Announces Website

The Federal Public Defender for the Northern District of New York has announced creation of a new website: www.nynd-fpd.org. A repository of pleadings, articles, and information relevant to attorneys on the Northern New York Criminal Justice Act Panel and criminal defense lawyers generally, the site replaces former email lists as the mechanism for distributing *Errores Juris* (formerly *Reversible Errors*) and *The Defender Newsletter*. A "News" section will be updated at least weekly.

Acknowledge a Colleague

Kevin M. Andersen Memorial Award

Do you know an attorney who:

- exemplifies a deep sense of justice, determination, and compassion,
- practices in the area of indigent defense, and
- has been in practice fewer than fifteen years?

Nominate that lawyer for the 2006 Kevin M. Andersen Memorial Award.

Send nominations with supporting materials to the Genesee County Public Defender Office, One West Main Street, Batavia, NY 14020.

Wilfred R. O'Connor Award

Do you know an attorney who:

- exemplifies a client-centered sense of justice, persistence, and compassion,
- practices in the area of public defense, and
- has been in practice fifteen or more years?

Nominate that lawyer today for the 2006 Wilfred R. O'Connor Award.

Send nominations with supporting materials to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314.

Take the time today to nominate a worthy colleague for one of these awards, which will be presented at NYSDA's annual conference in July (see p. 7). For more details, see the last issue of the *REPORT*.

Fulton County Habeas Writs Upheld

Last year a Fulton County Family Court Judge saw four of his orders overturned by writs of habeas corpus for imprisoning individuals in violation of their right to counsel (three of them upon default). Two of those writs were appealed to the 3rd Department (the other two matters were returned to Family Court for further proceedings). In April, the Appellate Division upheld both writs. (*Sunday Gazette*, 4/30/06.) At least two local newspapers editorially urged Fulton County not to pay for further efforts to overturn the writ (*Leader-Herald*, 5/4/06; *Daily Gazette*, 5/3/06.) While the County Board of Supervisor's Finance Committee approved expenditure of funds to seek leave to appeal to the Court of Appeals, the full Board defeated the effort. (*Leader-Herald*, 5/9/06.) The first writ granted was reported here last year. (*Backup Center REPORT*, June-July 2005). [For summaries of the 3rd Department cases, *People ex rel Foote v Lorey* and *People ex rel Constantino v Lorey*, see pp. 23-24.]

(continued on page 27)

CONFERENCES & SEMINARS

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: Crossing Your Way to "Not Guilty" — Keys to Winning Your Case on Cross
Dates: July 26-29, 2006
Place: Miami Beach, FL
Contact: Gerald Lippert: tel (202)872-8600 xtn 236; fax (202)872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: Carroll Consulting and Training
Theme: Investigative Training: Eyewitness Evidence and Death Investigation
Dates and Places: July 27-28, 2006 — Burlington, VT
October 20, 2006 — Syracuse, NY
Contact: Sgt. Paul Carroll (ret.): tel (352)563-5701; fax (352)563-0436; email www.paulcarroll.com

Sponsors: Santa Clara University, California Attorneys for Criminal Justice, California Public Defenders Association and American Bar Association Death Penalty Representation Project
Theme: Bryan R. Schechmeister Death Penalty College
Dates: August 5-10, 2006
Place: Santa Clara, CA
Contact: Ellen Kreitzberg, email ekreitzberg@scu.edu; website www.scu.edu/law/dpc/

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Criminal Law Update
Date: September 9, 2006
Place: Ithaca, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Child Abuse Defense and Resource Center
Theme: Child Abuse Allegations: Separating Fact from Fiction
Dates: September 28-30, 2006
Place: Las Vegas, NV
Contact: NCADRC: tel (419)865-0513; fax (419)865-0526; email ncadrc@aol.com; website www.falseallegation.org

Sponsors: National Association of Criminal Defense Lawyers and Southern Center for Human Rights
Theme: Making the Case for Life IX
Dates: September 29-October 1, 2006
Place: Las Vegas, NV
Contact: Colin Garrett: tel (404)688-1202; email cgarrett@schr.org; website www.nacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: 10th Annual DUI Seminar: DWI Means Defend With Ingenuity — Making Over Your DUI Practice
Dates: October 12-14, 2006
Place: Las Vegas, NV
Contact: Gerald Lippert: tel (202)872-8600 xtn 236; fax (202)872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer — Part II
Date: October 14, 2006
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 20, 2006
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org



Chief Defender Convening, April 7, 2006, in Albany, NY.

Book Preview

Essentials of the Reid Technique— Criminal Interrogation and Confessions

By Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne

Jones and Bartlett Publishers, 2005

Criminal Interrogation and Confessions, 4th Edition

By Fred E. Inbau, John E. Reid, Joseph P. Buckley, and Brian C. Jayne

Aspen Publishers, Inc., 2001

Interrogations, Confessions, and Entrapment (Perspectives in Law and Psychology, Vol. 20)

Edited by G. Daniel Lassiter

Kluwer Academic/Plenum Publishers, 2004

What is the Reid (or Inbau) Technique, Why Should You Care, and How Can You Learn More?

[Ed. Note: For more on interrogations, see pp. 3–4.]

References to Reid (and/or Inbau) Recur in Discussions, Analysis, and Decision-making Regarding Interrogations

During a hearing to determine the admissibility of expert testimony on the issue of false confessions, the prosecutor cross-examined Dr. Richard Ofshe. The subject: a textbook by (among others) one Inbau, put out by an organization known as “Reid.” Ofshe said: “The Reid method is very influential, and much of it simply describes what goes on in police interrogation, and some of it is very controversial.” He mentioned that the US Supreme Court in *Miranda* criticized a Reid example of describing for the suspect a way in which the suspect’s actions happened that would constitute self-defense, essentially offering the subject leniency. The Reid organization, Ofshe noted, claims to have trained between seventy-five and ninety thousand police officers over the years.¹

A 2003 law review article seeking to examine current law and contemporary social science studies relating to false confessions discussed the work of Inbau and Reid in some detail for three reasons: “First, their work is widely accepted in law enforcement,” although many law

enforcement investigators trained in the “Reid technique,” often employ their own modifications. “Second, there is a growing body of case law where experts have been proffered and, in some cases, permitted to testify as to the perceived flaws in the Reid technique.” And third, “Inbau and Reid’s studies span a large tract of time.”²

Among “2004 Winning Strategies Seminars Materials,” posted on the Office of Defender Services Training Branch website, serving federal public defenders, is a document by well known capital defense lawyer Denny LeBeouf entitled, “Litigating False Confessions.” The “Reid Method for Training Police Interrogators” is featured prominently there.³

These are just three examples of references to Reid during litigation, in an academic publication, and in defense-oriented materials. Any lawyer with a client who says a confession is untrue and/or was coerced, and must be challenged (see accompanying article), needs to know about Reid. So does every lawyer who may someday have a client who says their confession has to be challenged.

Criminal Interrogation and Confessions: Reid at the Source

So how do you learn about Reid? A first step might be to read the softcover, abridged (253 pages) version of the well-known Reid title “Criminal Interrogation and Confessions.” Published just last year, *Essentials of the Reid Technique—Criminal Interrogation and Confessions* presents information in more graphical format, with tables, pull-quotes, boxed lists of suggestions, and bulleted points. Like the 4th Edition of the full volume, *Essentials* touts on the back cover that it includes material on recognizing and avoiding false confessions.

In *Essentials*, those materials are collected in a five-page appendix. Like the rest of the book, Appendix A offers short headings (Juveniles/Mental Impairment, Threats/Promises, Theme Development, Alternative Questions, Confession Corroboration, and Factors to Consider). It closes with a Data Sheet to “help document information relevant to these considerations,” and, for further information, a referral to the Critics Corner area of the Helpful Info page at www.reid.com. The Critics Corner, now located under a menu item entitled “Educational Information,” includes a number of sections, including one entitled Defending the Reid Technique of Interrogation and one called False and Coerced Confessions. In the latter you can link to the entire chapter on “Distinguishing between True and False Confessions” that first appeared in *Criminal Interrogations and Confessions* in its 4th Edition.

The full 4th Edition is obviously where one learns in detail what the modern Reid method includes. With over 600 pages of text, and few illustrations, this volume is no easy read. Chances are that if you do not anticipate having to personally litigate a challenge to an interrogation

anytime soon, you may first skim through the book looking for “ah-hah” moments.

(These may not even relate directly to the confession you may someday need to suppress. If you had just read about a challenge to eyewitness identification based on improper police reinforcement of a witness’s identification during a lineup (see item p. 3), the following sentence in a list of suggestions for questioning a witness rather than a suspect might catch your eye: “Offer the witness support and encouragement by interjecting such comments as ‘That’s very good,’ ‘That’s going to help us,’ or ‘You seem to have an excellent memory.’”⁴)

You may scrutinize the Table of Contents, or page thru sections of the book, thinking, “I really need to read this.” No doubt, we all do.

History and Current Developments in Interrogation: Reid in Context

We also need to read other materials on interrogation, and not just Denny LeBoeuf’s outline, noted above. One recent book that addresses in depth at least some aspects of interrogation, in history and in current use, is *Interrogations, Confessions, and Entrapment*, edited by G. Daniel Lassiter. While not every chapter will grab a defense lawyer by the suit coat and say, “use this!”—the first-person account by a psychologist of his interrogation when a prisoner of war in World War II, for example—others may. (And some may already be familiar: Chapter 5, “The Police Interrogation of Children and Adolescents,” by Allison Redlich et al, was included in handout materials at NYSDA’s 2004 Annual Conference.) Still others put the Reid method and modern interrogation in perspective.

Richard A. Leo’s chapter, “The Third Degree and the Origins of Psychological Interrogation in the United States,” quotes documented accounts of beatings and torture routinely used by police to gain confessions through the 1930s. He notes that repeated public revelations of such tactics had some effect, but no lasting one, until the so-called Wickersham Report of 1931. In the wake of that report by the National Commission on Law Observance and Law Enforcement, alternative methods of extracting confessions began receiving serious consideration. Inbau’s manual, *Lie Detection and Criminal Interrogation* (1940), the precursor to the Reid manual, was among the first. According to Leo, the psychological interrogation techniques that came into being were like—and inspired by—the development of polygraph tests; they were efforts to come up with scientific methods of truth-telling, not in and of itself a bad thing. “Both Inbau and Reid were, indeed, progressives by the political standards of the 1930s, and their seemingly well-intentioned training materials appear to be at least partially responsible for the decline of third degree practices by American police in the 1940s and 1950s.” Leo devotes the rest of his chapter to the evolution of supposedly “scientific” interrogations into

psychological manipulation. While claiming to eschew a direct critique of the Inbau-Reid method, Leo notes that numerous social scientists and scholars have done so. He also notes that while the new interrogation methods were a reaction to the physical third degree, they remain linked to that past.

And finally, he adds, police course instruction purporting to use the Reid manual (or others) may “depart from the texts by teaching their subjects in a less formal manner, drawing on more eclectic sources (such as publications, handout, word of mouth, first-hand experiences and observations, and other lectures and seminars) . . .” and “teach ‘state of the art methods’ of behavioral lie detection or psychological manipulation that are not mentioned in manuals.” In other words, to whatever extent Reid et al meant to curb interrogation excesses, those claiming to be their disciples may have other ideas.

To effectively investigate and challenge a client’s coerced confession, a lawyer needs to know about the Reid Technique, and about more. Reading Reid, and about Reid, in these books, is a good beginning. ♪

Endnotes

¹ *People v Kogut*, Indictment No. 61029/85, Frye Hearing (Supreme Ct, Nassau Co, 5/23/05) pp 756-757, 779-780.

² Joshua E. Kastenberg, “A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact,” 26 *Seattle Univ. L. R.* 783 (2003).

³ Denny LeBoeuf, “Litigating False Confessions,” http://www.fid.org/pdf_lib/LeBoeufD_%20false_confessionPPT.pdf.

⁴ Inbau et al, *Criminal Interrogation and Confessions, 4th Edition* (2001), p. 405.



Chief Defender Convening, April 7, 2006, in Albany, NY.

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

Search and Seizure (General) SEA; 335(65[a] [p])
(Search Warrants [Affidavits, Sufficiency of] [Suppression])

United States v Grubbs, 546 US __, 126 Sct 1494, 164 LEd2d 195 (2006)

The respondent was arrested for possession of child pornography. A video ordered from an undercover government website was found in his home after the postal service delivered it. The government used an anticipatory search warrant not to be executed until the package had been delivered. The triggering event was detailed in the affidavit attached to the warrant, but was not included with the copy given to the respondent. Denial of the respondent's motion to suppress was reversed on appeal for failure of the warrant to meet the 4th Amendment particularity requirement.

Holding: The triggering condition for an anticipatory search warrant need not be stated in the warrant. *See Dalia v US*, 441 US 238, 255 (1979). Anticipatory warrants are not categorically unconstitutional. All search warrants must be based on probable cause that evidence of a crime will be found when the search is conducted. *See Katz v US*, 389 US 347 (1967). An anticipatory search warrant is valid provided there is probable cause to believe that evidence or contraband will be found when the search occurs. *US v Garcia*, 882 F2d 699, 702 (2nd Cir, 1969). Conversely, probable cause may expire if law enforcement knows that the evidence is no longer at the specified location, or the information can become stale over time. *See eg US v Bowling*, 900 F2d 926, 932 (6th Cir 1990). The validity of an anticipatory warrant depends on the certainty of the triggering condition and the particularity of the search location. Judgment reversed.

Concurring: [Souter, J] An anticipatory warrant based on unstated triggering conditions would not provide any guidance to law enforcement, giving them the added responsibility to determine the underlying conditions before conducting the search. An incomplete warrant puts the property owner at a disadvantage, removing the ability to learn the limits of the search or whether the triggering event had occurred.

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

Georgia v Randolph, 546 US __, 126 Sct 1515, 164 LEd2d 208 (2006)

The respondent's estranged wife allowed police into the home she shared with the respondent, and showed them to the respondent's room where they found a straw with some powdery residue. The respondent was there and objected to the police entry and search. The straw was seized, and the respondent and his wife were arrested. Denial of a suppression motion was reversed on appeal; the reversal was affirmed by the state supreme court.

Holding: One co-tenant inviting police to conduct a search of a shared residence had no recognized authority in law or social practice to prevail over another present and objecting co-tenant. Consent of someone who shares common authority over premises or property is valid against an absent, nonconsenting co-occupant. *US v Matlock*, 415 US 164 (1974). It would be unreasonable to find consent to enter based on an invitation disputed by another occupant. Society recognizes the equal standing of co-inhabitants in the absence of a hierarchy such as parent and child. A co-resident intent on revealing criminal activity by another resident could deliver the evidence to the police or provide information for a warrant application. Exigent circumstances still justify warrantless entry for select purposes, such as emergencies, loss of evidence or protection. Judgment affirmed.

Concurrence: [Stevens, J] History underscores progress toward recognizing the equal weight to be given co-residents to allow police entry into a shared home.

Concurrence: [Breyer, J] Co-tenant consent alone should justify warrantless entry but the "totality of the circumstances" does not justify abandoning the warrant requirement when an objecting co-tenant is present, absent exigent circumstances.

Dissent: [Roberts, J] There is a diminished expectation of privacy in a shared home. The happenstance of an objecting co-owner did not lessen the other's right to consent.

Dissent: [Scalia, J] Regardless of the historical expansion or contraction of property rights, the original meaning of the 4th Amendment envisioned authorized individuals consenting to warrantless searches of commonly held property.

Dissent: [Thomas, J] The respondent's wife's leading police to evidence of a crime in her home was not a search. *See Coolidge v New Hampshire*, 403 US 443 (1971).

Sentencing (Guidelines) SEN; 345(39)

Salinas v United States, __ US __, __ Sct __, 164 LEd2d 364 (2006)

US Supreme Court *continued*

Holding: The petitioner's prior conviction for simple possession of a controlled substance did not fall within the definition of "controlled substance offense" under the United States Sentencing Commission Guidelines Manual §4B1.1(a) (2003). A "controlled substance offense" was defined as "an offense under federal or state law . . . that prohibits . . . the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." § 4B1.2(b). Simple possession without more did not satisfy this definition. The Solicitor General acknowledged that the federal appeals court incorrectly ruled for the government on this ground. Judgment vacated and remanded.

Habeas Corpus (Federal) **HAB; 182.5(15)**

**Day v McDonough, __ US __, __ SCt __,
164 LE2d 376 (2006)**

The petitioner was convicted in state court and his sentence was affirmed on Dec. 21, 1999. He did not seek US Supreme Court review and the deadline to do so passed. The petitioner sought state postconviction relief 353 days later. Denial of such relief was affirmed on Dec. 3, 2002. On Jan. 8, 2003, the petitioner filed a federal habeas claim based on ineffective assistance of counsel. The State's answer noted the petition was timely. On its own, the court recalculated the time and, finding 388 days had passed, dismissed the petition as time-barred. The court's authority to sua sponte review timeliness was upheld on appeal.

Holding: Whether the State fails to raise a timeliness issue or mistakenly finds none, the district court has independent authority to reach it. Federal courts have the option to consider exhaustion requirements and similar issues not mentioned by the State. *See Granberry v Greer*, 481 US 129 (1987). Lower appellate decisions have said courts may look into procedural defaults sua sponte, though in the Supreme Court this has been an open question. *See Trest v Cain*, 522 US 87, 90 (1997). The better route might have been for the magistrate to advise the State of its error and permit an amended answer, but the court had the choice to decide such questions on its own, having provided fair notice to both parties and allowed them to be heard, considered whether the delay caused by focusing on the timeliness issue prejudiced the petitioner, and decided that interests of justice were best served by dismissing the petition. Judgment affirmed.

Dissent: [Stevens, J] Judgment should be withheld since the time calculation issue at the heart of this case will be considered fully in a pending matter. *Lawrence v Florida, __US __, 126 SCt 1625, 164 Led2d 332 (2006) [cert granted]*.

Dissent: [Scalia, J] Time limitations in the Anti-terrorism and Effective Death Penalty Act, like similar statute of limitations, are nonjurisdictional and subject to waiver and forfeiture.

Civil Rights Actions (General) **CRA; 68(20)****Constitutional Law (United States Generally)** **CON; 82(55)****Hartman v Moore, No. 04-1495, 4/26/2006**

The respondent, chief executive of a company that made multiline optical character readers, was accused of engaging in criminal activities to influence the Postal Service's adoption of multiline instead of single line readers. After a lengthy trial, acquittal was granted by the court due to a "complete lack of direct evidence." The respondent then filed an action under *Bivens v Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971). He claimed that the petitioners, Postal Inspectors, manufactured the charges in violation of the 1st Amendment to punish him for criticizing the Postal Service. Denial of the petitioners' summary dismissal motion was affirmed on appeal.

Holding: A plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause in connection with the underlying criminal charges. Proof that no probable cause existed would under gird the retaliation evidence and show that retaliation was the but-for basis for the prosecution. Also, showing a lack of probable cause helps close the causation gap between the motive of non-prosecution government officials and the actions taken by prosecution officials, necessary to overcome the presumption of prosecutorial regularity. *See Bordenkircher v Hayes*, 434 US 357 (1978). Judgment reversed.

Dissent: [Ginsburg, J] The Postal Inspectors, non-prosecutors, should have the burden of showing that in the absence of a retaliatory motive the case would have been prosecuted anyway. Putting this burden on the plaintiff would curtail suits seeking vindication unless the prosecution was entirely baseless.

Due Process (General) **DUP; 135(7)****Holmes v South Carolina, No. 04-1327, 5/1/2006**

At a new murder trial following postconviction reversal of the petitioner's initial conviction, the State introduced forensic evidence including a palm print, fiber evidence, the petitioner's underwear with a mixture of DNA from two persons not the petitioner or the decedent; and his tank top with a mixture of his blood and the decedent's. The petitioner claimed, and called experts to show, that the evidence had been contaminated and the police manufactured the case against him. The court excluded defense evidence that a third party had committed the

US Supreme Court *continued*

crime. The conviction was affirmed on the basis that state law prohibited defense evidence of third-party guilt in the face of strong prosecution evidence, especially strong forensic evidence, of the defendant's guilt.

Holding: State evidentiary exclusionary rules are constrained by due process, compulsory process, and confrontation clause requirements that a defendant be given "a meaningful opportunity to present a complete defense." *See Crane v Kentucky*, 476 US 683, 690 (1986). Rules excluding third party guilt evidence must serve a legitimate interest and cannot be arbitrary or disproportionate, otherwise they would violate the right to present a defense. *See Washington v Texas*, 388 US 14 (1967). The state rule here focused on the strength of the prosecution's case independent of the probative value or potential adverse effects of the proffered defense evidence. The rule was "no more logical than its converse would be, *i.e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty." Judgment reversed, matter remanded.

New York State Court of Appeals

Appeals and Writs (Judgments and Orders Appealable) (Jurisdiction) (Preservation of Error for Review) APP; 25(45) (50) (63)

Due Process (Vagueness) DUP; 135(35)

People v Baumann & Sons Buses, No. 42, 3/23/2006

The defendant's conviction of creating unreasonable engine noise by operating his line of 50 bus engines early in the morning and disturbing the complainant, an area resident, was reversed on appeal. The Appellate Term found that the local town ordinance was intended to apply to noise that constituted a public problem.

Holding: Court of Appeals jurisdiction is limited to questions of law and properly preserved constitutional challenges to the validity of statutes. *See NY Const*, art VI, § 3 [a]; *see also CPL 470.35*. No objection was made to the validity of the town ordinance in the trial court. The question of whether the local anti-noise ordinance was unconstitutional, based on whether it required a public nuisance element (*see People v New York Trap Rock Corp.*, 57 NY2d 371, 380), was not preserved for review. *See CPL 470.05 [2]; People v Davidson*, 98 NY2d 738. The Appellate Term's decision that the anti-noise statute was unconstitutionally vague without requiring an objection was reached under its interest-of-justice jurisdiction. *See People v Johnson*, 47 NY2d 124, 126. Deciding an unpreserved error was an act

of judicial discretion, and not appealable to the Court of Appeals. *See People v Dercole*, 52 NY2d 956, 957. This unpreserved constitutional challenge to a statute did not fall under the exception for jurisdictionally defective accusatory instruments. Appeal dismissed.

Juries and Jury Trials (Waiver)

JRY; 225(65)

People v Smith, No. 18, 3/30/2006

Holding: The defendant's written waiver in open court of his right to a jury trial on charges of rape and burglary was knowing, intelligent, and voluntary. *See NY Const*, art I, § 2; *CPL 320.10 [2]*. While the preferred practice is an allocution by the trial judge eliciting a defendant's full understanding of the importance of the right being waived, the trial court's questioning of defense counsel about the defendant's understanding of the rights waived was minimally sufficient. *See People v Page*, 88 NY2d 1. Lastly, the evidence was legally sufficient to support the conviction. The complainant's testimony was corroborated by other witnesses and the defendant, along with forensic evidence. The evidence supported a valid line of reasoning and permissible inferences from which a rational person could conclude that every element had been met. *See People v Bleakley*, 69 NY2d 490, 495. Judgment affirmed.

Motor Vehicles (General)

MVH; 260(17)

Witnesses (Confrontation of Witnesses)

WIT; 390(7)

People v Pacer, No. 45, 3/28/2006

The defendant's New York driving privileges were revoked in 1987 after a plea to driving under the influence of alcohol. Later, he moved to Georgia and obtained a driver's license. In 2003, he was charged in New York for first-degree aggravated unlicensed operation (AUO) of a motor vehicle and other offenses. At trial, he testified that he did not know that his driving privileges had been revoked. The prosecution introduced a DMV record, "Affidavit of Regularity/Proof of Mailing," to establish that a revocation notice had been sent at the time. It included a statement from a DMV official that the procedures for routine mailing of notices were followed. On appeal, the AUO count was reversed.

Holding: First-degree aggravated unlicensed operation of a motor vehicle required proof that the defendant knew or had reason to know that his driving privileges have been revoked by the Commissioner of Motor Vehicles. *See Vehicle and Traffic Law 511 [3] [a]*. The prosecution was obligated to prove the knowledge element. The affidavit from a DMV employee was testimonial; its admission violated the Confrontation Clause. *See Crawford v Washington*, 541 US 36 (2004). The affidavit, a direct accusation that the defendant knew or should have

NY Court of Appeals *continued*

known of the revocation, was prepared for the prosecution. It was the sole evidence on this point. The defendant had no chance to challenge it, inquire about mistaken identity or errors in processing, or assail the accuracy of reconstructed procedures from 16 years ago.

It was also error for the trial court to refuse to charge the lesser offense of unlicensed operation of a motor vehicle. *See* Vehicle and Traffic Law 509 [1]. Judgment affirmed, new trial ordered on AUO.

Evidence (Hearsay) (Missing Witnesses) EVI; 155(75) (86)**People v Bosier, No. 43, 4/4/2006**

The defendant was charged with assault and weapons possession for allegedly shooting the complainant with a gun handed to him by the codefendant. Separate grand juries indicted the defendant and codefendant, and the complainant testified in both. Before the joint trial, the complainant decided not to testify. During a *Sirois* hearing, the court found sufficient evidence of witness intimidation to allow the prosecution to introduce at trial the complainant's testimony from the first grand jury hearing. The defendant objected to admitting only that testimony because it was inconsistent with the testimony given during his grand jury proceeding, which he sought to introduce. Denial of the defendant's application was affirmed.

Holding: The defendant claimed that selective use of the complainant's grand jury testimony by the prosecution, and the court's refusal to admit the evidence from the first proceeding, violated his rights to a fair trial and to present a defense. *See* US Const Amends VI and XIV § 1; *Pointer v Texas*, 380 US 400, 406 (1965); NY Const art I, § 6. He did not confute the allegations made at the *Sirois* hearing, and his challenge failed due to "forfeiture by misconduct." *See* *People v Geraci*, 85 NY2d 359. The *Geraci* policy of prohibiting a defendant from profiting by witness tampering supported the trial court's conclusion in this case. A narrow exception to the rule against benefiting from one's own misconduct allows a trial judge to permit impeachment evidence where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to a statement offered by the prosecution. *People v Cotto*, 92 NY2d 68. The inconsistency here as to whether the complainant had seen the defendant before did not go to the heart of the case. Judgment affirmed.

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

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

People v Wardlaw, No. 40, 4/4/2006

Facing a charge of rape, the defendant voluntarily spoke with police at the stationhouse. He denied the accusations; when confronted with hypothetical forensic evidence he stated if such existed he would have to accept his punishment. At the *Huntley* hearing, the court granted the defendant's motion to dismiss his attorney and proceed pro se; suppression was denied. The defendant was represented by counsel at trial. The conviction was affirmed.

Holding: The trial court's failure to conduct a searching inquiry before dismissing counsel and allowing the defendant to act pro se at his suppression hearing violated the right to counsel. *See* *People v Slaughter*, 78 NY2d 485. The remedy is usually a new suppression hearing, and if the evidence was suppressed, a new trial. However, the overwhelming evidence presented against this defendant, notwithstanding his statement, made the outcome of a new suppression hearing superfluous. The violation of the right to counsel was not harmless error at the hearing, but if the outcome did not prejudice the defendant at trial, a new hearing would serve no purpose. *See* *People v Crimmins*, 36 NY2d 230. Without the defendant's statement, the prosecution still had the complainant's prompt complaint and DNA evidence connecting the defendant to the crime. The harmless error rule has limited application to particular right to counsel violation outcomes, and even when no prejudice to defendant is shown, the risk of future abuses can justify reversal. *See* *People v Hilliard*, 73 NY2d 584. Not every deprivation of the right to counsel at a pretrial proceeding requires reversal; here it was clear beyond a reasonable doubt that the error was harmless. Judgment affirmed.

Dissent: [Ciparick, J] The defendant was deprived of his right to counsel at a critical stage. Regardless of the amount of proof or nature of the crime, as a matter of fundamental justice this violation was not subject to harmless error. *See* *Coleman v Alabama*, 399 US 1, 9-10 (1970); *People v Anderson*, 16 NY2d 282, 287-288.

Identification (General) IDE; 190(17)

Motions (Suppression) MOT; 255(40)

People v Boyer, No. 36, 3/38/2006

A civilian called the police to report that a black or Hispanic man, wearing a red sweater or sweatshirt, dark pants and a hat, was attempting to open apartment windows from the outside. Several police officers responded to a radio call. Officer Cremin claimed to have seen the suspect's face as he started to run up a fire escape—a male Hispanic with facial hair as well as a dark jacket and pants. Cremin transmitted a description to the other officers, omitting reference to the facial hair. Eventually, the defendant, wearing dark pants, a red shirt and black jacket, was spotted and arrested. Approximately 30 minutes

NY Court of Appeals *continued*

after the 911 call, Cremin identified the defendant as the man he had seen earlier. The defendant’s motion to preclude any identification testimony based on the lack of CPL 710.30 (1) (b) notice was denied. His conviction was affirmed.

Holding: The circumstances surrounding a police officer’s initial observation of a suspect are critical in determining whether it should be considered confirmatory. See *People v Wharton*, 74 NY2d 921. Notice is not required under CPL 710.30 for a confirmatory identification because it is not the product of undue suggestiveness. Here, Cremin had scant opportunity to see the suspect, at night, while he stopped for a few seconds on a fire escape some 40- to 50-feet above the ground, and did not view him again for 30 minutes. There was a great risk of misidentification. Judgment reversed, identification testimony precluded, new trial granted.

Dissent: [Smith, RS, J] A *Wade* hearing was unnecessary where there was little if any evidence that the identification procedure violated the defendant’s constitutional rights. The prompt post-arrest viewing minimized the risk of misidentification.

Motions (Suppression) MOT; 255(40)
People v Burton, No. 55, 5/2/2006

The defendant was arrested for felony drug possession. A police officer had met him on a public street and found a plastic bag containing crack cocaine in the front pocket of his sweatpants. The motion to suppress the drugs stated that the defendant was stopped and searched “for no apparent lawful reason,” and cited the officer’s statement in the felony complaint that “he recovered one bag containing crack/cocaine from the defendant’s person.” Suppression was denied for lack of standing because the defendant failed to allege possession of the items seized. After an appeal under CPL 710.70 (2) challenging the denial of suppression the conviction was affirmed.

Holding: The motion alleging that the defendant was searched by a police officer without legal justification, citing only the officer’s statement, was sufficient to meet the requirements for standing under CPL 710.60 (1). The defendant had a reasonable expectation of privacy in the contents of his pants pocket. See *Mancusi v DeForte*, 392 US 364, 368 (1968). Standing to challenge the search could be established by allegations of fact from “another person or persons.” See CPL 710.60 [1]; *People v Ramirez-Portoreal*, 88 NY2d 99, 108. The statement of the officer that drugs were taken from clothing worn by the defendant were facts from “another person.” Contrary to *People v Brown*, 256 AD2d 42 *lv den* 93 NY2d 871, the defendant was not

required to admit possession in order to seek suppression. He was required to claim that the search was not legally justified and make sufficient factual allegations to support that claim. CPL 710.60 [1]; *People v Mendoza*, 82 NY2d 415. Judgment reversed, remanded for suppression hearing.

Evidence (Sufficiency) (Weight) EVI; 155(130) (135)
Homicide (Negligent Homicide) HMC; 185(45)
People v Conway, No. 54, 5/4/2006

The defendant, a police officer, observed Dantae Johnson talking with a friend on a city sidewalk after midnight. One of the other officers in the patrol car believed that Johnson had a gun. While other officers left the car to pursue Johnson’s friend, the defendant drove after Johnson. During the chase, the defendant held a gun in one hand, finger on the trigger, drove up on the sidewalk, then into oncoming traffic, and finally transferred the gun to his nondominant right hand and reached out with his left hand to grab Johnson. When Johnson attempted to free himself, the defendant’s gun went off striking and severely wounding Johnson, who had no gun. Following a bench trial, the defendant was convicted of third-degree criminally negligent assault. The Appellate Division reversed for legal insufficiency.

Holding: The evidence was legally sufficient to prove that the defendant’s blameworthy conduct created a substantial and unjustifiable risk of harm. The criminal negligence element required proof that the defendant failed to perceive a substantial and unjustifiable risk, which was a gross deviation from the standard of care that a reasonable person would have observed in the situation. See Penal Law 15.05[4]; *People v Boutin*, 75 NY2d 692, 695-696. A “valid line of reasoning and permissible inferences” supported the trial court’s finding of criminal negligence. See *People v Santi*, 3 NY3d 234, 246. It cannot be said as a matter of law that the trial court erred. Judgment reversed, matter remanded for factual review.

Dissent: [Smith, RS, J] Court of Appeals jurisdiction is limited to questions of law; it lacks the power to review an Appellate Division decision based on weight of the evidence. CPL 450.90(2)(a). Sufficiency of the evidence is a legal question. *People v Contes*, 60 NY2d 620. Weight of the evidence is a factual one. *People v Cahill*, 2 NY3d 14, 58. Unlike *People v Whipple* (276 AD2d 829), if the Appellate Division found legal insufficiency here, it impliedly reached the weight of the evidence. In any event, the evidence was insufficient.

Identification (Expert Testimony) IDE; 190(5) (10)
(Eyewitnesses)
Witnesses (Confrontation of Witnesses) WIT; 390(7) (22)
(General)

NY Court of Appeals *continued***People v Drake, No. 63, 5/9/2006**

The complainant was struck in the head with a brick and did not see the attacker. More than a week later, police arrested the defendant. At trial two witnesses stated that the defendant had thrown the brick or fled the scene, three said it was not him, and several were unsure. The court granted the defendant's motion to allow an expert, Dr. Elizabeth Loftus, to testify about the reliability of eyewitness identifications. However, she was not allowed to give an opinion on witness credibility. Without defense objection she was only permitted to discuss relevant psychological factors and interpret research data on their effect on memory and perception. The court denied application for in camera review of psychiatric records of the first eyewitness. The judge charged the jury that the expert's testimony "may not be used to discredit or accredit the reliability of eyewitness testimony in general or in this case." The conviction was affirmed.

Holding: Considering the limited scope of the expert's evidence, there was no risk that the jury would have adopted her opinions in lieu of their own. The jurors were entitled to apply the psychological factors outlined by Dr. Loftus. The instruction was a poorly crafted attempt to focus the jury on making an independent assessment of witness credibility, and not to rely on the expert's guidelines. Standing alone, the court's statement was incorrect, since it conveyed the impression that the jury should disregard the expert's testimony completely. However, the charge as a whole was valid. *See People v Ladd*, 89 NY2d 893, 895. Judgment affirmed.

Dissent: [Smith, GB, JJ] Where only two of 11 witnesses identified the defendant, instructing the jury to disregard expert evidence on eyewitness reliability was prejudicial. *See People v Williams*, 5 NY3d 732. Rejecting the motion for in camera review of the psychotherapy records of a witness who admitted being on medication violated the Confrontation Clause. *See People v Gissendanner*, 48 NY2d 543, 548.

Identification (Expert Testimony) IDE; 190(5) (10) (30)
(Eyewitnesses) (Lineups)

People v Young, No. 64, 5/9/2006

An intruder, whose face and body were covered except for his eyes, entered the complainants' home, threatened to kill one of them and took their money and valuables. One complainant, who is white, identified the suspect as black, and could not contribute to a composite drawing of his face. A month later, the defendant was arrested. One complainant never identified the defendant. The other failed to pick him from a photo array, but chose him from a lineup—and testified about it at trial. The

defendant's initial conviction was reversed due to lack of probable cause for the lineup. On retrial, the court found the complainant had an independent source for her identification and rejected the defendant's proffer of an expert witness, Prof. John Brigham, on eyewitness accuracy and cross-racial identification. The conviction was affirmed.

Holding: The record supported the conclusion that there was an independent source, despite lengthy delay and intervening proceedings between the incident and the lineup. *People v Malloy*, 55 NY2d 296, 300. The trial court did not abuse its discretion in excluding the identification expert. *See People v Lee*, 96 NY2d 157. There was sufficient, strong corroboration of the identification minimizing the value of the expert's testimony. While the expert's evidence would have helped the jury understand the impact that stress and limited viewing opportunity could have on memory, and the false confidence that can develop over time, the corroborating evidence of guilt countervailed. Judgment affirmed.

Dissent: [Smith, GB, JJ] It was error as a matter of law to permit an independent source hearing for the sole eyewitness before a retrial, and the court abused its discretion in disallowing the expert testimony.

First Department

**Subpoenas and Subpoenas Duces
Tecum (General)**

SUB; 365(7)

**Re Tran v Lee, __AD3d__, 810 NYS2d 467
(1st Dept 2006)**

The petitioner is charged with first-degree murder in California. Pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings (CPL 640.10 [2]) the petitioner sought a subpoena directing the New York respondent to testify in California. The subject of the respondent's testimony would be an alleged meeting between the petitioner and a third person about disposal of the body of the decedent, whom the petitioner claims the third person had killed. There is no allegation that the respondent heard the content of the meeting. The testimony is sought because it would place the petitioner and third party together at a time and place consistent with the petitioner's theory of defense and contradict the third person's version of events. A Superior Court in California executed a Certificate for Issuance of Out of State Subpoena. The petitioner then sought a subpoena in New York. The respondent's attorney filed an affirmation in opposition citing undue hardship, the respondent's fear that he or his loved ones will be killed, and the respondent's denial of the accuracy of the statements made in support of the application. The hearing court did not reach the issue of undue hardship, finding that the respondent "could not offer material or necessary testimony."

First Department *continued*

Holding: The California judge’s certificate is “prima facie evidence of all the facts stated therein,” but New York courts must determine once again whether the witness is material and necessary. The burden of so showing is on the petitioner. See *People v McCartney*, 38 NY2d 618, 622. The question may be resolved only by reference to the subject matter of the underlying proceeding and the logical relationship of the evidence sought to it. See *Matter of Codey [Capital Cities, Am. Broadcasting Corp.]*, 82 NY2d 521, 528-529. In other cases, testimony sought to refute or corroborate that of another witness has been found material and necessary. See *Matter of Failla*, 89 AD2d 923 *lv dsmd sub nom People v Failla*, 58 NY2d 692; *State of New Jersey v Bardoff*, 92 AD2d 890, 891. The respondent’s expected testimony is material and necessary. His claims of undue hardship are unpersuasive as no familial, monetary, or job-related hardships are identified. His presence would be required for only two days, and assurances are made that his expenses would be paid.

The statute requires a hearing where the respondent has requested one. Order reversed, matter remanded for an expedited hearing. (Supreme Ct, New York Co [Soloff, JJ])

Dissent: [McGuire, J] The petitioner’s submissions afford no reason to believe the third person will testify at trial. The petitioner also failed to meet the burden of showing the supposed corroborative effect of the respondent’s testimony.

Instructions to Jury (Preliminary Instructions) **ISJ; 205(48)**

Narcotics (Instructions) **NAR; 265(33)**

People v Friendly, No. 8044, 1st Dept, 3/9/2006

Holding: “The court did not err when, in an effort to dispel any misimpression the prospective jurors may have derived from the extensive media attention to proposed drug law reforms given at the time of defendant’s trial, it informed the panel that this case did not involve the possibility of a life sentence (see *People v Williamson*, 267 AD2d 487, 489 [1999], *lv denied* 94 NY2d 882 [2000]). The court’s statement was part of a carefully balanced instruction in which it advised the panelists, among other things, of their duty to avoid speculating about potential sentences (see CPL 300.10[2]), and in which the court avoided any possible prejudice.” Judgment affirmed. (Supreme Ct, New York Co [Uviller, JJ])

Juveniles (Delinquency) **JUV; 230(15)**

Narcotics (Evidence (Paraphernalia) (Possession)) **NAR; 265(20) (50) (57)**

Matter of Billy G., __AD3d __, 811 NYS2d 391 (1st Dept 2006)

Holding: The Presentment Agency concedes that there was insufficient evidence to support the determination that the appellant committed acts that would constitute third- and seventh-degree possession of drugs and second-degree use of drug paraphernalia. “The evidence only established that appellant was present in an apartment where a group of adults, also arrested, were apparently conducting a drug-selling operation. None of the contraband was in open view or connected in any way with appellant, and the evidence did not establish beyond a reasonable doubt that appellant was a participant in the criminal enterprise (compare *People v Bundy*, 90 NY2d 918, 920 [1997]).” Order of disposition reversed. (Family Ct, New York Co [Larabee, JJ])

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

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

People v Garcia, __AD3d__, 812 NYS2d 66 (1st Dept 2006)

The defendant lived with a woman and her children in an apartment with several animals including fish. One night the defendant threw the fish tank into the television, shattering both. He fatally stomped on a fish. The defendant was arrested following additional acts of violence toward the woman and convicted of assault, criminal mischief, aggravated cruelty to animals, and related charges.

Holding: The defendant argued that killing the goldfish was a misdemeanor under Agriculture and Markets Law 353 (unjustifiable killing of any animal) rather than a felony under section 353-a(1) (intentional killing or serious physical injury of a companion animal with aggravated cruelty). The definition of “companion animal” in Agriculture and Markets Law 350(5) includes any domesticated animal normally maintained in or near the household of the person who cares for it. Domesticated animals are those adapted to intimate life with and to the advantage of humans. The argument that goldfish are not “domesticated” because they would leave if given the opportunity is without merit; the Legislature did not include loyalty in its definition of companion animal. The Legislature’s concern in prohibiting acts of aggravated cruelty to animals stemmed from the correlation of violent behavior toward animals and subsequent violence against humans; the perpetrator’s state of mind, not that of the animal, is key.

The court erred by considering second-degree attempted assault as a lesser-included offense of first-degree attempted assault based on a significant departure from the prosecutor’s theory of the case, and by sentencing the defendant as a second violent felony offender.

First Department *continued*

Judgment modified and otherwise affirmed. (Supreme Ct, New York Co [Kahn, JJ])

Insanity (Civil Commitment) ISY; 200(3)

Sex Offenses (Sentencing) SEX; 350(25)

**State of New York ex rel Harkavy v Consilvio, No. 7675,
1st Dept, 3/30/2006**

In a highly publicized case, 12 prisoners about to be released from the custody of the Department of Correctional Services (DOCS), where they were serving sentences for felony sex offenses, were committed to Office of Mental Health (OMH) psychiatric facilities. Before the sentences expired, two OMH physicians certified the need to commit each prisoner pursuant to Mental Hygiene Law 9.27. After transport to an OMH facility when their sentences expired, each was examined by a third OMH doctor who concurred. Mental Hygiene Legal Services (MHLS) sought, under CPLR article 70, habeas corpus relief for all, which was partially granted.

Holding: MHLS argues that the petitioners' retention should have been made, if at all, under the Correction Law, which, unlike the Mental Hygiene Law (MHL), provides for a pre-commitment hearing. The court below found that as the prisoners were never out of custody when committed, Correction Law 402 applied, and ordered examination by two independent physicians and release of any prisoner not certified by both as mentally ill in need of care and treatment in a hospital and posing a substantial threat. Correction Law Article 9 and the inmate-patient provision of MHL 29.27 (enacted in 1976 "to ensure that, in concert with DOCS, OMH provide mentally ill inmates appropriate psychiatric care in both prison and psychiatric hospitals when necessary, and upgrade the quality of care while at the same time providing adequate assurances of security for the duration of the inmate's sentence . . ."). The Correction Law provisions contemplate return of the prisoner to a DOCS facility, and 404(1) says that MHL procedures control where a hospitalized person no longer under sentence becomes a free person. Applying the Correction Law here is a hyper-technical reading of the law unsupported by legislative intent. Under MHL, a person's status is fixed on the "commitment" date, which is the date the third physician confirms the need to commit the individual. DOCS had standing to seek commitment as a public institution. The petitioners here were not deprived of due process. This habeas proceeding should have been brought under MHL 33.15, which requires a judicial determination of sanity. Order and judgment reversed, petition dismissed. (Supreme Ct, New York Co [Silbermann, JJ])

**Counsel (Choice of Counsel)
(Right to Counsel) (Standby
and Substitute Counsel)** COU; 95(9.5) (30) (39)

People v Burton, No. 8207, 1st Dept, 4/4/2006

Holding: The court sua sponte discharged defense counsel, "who had actively participated in motion practice and had demonstrated familiarity with the case," and substituted new counsel on the basis of a single absence. Counsel's explanation for the absence was facially reasonable and was "neither contradicted by any evidence nor addressed by the court." "There had been no pattern of delay caused by counsel's failure to appear." The substitution deprived the defendant "of the right to continued representation by assigned counsel with whom he had formed an attorney-client relationship." As the prosecution concedes, substitution was reversible error in these circumstances. *See People v Espinal*, 10 AD3d 326 *lv den* 3 NY3d 740. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Goodman, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Parental Rights) JUV; 30(90)

**Matter of Adams H. v James H., 7577,
1st Dept, 4/4/2006**

Holding: The court erred in terminating the respondent father's parental rights. The respondent, his aunt, and the foster mother of the child in question testified consistently that the respondent visited with the child at least one or two weekends a month at the aunt's home during the six months before the petition to terminate was filed. The caseworker's testimony that the foster mother said the respondent had not visited with the child at the foster home was not inconsistent with the testimony that visits did occur, but at the aunt's home. The respondent's failure to visit for two or three weeks during the six-month period was justified as he was caring for his ill mother. He testified that he and the child were in daily contact by phone. The petitioner failed to carry its heavy burden under Social Services Law 384-b(3)(g) of proving abandonment by clear and convincing evidence. There was a one and a half year delay between the oral decision terminating the respondent's parental rights and signing of the written order of disposition. The claim that such delay violated due process is unreserved. In any event the delay was largely due to the court's concern about the status of the biological mother and a person initially presumed to be the biological father and was reasonable. There is no rule providing that failure to timely submit a written order renders an order unenforceable. *See Matter of Kim Shantae M.*, 221 AD2d 199. Order reversed, petition dismissed. (Family Ct, New York Co [Larabee, JJ])

First Department *continued*

Ethics (Defense) (General) ETH; 150(5) (7)

**Matter of Murawinski, No. M-1059,
1st Dept, 4/13/2006**

Holding: A prisoner retained the respondent attorney to file a supplemental appellate brief. The client contacted the Departmental Disciplinary Committee because he had talked only sparingly with the respondent, who had provided three different addresses from January to March 2003. The respondent promised to send the client a copy of the brief for review before filing but failed to do so, and had no contact with the client after May 2003. The Committee sent a copy of the client’s complaint to the respondent at the last address provided to the client, then learned that the respondent had never been a member of the firm that had referred some legal matters to him and occasionally let him use its library and support staff. That firm had forwarded the Committee’s correspondence to the respondent’s home address. After several efforts by the Committee to contact the respondent failed, service by publication was directed. The respondent’s actions demonstrate a willful noncompliance with a Committee investigation and threaten the public interest. Those actions include failure to: respond to the allegations; contact the Committee in response to its many letters, making him inaccessible to the Committee and clients including the complainant (*Matter of Horowitz*, 17 AD3d 191); or otherwise answer the complaint, update his contact information with the Officer of Court Administration and pay his attorney registration fee. Respondent suspended from the practice of law until further order.

Ethics (General) ETH; 150(7)

Matter of Gen, No. M-3861, 1st Dept, 4/20/2006

Holding: A friend requested the help of the respondent, an attorney. The friend wanted to obtain restitution from a person named Olexa who had burglarized the friend’s apartment, in exchange for the friend giving a lenient victim impact statement in Olexa’s case. The respondent talked to a lawyer for Olexa’s family. The respondent told the lawyer that the friend, for \$100,000, would provide a favorable statement and waive civil liability. Subsequent conversations were taped by the other attorney, and eventually an undercover detective talked to the respondent, pretending to speak for the Olexa family. The respondent proposed that of the suggested payment, \$10,000 be reported to the prosecution as restitution, and \$90,000 be kept secret to avoid triggering “additional procedures.” He added that without payment, the friend would make unfavorable statements to the prosecutor and that Olexa would be in prison for a long time where

he would be subject to harm. Eventually the respondent agreed that upon payment, the friend would not cooperate with the prosecution or testify if asked to. When checks for the final agreed-upon amounts were accepted by the friend, he and the respondent were arrested. The respondent was convicted of a misdemeanor. That conviction arose from “an extortionate scheme to obstruct justice.” It was not a single aberrant mistake; the respondent’s actions evolved over several weeks and, in addition to these acts, the respondent seriously misrepresented prior employment on his résumé. Respondent disbarred.

Second Department

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

Sentencing (General) SEN; 345(37)

**People v Smith, 25 AD3d 573, 807 NYS2d 402
(2nd Dept 2006)**

Holding: Defense counsel said on the original sentencing date that the defendant had filed grievances against counsel, who intended to defend himself against the claims and thought it might well breach his advocacy role; the defendant asked that counsel be relieved. This was a “seemingly serious request” for substitution of counsel under *People v Sides* (75 NY2d 922, 824). On the adjourned date, the court merely conducted a persistent violent felony offender inquiry without referring to the substitution request. Counsel agreed that the defendant’s status as a persistent felony offender had been established; the defendant said why he believed that was not so. After finding the defendant to be a persistent felony offender, the court asked if there was any reason for sentence not to be imposed. The defendant said, “Yes.” The clerk asked if the person next to the defendant was his lawyer. The defendant first said he had brought complaints and asked for counsel’s dismissal, adding, “I don’t know.” Asked again, he replied, “Yes.” The court erred in not inquiring as to whether substitution of counsel was warranted. *See People v Medina*, 44 NY2d 199, 207. There is no per se rule that defendants who file grievances are entitled to new counsel, but the court made no determination whether the defendant was merely delaying, and whether counsel was capable of providing effective representation. The record is not clear whether the defendant was proceeding pro se (no warnings about the dangers of so proceeding were given) or on his own.

A “lifetime” order of protection was issued. Any order of protection issued must include an expiration date. *See CPL 530.13(5); People v McClemore*, 4 NY3d 821, 822-823. Judgment modified, remitted for assignment of

Second Department *continued*

new counsel and resentencing. (Supreme Ct, Kings Co [Partnow, JJ])

Retroactivity (General) **RTR; 329(10)**

Sentencing (General) **SEN; 345(37)**

**People v Goode, 25 AD3d 723, 809 NYS2d 128
(2nd Dept 2006)**

Holding: Promised an indeterminate prison term of one to three years, the defendant pled guilty to third-degree sale of drugs. At sentencing on Jan. 18, 2005, he successfully argued that he should benefit from the provisions of the Drug Law Reform Act of 2004 (L 2004, ch 738) [DRLA]. He was sentenced under the new law to a determinate term of one year imprisonment followed by two years of post-release supervision. The prosecution appealed. The defendant's crime having occurred before the effective date of the new provisions, Jan. 13, 2005, his sentence was invalid as a matter of law. While the amendments to the drug laws were ameliorative, the DRLA expressly states (L 2004, ch 738, §41[d-1]) that its sentencing provisions have only prospective application. *See People v Nelson*, 21 AD3d 861, 862. Retroactive application of recently amended drug sentencing provisions is limited to persons convicted of class A-I felonies (*see* L 2004, ch 738 §23) and class A-II felonies (*see* L 2005, ch 643), not relevant here. Sentence reversed, matter remitted for resentencing. (County Ct, Rockland Co [Resnik, JJ])

Search and Seizure (Stop and Frisk) **SEA; 335(75)**

**People v Breazil, 25 AD3d 719, 811 NYS2d 704
(2nd Dept 2006)**

Police responding to a call about a robbery in progress by six black men, one dressed in all white and some riding bicycles, found one black male, wearing all white, on a bicycle. An officer stopped the man, later identified as the defendant, and recovered a gun. The complainant could not identify him at a showup, but ballistics evidence tied the gun to an earlier murder, for which the defendant was convicted. Suppression of the gun was denied. His conviction was affirmed on direct appeal. *See People v Breazil*, 269 AD2d 537. His CPL 440.10 motion to vacate the judgment was denied.

Holding: The defendant claims his conviction must be overturned for violation of the 4th Amendment prohibition of unreasonable searches and seizures under the rule announced in *Florida v J.L.* (529 US 266, 275 [2000]). That case held that an uncorroborated anonymous tip does not supply reasonable suspicion to stop and frisk someone under *Terry v Ohio*, 392 US 1 (1968). As *Florida v*

J.L. was decided before the defendant's conviction was final (his application for leave to appeal to the Court of Appeals from affirmance of his conviction on direct appeal was pending), the court below erred in ruling that the *Florida v J.L.* ruling could not be applied here. However, the claim that this case is similar to, and controlled by, *Florida v J.L.* is without merit. In *Florida v J.L.*, there was no showing that the anonymous tipster reporting a man with a concealed gun had knowledge of concealed criminal behavior. Here, the report was not of concealed activity. The police observation of the defendant (and no one else) matching a sufficiently specific description supported a permissible inference that the report was made by someone witnessing a robbery. *See People v Daniels*, 6 AD3d 245, 246. Order affirmed. (Supreme Ct, Kings Co [Feldman, JJ])

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

**People v Hegazy, 25 AD3d 675, 811 NYS2d 700
(2nd Dept 2006)**

Holding: In 2000, the defendant's estranged husband told the FBI he had found child pornography on the defendant's computer and could not find the defendant or their young son. After she and the child were located, the defendant pled guilty to a federal charge of conspiracy to receive child pornography. She was sentenced almost two years later to time served (32 months) and two years probation. Upon her release, the New York Board of Examiners of Sex Offenders (Board) completed a risk assessment instrument under the Sex Offender Registration Act (Correction Law article 6-C). The Board concluded that the defendant had engaged in a continuing course of sexual misconduct against her son, based on the findings of an FBI agent, who had interviewed the child, and assessed her 20 points for it. She was assessed 60 other points in various categories. From the resulting level two risk level classification, the Board recommended an upward departure "based on the defendant 'lead[ing] a very precarious life [where] scrutiny in the community should be of the highest nature.'" The evidence established by clear and convincing evidence (Correction Law 168-n[3]; *see People v Brown*, 7 AD3d 831, 832) facts sufficient to support the level two classification. There was no evidence of an aggravating factor not taken into account by the applicable guidelines. *See People v Inghilleri*, 21 AD3d 404, 406; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 (1997). There should be no departure from the defendant's presumptive classification. Order reversed, the defendant reclassified as a level two sex offender. (Supreme Ct, Kings Co [Dowling, JJ])

Second Department *continued*

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

People v Sherman, 25 AD3d 813, 808 NYS2d 754 (2nd Dept 2006)

Holding: The prosecution appealed from a purported order dismissing the indictment in the interests of justice. On Jan. 7, 2003, the court stated on the record, “indictment is dismissed. This constitutes the decision and order of the court.” An entry was made the same day in what is called the court’s “motion buck sheet” as follows: “motion to dismiss granted—dec[ision] and order dictated into record.” The statute governing appeals by right from the dismissal of an accusatory instrument (CPL 450.20[a]) states that such appeal may be taken from an order entered pursuant to CPL 210.20. The word “order” is not defined, but “there is no statutory language which provides for appeals from decisions, transcripts, or notations.” The motion buck sheet entry contains nothing indicating it was intended to be an order—no recital of papers considered in deciding the motion, no decretal paragraphs. See *gen Matter of Dondi*, 63 NY2d 331. The language indicating that the decision and order were dictated into the record suggests that the court itself did not consider the motion buck sheet to be a court order. Thus, no appeal currently lies. An appeal may be taken after entry of an appropriate order under CPL 210.20. (Supreme Ct, Kings Co [Garry, JJ])

Sentencing (Youthful Offenders) SEN; 345(90)

People v Rivera, __AD3d__, 810 NYS2d 3 (2nd Dept 2006)

Holding: The sentencing court had an obligation to determine on the record whether the defendant should be afforded youthful offender treatment, the issue having been properly raised. See *People v Martinez*, 301 AD2d 615. The court failed to adequately place its reasons for denying youthful offender status on the record, requiring resentencing after a proper determination as to whether the defendant should be given youthful offender status. No opinion is expressed as to whether youthful offender status should be afforded. The defendant’s other issues lack merit. Judgment modified, sentence vacated, matter remitted. (Supreme Ct, Queens Co [Braun, JJ])

Family Court (General) FAM; 164(20)

Matter of Neu v Davidowitz, No. 2005-05591, 2nd Dept, 3/17/2006

The father appealed from a Family Court order entered on May 10, 2005, dismissing his objections to three

orders of the same court issued on Feb. 16, 2005 and entered on Feb. 18, 2005. The objected-to orders of a Support Magistrate awarded the mother a money judgment for support arrears, directed the entry of a judgment against the father for that amount, and denied the father’s petition for downward modification of support.

Holding: Family Court dismissed the father’s objections to the Support Magistrate’s orders on the ground that the objections were not timely filed under the 35-day limit of Family Court Act 439(e), applicable when the orders are mailed to the parties. See *Matter of Chambers v Chambers*, 305 AD2d 672, 673. The objections were served upon the mother by mail on Mar. 24, 2005 and mailed to the Clerk of the Family Court the same day, where they were filed on Mar. 28, 2005. Calculating from the entry date of Feb. 18, 2005, the service of the objections on Mar. 24, 2005 was timely but the filing of the objections on Mar. 28, 2005 was not. However, the record does not show whether the Support Magistrate’s orders were mailed on the date of entry (Feb. 18, 2005). There must be a new determination of the timeliness of the father’s objections and, if timely, a determination of their merits. Order reversed, objections reinstated, matter remitted. (Family Ct, Westchester Co [Davidson, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Support Proceedings) JUV; 230(135)

Matter of Paige v Austin, No. 2005-02395, 2nd Dept, 3/7/2006

Holding: Family Court denied the father’s objections to an order directing him to pay \$98 per month child support. At the time of the hearing, the father’s annual gross income was \$6,912 per year. Although the father has two other children with a different mother, only the parties’ child in common is the subject of the support matter, so the support percentage applicable under the Child Support Standards Act (Family Court Act 413) is 17% of combined parental income. See Family Court Act 413(1)(b)(3)(i). The full 17% was apportioned to the father. Where a basic child support obligation would reduce a non-custodial parent’s income below the poverty guidelines for a single individual, the basic obligation is to be \$25 per month. See Family Court Act 413(1)(d). Only that amount should have been ordered. See *Matter of Edwards v Johnson*, 233 AD2d 844. Order modified, and as modified affirmed. (Family Ct, Kings Co [Elkins, JJ])

Evidence (Sufficiency) EVI; 155(130)

People v Carter, No. 2004-00213, 2nd Dept, 3/7/2006

The defendant was convicted after a nonjury trial of promoting prostitution and conspiracy.

Second Department *continued*

Holding: The evidence was insufficient to support the defendant's convictions of third-degree promoting prostitution. The dates of the alleged offenses were July 12 and Aug. 9, 2001. With regard to August 9, the evidence, when viewed in a light most favorable to the prosecution, showed only that "the defendant was in the vicinity of two prostitutes." There was no proof as to his activities on July 12. To be guilty of promoting prostitution, one must advance or profit from it by some form of control of a house or business of prostitution involving two or more prostitutes. *See* Penal Law 230.25(1); *People v Land*, 10 AD3d 369. Nor was there sufficient evidence to support the conviction of fifth-degree conspiracy, which requires the object crime of the conspiracy be a felony. *See* Penal Law 105.05(1); *People v Yon*, 300 AD2d 1127, 1128-1129. The direct evidence here showed, during the relevant time, only conduct constituting prostitution (*see* Penal Law 230.00), a class B misdemeanor. The defendant's remaining contentions lack merit. Judgment modified, promoting prostitution counts eight and 10, and fifth-degree conspiracy, vacated, and as modified, affirmed. (Supreme Ct, Queens Co [Braun, JJ])

Third Department

Impeachment (General) (Of Defendant) IMP; 192(15) (35)

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

People v Bellamy, 26 AD3d 638, 809 NYS2d 287 (3rd Dept 2006)

Holding: While an alternative verdict would not have been unreasonable, the verdict was not against the weight of the evidence. Two errors, combined, require reversal of the defendant's reckless endangerment and weapons convictions. A prosecution witness told the grand jury he saw the defendant at the scene of a shooting when it happened. He said at trial that he first saw the defendant later in the evening, a block away. This testimony did not disprove, or affirmatively damage, the prosecution's case. The prosecutor could not impeach the witness with prior statements or disclose their contents to the jury if seeking to refresh the witness's recollection. *See People v Reed*, 40 NY2d 204, 207. Despite an admonition by the court to comply with CPL 60.35(3) and the witness's insistence that he did not need his recollection refreshed, the prosecutor persisted, eventually eliciting portions of the statement's contents. The prosecution also presented rebuttal testimony, over objection, that the defendant was known as "'Two Guns' and 'Killer,'" the defendant having denied he was called "Two Guns." The nickname was not a mate-

rial issue. *Cf People v Rice*, 223 AD2d 405, 406 *lv den* 87 NY2d 1024. A cross-examining party is bound by a witness's answers as to collateral matters affecting credibility. *See People v Pavao*, 59 NY2d 282, 288. The improper rebuttal testimony "had an obvious potential for a prejudicial effect on the jury." These errors were not harmless given the circumstantial nature of most of the evidence and the conflicting evidence on key issues. *See People v Stewart*, 20 AD3d 769, 770-771. Judgment reversed, matter remitted for new trial. (Supreme Ct, Albany Co [Lamont, JJ])

Homicide (Murder [Definition] HMC; 185(40[d] [j] [p]) [Evidence] [Intent])

People v Breedlove, 26 AD3d 641, 809 NYS2d 291 (3rd Dept 2006)

The defendant was convicted of second-degree murder, second-degree possession of a weapon, and second-degree assault.

Holding: The defendant fired five shots, two at very close range, at the decedent, who was fighting with the defendant's friend. These actions were consistent only with intentional murder, not depraved indifference murder. *See People v Payne*, 3 NY3d 266, 270-272. Whether or not he intended to kill, the defendant certainly acted intentionally, not recklessly. He was acquitted of intentional murder. Judgment modified, second-degree murder conviction reversed, and as modified, affirmed. (County Ct, Chemung Co [Hayden, JJ])

Parole (Release [Conditions]) PRL; 276(35[a])

Matter of Breeden, 26 AD3d 660, 808 NYS2d 839 (3rd Dept 2006)

Holding: The petitioner, a prisoner serving a prison sentence of 12½ to 25 years for sexually assaulting a teenage girl, remains incarcerated beyond his conditional release date (Feb. 7, 2004) for failure to find a suitable residence as required by the Parole Board. He brought a CPLR article 78 proceeding challenging his continued incarceration. The court dismissed the petition. The Parole Board is authorized to require that special conditions be met before a prisoner's release. *See Executive Law 259-c(2) and 259-g; Matter of Wright v Travis*, 297 AD2d 842. A condition that a prisoner with a record of multiple serious sex offenses and a demonstrated inability to comply with parole release terms to find approved housing before release is a rational condition. *See Matter of Billups v New York State Div. of Parole*, 18 AD3d 1085, 1085-1086. "Moreover, the Board has no obligation to assist him in locating and securing appropriate housing (*see Executive Law Sec. 259-a [6]-[8]; 9 NYCRR 8000.1 [a] [5]*). Judgment affirmed. (Supreme Ct, Franklin Co [Feldstein, JJ])

Third Department *continued*

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

Double Jeopardy (Punishment) DBJ; 125(30)

People v Williams, __AD3d__, 811 NYS2d 150 (3rd Dept 2006)

Holding: The court conducted a searching inquiry into the defendant’s ability to proceed pro se as he unequivocally requested. See *People v Arroyo*, 98 NY2d 101, 103. Inquiring about the defendant’s knowledge of the charges, education, and prior experience with the criminal justice system, the court learned that the defendant had represented himself before. The court thoroughly looked into the defendant’s mental health, past and present. While the public defender representing the defendant had reservations about his competency and had not been able to appropriately investigate a mental defense, the court had before it psychiatric reports finding the defendant competent. The colloquy with the defendant did not disprove those findings, and firmly established that the defendant knew his rights, knowingly and intelligently waived his right to counsel, and comprehended “fundamental legal principles.” He had not been disruptive. Denying his request to proceed pro se was error.

Double jeopardy did not bar prosecution where the defendant had been subjected to prison administrative discipline for the same conduct. While the administrative punishment was severe (10 years in special housing unit and loss of commissary privileges, loss of phone and package privileges, restrictive diet for 28 days, full restraints, and loss of a year of good time), it was not so harsh as to bar criminal prosecution. Judgment reversed, matter remitted for new trial. (County Ct, Chemung Co [Buckley, JJ])

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

People v Wolcott, __AD3d__, 809 NYS2d 676 (3rd Dept 2006)

The defendant was indicted for second-degree robbery and perjury based on allegations that she had driven a getaway car for the man now her husband and lied at his trial. After pleading guilty to perjury, the defendant waived a jury trial, consented to a stipulated set of facts as to the robbery count, and was convicted of third-degree robbery. She then appealed. An *Anders* brief was rejected.

Holding: During the plea colloquy, the defendant said she had lied under oath because she was afraid of her husband, who had beaten her and threatened her with death. The court did not inquire further or advise the

defendant about the potential duress defense that her statements raised. The court erred by accepting the plea without determining whether the defendant was aware of the possible defense and wanted to waive it by proceeding with the plea. See *People v Adams*, 15 AD3d 987, 987-988 *lv den* 4 NY3d 851. “Because this was an integrated plea agreement, the convictions of both charges must be reversed even though defendant knowingly waived her right to a jury trial and entered into a trial on stipulated facts regarding the robbery charge.” Judgment reversed, plea vacated, matter remitted. (County Ct, Chemung Co [Buckley, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Peters, __AD3d__, 809 NYS2d 680 (3rd Dept 2006)

Holding: Upon release from incarceration for two counts of second-degree sodomy, the defendant was presumptively classified by the Board of Examiners of Sex Offenders (Board) as a risk level II under the Sex Offender Registration Act (SORA). See Correction Law article 6-C. During the hearing to determine risk level, the court opined that its role was only to “determine whether the board’s recommendation was arbitrary or capricious.” Apparently the court felt it lacked the authority to independently establish the appropriate level, and merely “confirmed” the Board’s classification. However, SORA requires that after receiving a Board recommendation, the court is to make the risk level determination. See *People v David W.*, 95 NY2d 130, 138. The burden is on the prosecution to show by clear and convincing evidence that the requested assessment is correct. See *People v Neish*, 281 AD2d 817. No such process occurred here. Order reversed, matter remitted. (County Ct, Albany Co [Herrick, JJ])

Prisoners (Conditions of Confinement) (General) PRS I; 300(5) (17)

Prisons (Programs) PRS II; 300.5(60)

Sex Offenses (Sentencing) SEX; 350(25)

Matter of Matos v Goord, __AD3d__, 811 NYS2d 480 (3rd Dept 2006)

Convicted of first-degree robbery, the petitioner was sentenced to prison where he initially agreed to participate in a recommended sex offender counseling program (SOCP). He later questioned the recommendation because he had not been convicted of a sex offense and filed a grievance. When it was denied, he commenced a CPLR article 78 proceeding; the court dismissed the petition.

Third Department *continued*

Holding: The Department of Correctional Services (DOCS) includes in the category of prisoners eligible for a SOCP those sentenced for non-sex crimes where “there is evidence that a sex crime or the attempt to commit a sex crime did occur in the course of” the prisoner’s offense, as documented in a presentence report or related materials. The petitioner’s presentence report indicates that he forced the female complainant into her car, fondled her breasts, and demanded oral sex. Referring him to a SOCP was rational. The petitioner therefore failed to meet his burden of showing that the challenged administrative determination at issue was “arbitrary and capricious” or “without a rational basis.” *See eg Matter of Harris v Goord*, 18 AD3d 1040. While the petitioner’s refusal to participate in a SOCP “may have potentially adverse effects on such matters as his eligibility for parole and participation in the family reunion program,” he “cannot be compelled to attend the program.” Judgment affirmed.

Arrest (Warrantless) **ARR; 35(54)**

Motions (Suppression) **MOT; 255(40)**

**People v McNair, __AD3d__, 811 NYS2d 819
(3rd Dept 2006)**

Holding: In August, “defense counsel filed a demand to produce ‘any tapes or other electronic recordings which the prosecution intends to introduce at trial.’” The prosecution indicated that the requested material would be provided as soon as the prosecution received it. In September, on the last date that an omnibus motion could be filed, the defense moved for a *Dunaway* (*Dunaway v New York*, 442 US 200 [1979]) hearing. Having not received the requested tapes, counsel’s affirmation in support was based on information and belief. Lacking access to the 911 call made in the case, counsel’s assertions were indeed somewhat vague. While a *Dunaway* hearing request must contain facts that, if true, would warrant suppression, that sufficiency must be assessed in light of the motion’s context and “‘defendant’s access to information.’” *People v Mendoza*, 82 NY2d 415, 426. In the circumstances of this case, denial of the hearing was improvident. An appropriate hearing must be held. *See eg Weddington*, 192 AD2d 750, 751 *lv den* 83 NY2d 859. Appeal withheld, matter remitted. (Supreme Ct, Albany Co [Lamont, JJ])

**Counsel (Advice of Right to
(Right to Counsel) (Waiver)** **COU; 95(5) (30) (40)**

**People ex rel Foote v Lorey, No. 99211,
3rd Dept, 4/13/2006**

A Support Magistrate told the petitioner at an appearance regarding alleged violation of a child support order that the petitioner was entitled to have an attorney. Petitioner was told that she might be eligible for public representation and given two weeks to apply for counsel for the hearing date set for almost four months later. The petitioner did not apply for counsel. She failed to appear at the hearing because she believed that the child’s father had agreed in a related proceeding not to pursue the violation. Upon this default, the Support Magistrate found the petitioner in contempt and recommended incarceration. The petitioner appeared in Family Court for a confirmation hearing and asked not to proceed without counsel, but was jailed. Supreme Court granted a writ releasing her under CPLR article 70.

Holding: Family Court did not meet its obligations to determine whether the petitioner had been properly advised of her right to assigned counsel and to rectify any deficiencies. *See Matter of Wilder v Bufo*, 25 AD3d 827, 828. The court merely said that petitioner was “too late” and ordered her immediate incarceration, denying her right to counsel when she tried to exercise it. *See Matter of Brunelle v Bibeau*, 18 AD3d 927, 929. Nothing in the record can be read to constitute the petitioner’s knowing and intelligent waiver of her rights at either appearance. There is no merit to the unpreserved argument that the petitioner should have appealed; she properly sought a writ alleging deprivation of an absolute and fundamental right. *See Family Ct Act 262(a)(vi)*. Order affirmed. (Supreme Ct, Fulton Co [Aulisi, JJ])

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

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

People v Barton, No. 15854, 3rd Dept, 4/20/2006

Holding: The minutes of the defendant’s guilty plea reveal the use of language of forfeiture, not language of waiver. *See People v Lopez*, 6 NY3d 248, 256-267. It is therefore impossible to determine whether or not the defendant understood the nature of the waiver of appellate rights. The merits of his claim are considered. His plea to first-degree possession of a forged instrument was not knowing and intelligent where he was not in possession of a forged instrument. His insertion of his own name on a stolen money order was not forgery. *See People v Cunningham*, 3 NY3d 593, 596-598. This is not a plea to a hypothetical or nonexistent crime in satisfaction of an indictment charging a crime with a higher penalty. *See People v Guishard*, 15 AD3d 731 *lv den* 5 NY3d 789. The defendant is not claiming that his plea allocution was insufficient. *See People v Seeber*, 12 AD3d 950 *lv den* 4 NY3d

Third Department *continued*

803. It was not a plea to an offense for which the facts alleged to support the original charge would not be appropriate. See *People v Francis*, 83 NY2d 150, 155. The defendant pled to the original charge, which is unsupported by the facts. Other issues raised lack merit. Judgment modified, judgment of possession of a forged instrument reversed, and as modified, affirmed. (County Ct, Albany Co [Breslin, JJ])

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

People v Trotter, No. 16266, 3rd Dept, 4/29/2006

Holding: The presentence report contained information about the defendant’s past mental health issues. The defendant claims on appeal that the court erred by not mandating a competency hearing. The defendant’s coherent responses to questioning during the plea colloquy and lucid statements at sentencing do not support a finding that the court abused its discretion. See *People v Tortorici*, 92 NY2d 757, 765 *cert den* 528 US 834.

After the defendant was asked if he understood that he was giving up his right to appeal the process, no further colloquy was held explaining the right being relinquished. An appellate court cannot be certain of a defendant’s understanding of appellate rights waiver absent a record that establishes the defendant’s comprehension that the right to appeal is distinct from rights automatically forfeited by a guilty plea. See *People v Lopez*, 6 NY3d 248, 253, 256. Assuming that the inquiry here was insufficient, interest of justice jurisdiction exists to consider the length of the defendant’s sentence. No extraordinary circumstances or abuse of discretion have been shown to support a sentence reduction. See CPL 470.15(16) (B); *People v Delgado*, 80 NY2d 780, 783. Judgment affirmed. (County Ct, Albany Co [Breslin, JJ])

Due Process (General) (Miscellaneous Procedures) (Prisoners) DUP; 135(7) (10) (25)

Family Court (General) (Violation of Family Court Orders) FAM; 164(20) (60)

People ex rel Constantino v Lorey, No. 98918, 3rd Dept, 4/27/2006

The petitioner was sentenced in absentia to 180 days in jail by Fulton County Family Court (Jung, J) after being found, on default, to be in violation of an order of protec-

tion for having failed to complete drug counseling or visit her children. The Fulton County Supreme Court granted her application for release under CPLR article 70.

Holding: Notwithstanding knowledge that the petitioner was in a neighboring county jail when the violation proceeding was commenced, the Family Court failed to produce her. The summons served on her in jail did not give notice of the court’s apparent policy that incarcerated persons bear the burden of requesting in writing to be produced. The petitioner tried to contact the Family Court, asking jail personnel to provide contact information, contact the court for her, or at least notify the court of her location. She was told that the court knew her whereabouts and would order her produced. The petitioner’s mother was told that only the petitioner could arrange to be produced. The written decision finding the petitioner in default and sentencing her indicated that a fact-finding hearing had taken place. However, no evidence had been offered or testimony taken. The Family Court denied the petitioner not only her statutory rights under Family Court Act 1072 but also her fundamental right to due process, permitting the remedy of habeas corpus. See *People ex rel Lobenthal v Koehler*, 129 AD2d 28, 30. The Supreme Court properly found that fundamental fairness was patently lacking in the proceedings leading to the petitioner’s confinement, necessitating habeas relief. See *People ex rel Keitt v McMann*, 18 NY2d 257, 262. Judgment affirmed. (Supreme Ct, Fulton Co [Aulisi, JJ])

Fourth Department

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

People v Lawrence, __ AD3d __, 812 NYS2d 199 (4th Dept 2006)

Holding: The defendant’s attorney essentially became a witness against the defendant at sentencing, denying the defendant the effective assistance of counsel. See *People v Caccavale*, 305 AD2d 695. Defense counsel told the court that the defendant had failed to contact counsel, failed to appear in court or do the things the court had outlined at prior proceedings, and had appeared at counsel’s office drunk and exhibiting threatening behavior. Judgment modified, matter remitted for assignment of new counsel and resentencing. (County Ct, Onondaga Co [Fahey, JJ])

Guilty Pleas (General) (Withdrawal) GYP; 181(25) (65)

People v Chapman, __AD3d__, 810 NYS2d 766 (4th Dept 2006)

Holding: The defendant pled guilty to fourth-degree drug possession and was placed in a drug program after

Fourth Department *continued*

being advised that successful completion would result in the charges being dismissed, while failure to complete the program “for any reason” would result in a prison sentence of one to three years. He completed the drug program. However, he failed to pay a service fee of \$201. As a result, the program would not provide a discharge summary to the court, and program records reflected that the defendant was out of the program for nonpayment of the fee. The court abused its discretion in refusing to allow the defendant to withdraw his plea, and in sentencing him to five years probation. Payment of the fee was not a condition of the plea agreement. A plea induced by an unfulfilled promise must be vacated or the promise must be honored. *See People v Jackson*, 272 AD2d 342, 342-343. Judgment modified, matter remitted for withdrawal of the plea or dismissal of the charge. (Supreme Ct, Onondata Co [Brunetti, AJ])

Admissions (Miranda Advice) ADM; 15(25)

Motions (Suppression) MOT; 255(40)

**People v Long, __AD3d__, 810 NYS2d 754
(4th Dept 2006)**

Holding: After stopping the defendant because his vehicle registration was expired, an officer told the defendant that pursuant to department policy the vehicle must be towed. The defendant was placed in the back of the patrol car so the officer could give him a citation. The officer then asked the defendant if there was anything he should know about the vehicle’s contents, and the defendant said there was a gun in the door, and later made further statements. Because the defendant was in custody when the statements were made and had neither received nor waived his *Miranda* rights, the court properly suppressed them. *See gen People v Smith*, 214 AD2d 845, 847 *lv den* 86 NY2d 741. Having been placed in the police car, the defendant could not get out, even though he was not handcuffed. The officer “testified that the defendant was not free to leave and that a traffic stop for the purpose of issuing a citation is ‘technically an arrest.’” The question was designed to elicit inculpatory cooperation (*see People v Hardy*, 5 AD3d 792, 793 *lv den* 3 NY3d 675) and the officer should have known that it “was ‘reasonably likely to elicit an incriminating response.’”) Suppression order affirmed. (Supreme Ct, Monroe Co [Affronti, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

**People v Farchione, Jr., __AD3d__, 810 NYS2d 726
(4th Dept 2006)**

Holding: The prosecution concedes that they failed to comply with the notice provisions of the Sex Offender Registration Act. *See* Correction Law 168-d(3). County Court and the defendant were not provided with the requisite written indication that the prosecution would seek an upward departure from the level one risk assessment recommended in the presentence report. *See Popel v Davila*, 299 AD2d 573. The order determining the defendant to be a level two risk reversed, matter remitted for further proceedings. (County Ct, Monroe Co [Geraci, Jr., JJ])

Evidence (Hearsay) EVI; 155(75)

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

**People v Bryant, No. KA 03-00401,
4th Dept, 3/17/2006**

The defendant was convicted of murder and assault.

Holding: The autopsy report admitted as a business record did not, for the most part, constitute testimonial evidence. *See People v Durio*, 7 Misc3d 729, 734-736; *see gen* US Const 6th Amend and *Crawford v Washington*, 541 US 36, 56 (2004). To the limited extent the report could be deemed to contain testimonial evidence, such as the pathologist’s opinions, the defendant did not contest that evidence. The defendant admitted causing the decedent’s death. Any error did not pose the possibility of prejudice to the defendant. *See People v Crimmins*, 36 NY2d 230, 237. Nor was the defendant’s right of confrontation violated by admission of a complainant’s statements. Those statements were made outside the context of “structured police questioning” and were not testimonial evidence. *See People v Paul*, 25 AD3d 165, 169-170 *lv den* 6 NY3d 752, 757. They were properly admitted as excited utterances. *See People v Seymour*, 183 AD2d 35, 38-40 *lv den* 81 NY2d 766. That the complainant was still under the stress of the earlier beating by the defendant and of being confined in the house with him afterward was properly found to be enough to still the complainant’s reflective faculties. *See People v Johnson*, 1 NY3d 302, 306. The evidence of assault was sufficient for conviction. Judgment affirmed. (Supreme Ct, Monroe Co [Egan, JJ])

Admissions (Miranda Advice) ADM; 15(25)

Evidence (Other Crimes) EVI; 155(95)

People v Ramos, No. KA 04-00050, 4th Dept, 3/17/2006

Holding: The court allowed the prosecution to elicit testimony that the defendant, on trial for third-degree weapon possession, was on parole at the time of his arrest. This sua sponte ruling, after an initial ruling that such evidence would not be allowed, followed testimony by the defendant’s mother contradicting testimony by the defendant’s parole officer about events before the defendant’s

Fourth Department *continued*

arrest. The court found this “opened the door” to evidence of the defendant’s parolee status. The mother’s testimony in no way misled the jury about the defendant’s criminal history or status. Allowing evidence about his parolee status was error. *See People v Seavy*, 16 AD3d 1130, 1131.

The court also erred by denying suppression of the defendant’s prearrest statements made as he was being transported, handcuffed, in a police vehicle. The statements were the result of questioning by the arresting officer without *Miranda* warnings being given. *See People v English*, 73 NY2d 20, 24. Judgment reversed, new trial granted. (Supreme Ct, Erie Co [Tills, AJ])

Search and Seizure (Plain View Doctrine) SEA; 335(53)

People v James, __AD3d__, 811 NYS2d 245 (4th Dept 2006)

Holding: Drugs found in the bedroom of an apartment by Housing Authority police executing arrest warrants should have been suppressed. An officer accompanied a codefendant to the bedroom to get identification. After seeing, on the bed, cash and baggies of a type commonly used to package drugs, the officer returned to the living room and told his supervisor what he had seen. He then went back to the bedroom with another officer, who saw more baggies protruding from an open compartment of a shaving kit on the dresser. The second officer unzipped another compartment of the kit, finding crack cocaine and a receipt with the defendant’s name, listing the apartment in question as his address. Even if the officers were lawfully in the bedroom, the drugs in the zippered compartment were not in plain view. *See People v Robinson*, 144 AD2d 960. Finding drugs by unzipping the compartment “was not ‘inadvertent rather than anticipated’ (*People v Basilicato*, 64 NY2d 103, 115. . .).” The drugs were illegally seized and must be suppressed. Statements by the defendant were fruits of the illegality and must be suppressed as well. *See gen Nardone v US*, 308 US 338, 341 (1939). (Supreme Ct, Erie Co [Forma, JJ])

Sentencing (Resentencing) SEN; 345(70.5)

People v Rachel L., No. KA 05-01555, 4th Dept, 4/28/2006

Holding: Following guilty pleas in two files, to second-degree burglary and several counts of second-degree criminal possession of a forged instrument, the appellant was sentenced to concurrent terms of imprisonment of six months each. Because the appellant was still in high school, the court ordered that the sentences be served during school vacations. The sentencing date was Oct. 13,

2004. The appellant spent time in jail from Dec. 22, 2004 until Jan. 2, 2005. The sheriff then concluded that the appellant had been committed on an intermittent basis and, under Penal Law 85.00, had completed her six-month sentence as of Jan. 2, 2005. The court erred by then sua sponte resentencing the appellant to concurrent determinate sentences of six months. Intermittent incarceration commences from the date imposed and continues until it expires, during time spent both in and out of confinement. *See Penal Law 85.00(3); Donnino*, Practice Commentary, McKinney’s Cons Laws of NY, Book 39, Penal Law art 85, at 21. The conditions of Penal Law 85.05 not having been met, the court lacked authority to modify or revoke the sentence. Resentences reversed. (County Ct, Ontario Co [Harvey, JJ])

Alibi (General)

ALI; 20(22)

Trial (Continuances)

TRI; 375(10)

People v Walker, No. KA 03-01322, 4th Dept, 4/28/2006

Holding: While requests for adjournment are matters resting in the sound discretion of the trial court (*Matter of Anthony M.*, 63 NY2d 270, 283), short adjournments requested to ensure a fundamental right call for a more liberal policy in favor of granting them. *See People v Foy*, 32 NY2d 473, 476-477. Requesting an adjournment to produce an alibi witness is an example of when the court’s discretionary power is to be “more narrowly construed.” This record shows no dilatory conduct by the defendant. A witness he had subpoenaed was seriously ill and defense counsel sought the adjournment to present alibi testimony by that witness’s son. There is no indication the proposed testimony would be cumulative; no other alibi evidence had been presented. *See gen People v Brown*, 4 AD3d 790, 791. The proposed testimony was pivotal as to the defendant’s guilt, and depriving him of the opportunity to present it denied him the fundamental right to defend himself. Judgment reversed, new trial granted on specified counts. (Supreme Ct, Monroe Co [Egan, JJ])

Dissent: [Kehoe and Hayes, JJ] The proposed witness was not under subpoena and no notice had been provided that he would present alibi testimony. Another witness corroborated the defendant’s testimony that they were at the scene only 10 minutes and that the witness had driven the defendant to his home, 10 minutes away. The defendant did not meet his burden of establishing an entitlement to an adjournment.

Sex Offenses (Sentencing)

SEX; 350(25)

People v Gonzalez, No. KA 05-01903, 4th Dept, 4/28/2006

Holding: The Board of Sex Offender Examiners (Board) presumptively classified the defendant at risk level three under the Sex Offender Registration Act (Correction Law 168 et seq) based on a score of 130 on the risk assessment instrument (RAI). The court concurred. However, points assessed by the Board in two of the RAI categories are not supported by clear and convincing evidence. See *People v Arotin*, 19 AD3d 845, 847-848. The defendant did not admit that he was armed with a dangerous instrument at the time of the offense—he took an *Alford* plea. Neither the complainant’s equivocal statement in her deposition nor the unreliable hearsay in the presentence report sufficiently established the dangerous instrument allegation for which 30 points were assessed. See *People v Hoppe*, 12 AD3d 792, 793. The record does support a finding of forcible compulsion, for which 10 points were assessed under the “use of violence” RAI category. The taking of an *Alford* plea alone does not warrant assessment of 10 points for failure to accept responsibility, “particularly in view of the evidence to the contrary presented by defendant at the hearing (see *Matter of Vandover v Czajka*, 276 AD2d 945, 947).” The defendant’s score on the RAI, lowered by 30 points, results in a presumptive risk level of two, and nothing in the record warrants a departure. Order modified, the defendant determined to be a level two risk. (County Ct, Genesee Co [Adams, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Milks, No. KA 05-00382, 4th Dept, 4/28/2006

Holding: Supreme Court incorrectly assessed five points against the defendant for “a ‘prior’ ‘criminal history’ not involving sex crimes or felonies” under risk factor nine of the Sex Offender Registration Act (Correction Law 168 et seq) risk assessment instrument. Without those points, the total points assessed do not reach the number necessary to determine him a level three risk. The Risk Assessment Guidelines and Commentary (Nov. 1997) provides that an “offender’s ‘concurrent or subsequent criminal history is not covered by’” risk factor nine, though such history may support an upward departure if it provides reason to believe the offender “poses an increased risk to public safety.” The defendant was released from prison in 1997 after being convicted of the underlying sex crime in 1991. The “criminal history” considered by the court concerned 1999 acts and a 2000 conviction. The record lacks the requisite clear and convincing evidence to support the assessed points under risk factor nine. See *gen* Correction law 168-n (3). The prosecution’s contention that the defendant’s subsequent criminal history warrants an upward departure is raised for the first time on appeal and is not considered. Order modified, the defendant determined to be a level two risk. (Supreme Ct, Erie Co [Forma, JJ])

Defender News (continued from page 6)

NYSDA Donates Books

To make room in its library for materials available only in print form, the Backup Center recently deaccessioned its *New York Supplement* 2d series. The volumes were donated to the Department of Correctional Services and placed in a prison law library. The overwhelming number of requests for research assistance received at the Backup Center tells us that prisoners need improved access to legal materials. The Association was pleased to make this small library contribution while recognizing that access to the law should be a prisoner’s right, not dependent on the random acts of kindness of a few organizations and individuals.

Job Opportunities

Neighborhood Legal Services (NLS), with offices in Lyon and Lawrence, MA, seeks an **Executive Director**. NLS is looking for a respected, experienced, innovative and dynamic leader who is passionate about and has a demonstrated commitment to promoting social justice and advocacy for low-income people. The new Executive Director will work closely with a dedicated and hard-working Board of Directors, an outstanding, creative and committed staff, and a regional partner legal services program, as well as a broader community of advocates, private lawyers, client groups, social service organizations and donors. The Executive Director is the primary spokesperson for NLS, oversees its legal, legislative advocacy and administrative staff, and is responsible for strategic planning, fundraising, and managing daily operations. Required: at least 10 yrs legal experience; experience in impact civil litigation; demonstrated successful experience in grant development, management, and fund raising; skill in personnel and financial management, program planning, development, and administration. Preferred: at least 3 yrs legal services management experience or comparable experience with another legal advocacy organization serving people with low incomes. Competitive salary, excellent benefits. EO/AAE; women, persons of color and disabled persons encouraged to apply. Send application, including cover letter explaining why the candidate is interested and what the candidate can contribute to the organization and its client community, resume, and contact information for 3 references to: Professor Kathleen Hirbour, Chair, NLS Search Committee, North Shore Community College, 1 Ferncroft Road, Danvers MA 01923; by email to khirbour@northshore.edu.

Franklin County NY seeks a NYS-admitted attorney to fill a **Assistant Public Defender** position in a busy office providing criminal defense to the indigent and also handling Family Court conflict cases. Salary BOE; full benefit package. Send resume and cover letter, including salary history, to: Franklin County Personnel Office, 355 West Main Street, Malone NY 12953.

NYSDA MEMBERSHIP APPLICATION

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

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

Name _____ Firm/Office _____

Office Address _____ City _____ State ____ Zip _____

Home Address _____ City _____ State ____ Zip _____

County _____ Phone (Office) (____) _____ (Fax) (____) _____ (Home) (____) _____

E-mail Address (Office) _____ E-mail Address (Home) _____

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

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

Attorneys and law students please complete: Law School _____ Degree _____

Year of graduation _____ Year admitted to practice _____ State(s) _____

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

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

To pay by credit card: Visa MasterCard Discover American Express

Card Billing Address: _____

Credit Card Number: _____ Exp. Date: ____ / ____

Cardholder's Signature: _____

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

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