



Public Defense Backup Center
REPORT

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Defender News

Unfulfilled Sentence Promise Justifies Vacating Conviction

A week after Juan Carlos Pichardo was sentenced to 20 years to life for second-degree murder in New York County, he pled guilty in Bronx County to third-degree criminal sale of a controlled substance in satisfaction of related charges, receiving a promised sentence of 1-3 years concurrent with the murder sentence. Eventually, the murder conviction was appealed and overturned based on ineffectiveness of counsel. A new trial was ordered and Pichardo was acquitted. At this point, he had completed serving the term of the drug sentence. Based on this change in circumstance, he filed a CPL 440.10 motion asking the Bronx court to vacate the drug conviction. The motion was granted. The Appellate Division reversed and reinstated the conviction because it found, assessing the totality of circumstances, that the drug sentence was concurrent “with any other sentence being served,” if one existed, not necessarily the murder conviction.

The Court of Appeals reversed (two judges dissenting), holding that a defendant had the right to withdraw a plea induced by a promise of lesser punishment and concurrent time with a sentence in another case when the latter was vacated, since the promise could not be kept. The court cited *People v Taylor* (80 NY2d 1 [1992]). The essence of the promise was that in exchange for the defendant’s guilty plea, he would not receive any more prison time. The fact that he had served out the term of his lesser sentence when the earlier sentence was vacated did not change the nature of the inducement. His decision to forgo his pre-trial and trial rights in the drug case was premised on the existence of the murder conviction. Once it was gone, the court’s promise became unrealizable. The decision vacating the Bronx plea was reinstated. Finally, the court suggested “a better practice might be for the parties in similar circumstances to spell out, on the record, the consequences that will follow upon vacatur of the conviction,” citing *People v Rivera* (195 AD2d 389, 390 (1st Dept 1993)). The decision is *People v Pichardo*, No. 145 [12/2/03].

Persistent Felony Offender Statute Violates Apprendi

Three years ago, the Supreme Court decided *Apprendi v New Jersey*, 530 US 466 (2000), which required any fact (except a prior conviction) increasing punishment beyond a statutory maximum to be decided by a jury and proved beyond a reasonable doubt. This decision sent shockwaves through the criminal justice system and provided astute defense counsel with ammunition to challenge excessive statutory sentencing schemes in death penalty and federal drug cases. See *Ring v Arizona*, 536 US 584 (2002) (expanding its scope to non-capital cases). In New York, a challenge was brought against the persistent felony offender statute, Penal Law 70.10, by a defendant with two prior felony convictions, convicted of first-degree sexual abuse. The trial court sentenced him to 25 years to life as a persistent felony offender. On appeal, he raised an *Apprendi* argument. The Court of Appeals in *People v Rosen* (96 NY2d 329 [2001]) rejected it, finding that the defendant did not have a constitutional right to a jury trial to establish the facts of his prior felony convictions, glossing over the judge’s evaluative role in making the assessment.

Since then, other New York State and federal courts have reexamined the issue and reached very different results. Several courts have found the persistent felony offender statute violated *Apprendi* and rejected the reasoning of *Rosen*. The latest case involved James Besser, convicted of enterprise corruption and sentenced to 15 years to life based on two prior felony convictions. He filed a federal *habeas corpus* motion in the Southern District, alleging an *Apprendi* violation. The magistrate found that the state judge was required to make a finding

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of bad character before imposing a lifetime sentence under the statute, exceeding the bounds of *Apprendi*. He criticized *Rosen's* focus on labeling judgments about a defendant's character, nature of the crime, and criminal history as "traditional exercises in judicial discretion." Other courts have agreed. *Brown v Greiner*, 258 FSupp2d 68 (EDNY 2003); *People v West*, NYLJ, 10/23/03, at 18 (Sup Ct NY County). (NYLJ, 11/17/03, 12/1/03). For more information, visit the Apprendi Hot Topics page on the NYSDA web site, www.nysda.org.

Aggravated Harassment Statute Violates Freedom of Speech

Carlos Vives was arrested for violating Penal Law 240.30(1) for sending political and religious materials, gleaned from newspaper articles, through the mail to "people of the Jewish faith with the intent to alarm them about current world events that have been prophesied in the Bible. . . ." Among his recipients was a candidate for Lieutenant Governor, who found the materials annoying and alarming. After his arrest, Vives filed a civil rights action in federal court asking for an injunction and declaratory relief prohibiting prosecution.

Over the last 20 years, Vives sent out 27,000 copies of his political and religious materials. Still, the mailings were protected speech, according to the Southern District, and did not fall into prohibited (defamatory, inflammatory, or obscene) expression. *Ashcroft v Free Speech Coalition*, 535 US 234, 245 (2002). They did not contain threats, only information garnered from news and religious sources. At worst, they were "distasteful or discomfoting." *Abrams v United States*, 250 US 616, 630 (1919). The harassment statute had been constitutionally suspect for years. *People v DuPont*, 486 NYS2d 169, 176 (1st Dept 1985) (PL 240.30[1] unconstitutional as applied); *People v Dietze*, 75 NY2d 47, 51 (1989) (similar statute, PL 240.25, overbroad). Last summer, the Court of Appeals in *People v Mangano* (No. 67 [NY 7/2/03]) found the statute unconstitutional as applied to a defendant who left crude messages on an answering machine about the performance of government officials. Based on these developments, Judge Scheindlin declared the portion of the statute concerned with annoying or alarming communications unconstitutional on its face, in violation of the 1st Amendment. *Vives v City of New York*, NYLJ, 12/1/03, at 17 (SDNY).

Limits on PINS Detention Struck Down

Jennifer G. was declared a person in need of supervision (PINS) by a Queens Family Court. The Commissioner of Social Services took custody of her, but she ran away nine times in one year. Warrants were issued each time to enforce the court's order, but Family Court Act 720(2) prohibited remand to a secure detention facility. An Article 3

juvenile delinquency petition was filed alleging that Jennifer G.'s acts were equivalent to an adult committing second-degree criminal contempt (PL 215.50[3]). Jennifer G. was picked up on a warrant after her tenth escape, and remanded to secure preventive detention based on the delinquency petition. The absconding charge being admitted, the court declared Jennifer G. a juvenile delinquent and placed her with Office of Children and Family Services (OCFS) for one year. The PINS petition was later dismissed as moot.

Further acts of truancy while in OCFS custody compelled the court to confront the constitutionality of the PINS limitation, in lieu of relying on an Article 3 delinquency finding. The delinquency decision was vacated and the PINS finding reinstated. Relying on the reasoning of its earlier decision critical of Family Court Act 720(2), *Matter of Jennifer G.*, 182 Misc2d 278, 695 NYS2d 871 (Family Ct Queens Co 1999), the court declared the statute's prohibition against secure detention for PINS unconstitutional. The fetter on PINS petitions, as opposed to Article 3 orders, undermined the legislative intent of the Family Court Act and the authority of the court to supervise youths and enforce its orders. Thus, it violated due process and equal protection, as well as the court's inherent power to compel compliance with its lawful orders. *Matter of Jennifer G.*, 764 NYS2d 503 (Family Ct, Queens Co [2003])

Willard Drug Treatment Option Underutilized

While reform of the Rockefeller Drug Laws awaits another legislative session, prosecutors and courts continue to ignore a drug treatment alternative to lengthy prison

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sentences, the Willard Drug Treatment Program. The original program, aimed at non-violent drug offenders, consisted of a secure, three-month, boot camp treatment phase followed by at least six months of community-based treatment. An extended program was set up in the Bronx and Queens in response to the low numbers of offenders sent to the original program from New York City. Extended Willard included six months in community-based residential treatment between the boot camp and outpatient phases. According to a study by the Vera Institute of Justice, requested by the Division of Criminal Justice Services, more than half of those sent to Extended Willard completed the program successfully. *Challenges of Replacing Drugs With Treatment: Implementation of New York's Extended Willard Program* (Vera Institute of Justice 2003). Nevertheless, courts and prosecutors in Bronx and Queens were not making full use of the program, sending about half of the Willard-eligible defendants to prison instead. The report revealed that many offenders were screened out based on poor employment history or mental health status. Vera's research underscored the difficulty of putting legislatively enacted treatment alternatives into practice. For more information visit the NYSDA web site, www.nysda.org, and go to the Prisoners' Rights and Rockefeller Drug Laws Hot Topics.

Defense Held to High Preservation Standard

Defense lawyers bear an increasingly heavy burden to raise with specificity any error they allege.

Don't Say "Relied on," Say "But For . . ."

In a recent Court of Appeals case, the defendant's lawyer had incorrectly told the defendant, who was facing maximum exposure of 25 years to life, that he would not be deported if he pled to drug charges with an agreed-upon sentence of one to three years. The Court of Appeals agreed that this incorrect advice constituted ineffectiveness of counsel. The high court also agreed that the courts below had used an improper test for whether the ineffectiveness had prejudiced the defendant. The trial court had rejected the defendant's motion to withdraw his plea for the reasons set out in the prosecution's response, *ie*, the defendant had failed to allege that the outcome of a trial would have been different had the defendant rejected the plea. The Court of Appeals held: "Contrary to the People's contention, and the Appellate Division's holding below, the prejudice inquiry here does not necessitate a prediction analysis as to the likely outcome of the proceeding." All that needed to be shown was a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Hill v Lockhart*, 474 US 52, 56 (1985). However, the

Court of Appeals denied McDonald relief because the factual allegation of prejudice by the same attorney who had committed the initial error was "merely" that the "defendant relied on the incorrect advice when entering the plea." The attorney failed to specifically allege that "but for counsel's error, defendant would not have pleaded guilty" (*People v McDonald*, #110, [11/24/03]).

Relief Denied Despite Prosecution Default

Such a basis for denying relief had not been raised by the prosecution. Trial counsel, in moving for plea withdrawal, contended that the defendant had maintained his innocence in the grand jury and pled guilty "in reliance on" counsel's affirmative errors. The prosecution did not challenge the sufficiency of this regarding the effect of counsel's error on the defendant's plea decision, but argued only—and incorrectly—that the defendant had to meet the higher burden of demonstrating trial outcome. Despite what would be called "sandbagging" if it was defense silence, the Court of Appeals found that the defendant's plea can stand based on this unraised ground. This clears the way for the defendant to be deported from the country in which he has lived for over 20 years.

Companion Case Reversed on Procedural Grounds

On the same day that it issued *McDonald*, the court decided, solely on procedural grounds, *People v Huang* (No. 115 [11/24/03]), a companion case to *McDonald*. The defendant in *Huang* had sought to withdraw his plea on the same basis as in *McDonald*—that the plea was based on a misapprehension of the defendant's immigration status due to information provided by defense counsel. The request to withdraw the plea came after sentence had been announced in open court but before a judgment had been entered, and was granted by the trial court. The Appellate Division rejected the defendant's ineffectiveness claim on the merits. The Court of Appeals reversed, finding that an appeal would not lie given the procedural posture of the case.

For more information see Immigration Practice Tips, at p. 12 and visit the Immigrant Defense Project on the NYSDA web site, www.nysda.org.

NYSDA Active as 2003 Draws to a Close *www.nysda.org* Offers New Hot Topics

The "Hot Topics" section of NYSDA's web site provides a quick way to catch up on rapidly-evolving legal, policy, and scientific/evidentiary issues. Appearing on the NYSDA home page when the site first appears, the "Hot Topics" list now contains several new areas. These include "Courts NY" and "Courts Federal," which provide news items, research links, and other information

helpful to practitioners. “Legislation NY” is a central location for current and past copies of the “Legislative Review” that appear annually in the *REPORT*, as well as for articles about pending and newly-enacted legislation of interest to NYSDA members and others. Finally, “Gideon Day” currently showcases—including video clips of the Client Defender Speak Out—2003 activities on the March 18th anniversary of *Gideon v Wainwright*. Watch for information on Gideon Day 2004 in the near future. In addition to “Hot Topics,” the NYSDA web site offers a wide variety of timely information for lawyers and others interested in public defense and criminal law.

NYSDA CLE Keeps Lawyers Informed

In addition to updated information via the Web, NYSDA provides information and CLE credits that busy lawyers need. Nearly 50 attended the “Assigned Counsel Criminal Appeals Mandatory Eligibility Training” held in Rochester. Co-sponsored with the Appellate Division, 4th Judicial Department, the October training offered seven sessions: Appellate Practice—A View From the Bench: Assigned Counsel Practice and Procedure; Criminal Motion Practice and Procedure; Filing and Calendaring a Criminal Appeal; Criminal Appeals: Ethics; Appellate Advocacy; Spotting and Analyzing Appellate Issues; and Fertile Ground: Successful Appellate Issues and Strategies.

Also co-sponsored in October with the 4th Department was “Assigned Counsel Family Court Appeals Mandatory Eligibility Training.” Materials from these two trainings can be requested from the 4th Department.

For lawyers practicing in federal courts, NYSDA co-sponsored in Albany a criminal defense update with the Office of the Federal Public Defender Districts of Northern New York and Vermont. This October training drew nearly 50 attendees. Materials may be obtained from the Federal Public Defender Office in Albany. Call (518) 436-1850.

Over 75 lawyers attended “Criminal Defense Update 2003” in Rochester in November. Presentations included: 2003 Legislative Highlights; Federal Courts on New York State Criminal Law; Computers and Ethics: Security and Privacy Issues; Developing and Presenting Mental Health Evidence in Criminal Case; and Effective Cross-Examination. Materials are available for \$20 from the Backup Center.

NYSDA Thankful For NYS Bar Foundation Grants

Regional trainings were some of the NYSDA services made possible in the last two years by \$10,000 grants (in 2002 and 2003) from the New York State Bar Foundation. Among other things, these grants made it possible for the Backup Center to continue publishing the *REPORT* in the

wake of the severe budget cuts of 2001. We hope that readers of this final issue of 2003 are as thankful as we are for the Bar Foundation’s assistance.

Client-Centered Reform Efforts Continue

Thanks in part to a grant from The Gideon Project of The Open Society Institute, NYSDA’s community organizer and several members of the Client Advisory Board went to Seattle in November for the National Legal Aid and Defender Association’s Annual Conference, where they presented a workshop, “A Client-Centered Process for Public Defense Reform.”

NYSDA recently released “A Preliminary Report Concerning the Inadequacy of Defense Services Available to Farm Workers,” analyzing testimony taken at a hearing in Albion and other information about public defense in the farmworker community. The process of collecting information about public defense across New York State, begun by NYSDA and the League of Women Voters in 1998, will continue with a December hearing in Schenectady. Contact Karla Andreu at the Backup Center for more information about that hearing and other aspects of the campaign, “Defending the Right to be Heard. Every County. Every Client.”

“Listening to the Voice of Clients” Published

That the concerns of clients should be considered when designing and maintaining a public defense system forms the basis of a recent analysis of New York State public defense by NYSDA Executive Director Jonathan E. Gradess. In “Public Defense at the Crossroads: Listening to the Voice of Clients,” published on the Web by the Drum Major Institute for Public Policy, Gradess describes the history of public defense in the state and its current underfunded, underresourced, disrespected status. He concludes that accountability is key. Accountability in this context would mean “using the experience of clients to identify shortcomings of the system and to remedy those shortcomings,” Gradess says. The system must include enough defense resources that “legitimate minimal expectations of clients—jail visits, answers to questions, returned phone calls, collegial strategy development, confidential communications, and respect—can be fulfilled.”

Gradess concludes with observations that NYSDA has made before. (See *e.g.* www.nysda.org/ResolvingtheAssignedCounselFeeCrisis_01.pdf). Support is sought for “the idea of an Independent Public Defense Commission empowered to promulgate standards, conduct oversight and require accountability.” This is needed because the status quo fails clients and justice. Under the commission envisioned, “There would be an expectation and requirement of quality representation that is too often lacking now.” http://www.nysda.org/03_PublicDefenseattheCrossroads_JEG2003_.pdf

County by County, Change Considered

In its 2001 position paper on assigned counsel fees, NYSDA called for systemic evaluation and change, not just an increase in the rates. Noting that any funding change would affect not just assigned counsel lawyers but county budgets, courts and other components of the justice system, and all public defense providers, the paper predicted that unconsidered and unforeseen consequences of a change in assigned counsel compensation could plunge the system, plagued by more than low assigned counsel rates, back into crisis. The plunge has begun.

Counties Continue to Contemplate, Effectuate Changes

Since the assigned counsel fee increase legislation passed in the spring, the Backup Center has been working with counties, public defense programs, and attorneys trying to avoid unintended consequences. Assistance may be basic, such as explaining misunderstood segments of the new bill itself to ensure that counties understand, for example, that they cannot decrease public defense spending without showing an increase in the quality of the representation offered. It may be immediate, such as having NYSDA's experienced Executive Director brainstorm with a county official with no background in public defense. It may be long-term and detailed, such as an evaluation, using existing national and other standards, of existing or proposed offices or systems.

Nearly half of New York counties are known to have considered some change concerning their public defense system as a result of the rate hike. The list of recent articles on the "Assigned Counsel Rates" Hot Topics page on NYSDA's web site at press time hinted at the scope of concern about public defense funding issues:

- **Montgomery** County Public Defender seeks additional funds to counterbalance impact of assigned counsel fee increase.
- Costs of assigned counsel for multiple co-defendants in murder case raises new concerns about public defense funding in **Delaware** County.
- New York counties reevaluate means of providing public defense services in view of assigned counsel rate increase (mentions **Warren**, **Onondaga**, **Albany**, and **Monroe** Counties).
- Cost of assigned counsel program in **Fulton** County might triple under new rate increase in 2004.

Other counties where concerns about public defense costs have been publicly aired in recent weeks include **Oswego**, **Rensselaer**, **Chenango**, **Otsego**, **Schuyler**, **Seneca**, **Steuben**, and **Sullivan**. **Broome** County is considering contracting with legal services organizations for family court representation. **Ontario** County considered changing from assigned counsel to public defender system.

Major changes in where public defense money is distributed occurred in **New York City** this year, with an increase in funding to The Legal Aid Society and a decrease in the use of assigned counsel panel attorneys. Similar changes have occurred in **Cattaraugus** and **Essex** counties.

Upstate, creation of a public defender office or adding a conflict defender office has been the most commonly considered structural change, but it is clear that there is no easy, ready, local solution to the continuing statewide problem of under-resourced public defense. It is also clear that solutions must be found. Clients, client communities, and communities at large are increasingly demanding change.

Litigation over public defense issues did not end with the passage of the assigned counsel fee increase. The New York County Lawyers Association (NYCLA) lawsuit in New York City has been settled in a way that "left intact the precedential value of the judge's decisions finding that New York's low rates had imperiled the constitutional rights of indigent New Yorkers to obtain counsel." (NYLJ, 11/13/03.) That precedential value is important. According to NYCLA Vice President Norman Reimer, "Underfunding in this area is a national problem, and there have been precious few cases where courts have said, 'you have to do better.'" (NY Times, 11/13/03.) The suit was handled *pro bono* for NYCLA by Davis, Polk & Wardwell.

Upstate, the New York Civil Liberties Union (NYCLU) has been reported to be considering litigation in a number of counties regarding staffing levels in public defender offices. NYCLU Associate Legal Director Christopher Dunn has been quoted as saying, "The particulars vary from county to county, and there are many counties where there are serious problems with the quality of services available to indigent defendants." ([Troy] Record, 12/2/03.)

As a New Year approaches, Backup Center staff continues to monitor developments and provide assistance. Public defense lawyers, county officials, clients, and others who need—or have—information about potential or recent changes in public defense in New York State are asked to call the Backup Center.

Defense Providers, Others, Meet at Judicial InSTITUTE

While not reaching any solution, Chief Defenders, judges, prosecutors, and others invited by the Office of Court Administration to a recent Indigent Defense Summit described the range of the problems facing New York State public defense. Held at University of Pace Law School on Nov. 5, 2003, the summit can be considered a follow-up to the national "Indigent Defense 2000" summit held in Washington DC three years ago. (See *Backup Center REPORT*, Volume XV, No. 5, July 2000, p.3. 7) As Chief Administrative Judge Jonathan Lippman (standing in for

Chief Judge Kaye) acknowledged, systemic problems had been put aside during the struggle to raise assigned counsel fees. With the rates increased, Lippman said, the rest of the problems besetting public defense can be addressed as the Chief Judge had said in a *New York Times* interview reported on Apr. 8, 2001.

Judicial Misconduct Findings

Two September decisions from the Commission on Judicial Conduct may be of interest to *REPORT* readers. The Commission admonished Judge John Conner of Supreme Court, Columbia County for violating the prohibition against *ex parte* contacts by considering reports from law guardians without providing the reports to the parties. The Commission stated in its Sept. 22, 2003 decision:

A law guardian is not a member of the judge's staff, but independent legal counsel for the child. It follows that a judge should not have private communications with a law guardian to which the parties and their attorneys are not privy.

The Commission censured Judge Leigh Fuller of the Canajoharie Town and Village Courts for numerous instances of failing to advise defendants of their right to assigned counsel in non-motor vehicle case violation cases, and for cross-examining unrepresented defendants at arraignment about the facts of their cases and making statements which assumed the defendant's guilt at a time when the defendants were presumed innocent. The Commission stated on Sept. 19, 2003:

By his improper *ex parte* questioning of defendants who had not yet entered a plea, respondent created a risk of eliciting admissions of guilt...It is inappropriate for a judge to lecture defendants about their transgressions before they have been afforded the full panoply of rights and before they have entered a plea."

Some of the other decisions reported in the Commission's 2003 annual report may also be relevant for practitioners and others. The Commission's decisions and annual report are available on the Commission's website at www.scjc.state.ny.us

In *Matter of John D. Cox*, the Commission admonished a town court judge from Jefferson County for failing to advise defendants who had not paid their fines of their right to a resentencing hearing pursuant to Section 420.10(3) and (5) of the Criminal Procedure Law. Instead, when the defendants failed to pay their fines, the judge sentenced them directly to jail without notifying original sentencing counsel or otherwise providing for counsel, even where some defendants told the judge that they were unable to afford the fine. (Section 420.10 provides that if the defendant is financially unable to pay a fine, the court must either adjust the terms of payment, or lower

the amount of the fine or revoke the sentence). The Commission found in mitigation that the nonlawyer judge was unfamiliar with Section 420.10, but it determined that the judge—who had been on the bench for almost 25 years—should have been familiar with basic statutory procedures.

In *Matter of Edwyn C. Hise* the Commission admonished a town justice in Genesee County for convicting a defendant and sentencing him to 10 days in jail without a plea or guilty or a trial. At arraignment, after the defendant pleaded not guilty to a town code violation of Accumulating Junk on Property, the defendant acknowledged that the property needed to be cleaned up. When the defendant failed to clean up the property in the time given, the judge, who is not a lawyer, took the acknowledgment of about messy property as being an implied plea of guilty and sentenced the defendant to jail.

This case is similar to a number of prior cases in which judges convicted defendants without a plea or trial, again pointing up the need for more formality in justice courts in which judges on occasion feel free to engage in discussions with unrepresented defendants about the charges (even asking why, for example, the defendant is pleading not guilty) and then act on the answers as though the defendant had entered a formal plea.

In *Matter of Kenneth Gibbons*, 98 NY2d 448 (2002), the Court of Appeals removed a judge for signing an *ex parte* search warrant, and then calling the attorney for the company who was the object of the search warrant, and warning him to meet with his client "right away" to "solve the problem." The Court found that this one incident represented such an "utter disregard of the Canons of Judicial Ethics," that removal was the only remedy.

ABA Urges Implementation of Death Penalty Guidelines, Supremes Cite Them

At a conference co-sponsored by and held at Hofstra University School of Law on Oct. 24, 2003 the President of the American Bar Association (ABA) announced a call for all death penalty jurisdictions to adopt the newly revised "Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." The Guidelines, first adopted by the ABA in 1989, were cited by the US Supreme Court in *Wiggins v Smith* (123 S Ct 2527 [2003]).

In *Wiggins*, the court found ineffective assistance of counsel for failure to conduct reasonable investigation of mitigation. The high court's acknowledgment of the ABA Guidelines (which have been updated (see *Backup Center REPORT*, Volume XVIII, No. 2, Mar-Apr 2003, p. 7) as evidence of what counsel should have done was a major topic at the conference. These developments are expected to greatly increase the demand for mitigation specialists to conduct investigations for defendants charged in capital (and potentially capital) cases. (See job announcement for Mitigation Fellow, p. 10.) ♪

Resources Sighted, Cited, or Sited

[Ed. Note: All items listed below are online. The URL (web address) at the end of each item omits the initial characters—http://—found in all URLs. If your browser cannot find an item as listed, insert these characters at the beginning of the address and try again or go to the “Resources Sighted” page of the NYSDA Web site and click on the link.]

■ **Mission Possible: Investigating the Background of an Expert Witness**, Virtual Chase (US), 2003. This article describes techniques for locating background information on experts using online sources. It discusses commercial online services, such as Lexis and Westlaw, news sources, specialized databases and search engines, and search methods. [Ed. Note: if you are in a hurry, skim quickly through the storyline introductions in this two-part article to find the helpful suggestions about tracking down an expert’s writings and background.] www.virtualchase.com/articles/expert_witness2.html

■ **Computer Manipulation of Forensic Evidence**. In a new article, “Fingerprint Evidence in the 21st Century,” Edward Imwinkelried, Distinguished Professor of Law at the University of California, Davis School of Law and Michael Cherry, imaging expert and principal at GMC7 Inc., describe problems created by computer manipulation of fingerprint evidence and other forensic measurements. This article has been republished on the NYSDA web site, with permission, from the September-October, 2003 issue of *The Champion*, a publication of the National Association of Criminal Defense Lawyers. www.nysda.org/03_FingerprintArticle.pdf

See also Mr. Cherry’s recent article, “Reasons to Challenge Digital Evidence and Electronic Photography,” which appeared in the July 2003 issue. www.nysda.org/03_ReasonstoChallengeDigitalEvidenceandElectronicPhotography.pdf

■ **Forensic Center Newsletter**. This is the home page of a newsletter that provides updates on current developments in forensic science, evidence, expert witnesses, identification, behavioral science, biological evidence and police procedures. It includes links to current articles and research resources in forensics. The publication is edited by Andre A. Moenssens, Professor of Law at the University of Missouri—Kansas City, School of Law. www.forensic-evidence.com/site/MasterIndex.html

■ **Legal and Appellate Weblogs: What They Are, Why You Should Read Them, and Why You Should Consider Starting Your Own**, Journal of Appellate Practice and Process (US) (Spring 2003). This article provides an introduction to legal web logs, and highlights current appellate blogs and analyzes the benefits of starting one. [Ed. Note: Find new blogs of interest to defense teams on the “Resources Sighted, Sited, or Cited—New Web Sites”

area of “Defense News” on NYSDA’s web site.] www.lac.org/index.html

■ **Legal Action Center (LAC)**. The LAC is a non-profit law and policy organization that provides assistance against discrimination based on histories of addiction, HIV/AIDS, or criminal records. Their web site provides information about their programs, legal activities, research and training projects, and publications. Their publications library includes free self-help guides in the areas of Alcohol and Drugs, HIV/AIDS, Criminal Justice and Welfare Reform. [Ed. Note: this site makes available the useful booklet, “How to Get and Clean Up Your State Rap Sheet” (Updated 2002), very helpful to pass on to clients.] www.lac.org/index.html

■ **Presenting Medical Evidence in an Adult Rape Trial (NJEP)**. This is a collection of web sites that concern the analysis and presentation of sex crimes evidence at trial. It includes links to: Anatomical Charts, Medical Glossary and Acronyms; SAFE and SANE Programs; Cross-Examination of Defense’s Medical Witness; Web-sites with Valuable Information for Sex Crimes Prosecutors; Sex Offenders, Treatment and Sentencing; and Voir Dire and Jury Instructions. The site is maintained by the National Judicial Education Program of the NOW Legal Defense and Education Fund. www.nowldef.org/html/njep/medicalevidence_resources.shtml

■ **Toxicology Glossary**. This is a dictionary of terms used by chemists in toxicology analysis and reporting. Arranged alphabetically, there are more than 1200 terms defined along with explanatory notes and references. The Glossary was created by the International Union of Pure and Applied Chemistry (IUPAC) and is maintained by the National Library of Medicine. sis.nlm.nih.gov/Glossary/main.html

■ **Investigator Directory (ALDONYS)**. The Associated Licensed Detectives of New York State has created a database of their nearly 400 members. Searches can be done by specialty, area code, zip code, or last name. Full contact information, list of specialties and web site addresses, when available, are provided. [Ed. Note: as with all information we provide about contacting particular experts, NYSDA does not vouch for any investigator found using this site or the one below; attorneys or pro se clients who use these search sites must determine the credentials and appropriateness of the investigator for their own case.] www.aldonys.org/search.htm

■ **National Association of Legal Investigators (NALI)**. In addition to information about NALI membership and activities, it includes: a directory of more than

Resources Sighted, Cited, or Sited *continued*

600 member-investigators nationwide and a list of investigative resource links. This web site is maintained by NALI, which has been in existence for over 30 years. www.nalionline.org/findmembers.html

■ **Illegal to Be Homeless: The Criminalization of Homelessness in the United States** (National Coalition for the Homeless 2003). This report describes problems faced by homeless persons due to selective enforcement by police and policymakers. It focuses on laws that have been enacted to curb the activities and movements of homeless persons, and criminalize their status. [Ed. Note: *if anyone has used the type of information found in this report to challenge formally or negotiate away charges against homeless persons, please share your stories with the REPORT.*] www.nationalhomeless.org/civilrights/crim2003/report1.html

■ **Offender.us**. This is a collection of web links to criminal history databases or informational sites maintained by departments of correctional services in the fifty states. Each entry includes data on whether the database is searchable, its scope of coverage and restrictions on use. [Ed. Note: *whatever your feelings about the propriety of posting this information, it can be handy for searching for potential witnesses etc.*] www.offender.us/

■ **National Association of Judiciary Interpreters and Translators** (NAJIT). This is the homepage of a non-profit organization devoted to improving the court interpreting and legal translation professions. They provide a membership directory; informative articles from past issues of their publication, *Proteus*; and news about certification exams, conferences and other issues of note in the legal translation and interpretation field. www.najit.org/index.html

■ **NYS Indigent Defense Summit: An Introspective Look at Our Criminal Defense System for the Poor** (OCA). This conference web site contains information about the Summit, which took place on November 5, 2003. It also includes a large collection of resource materials in the following areas: Indigent Defense Generally; Structuring an Indigent Defense System; Ensuring Justice Through Quality Counsel; and Funding a Criminal Defense System for the Poor. The conference was sponsored by the NY Office of Court Administration and held at the NYS Judicial Institute. [See p. 5.] www.nycourts.gov/ip/indigentdefense/index.shtml

■ **Ill-Equipped: US Prisons and Offenders With Mental Illness** (HRW 2003). This report describes the plight of mentally ill offenders in US prisons. Based on years of field research, Human Rights Watch found that these inmates suffered from mistreatment, neglect and lack of adequate medical care. Among their recommendations for reform are legislation to fund improvement of treatment facilities in prison and diversion programs. www.hrw.org/reports/2003/usa1003/

■ **Recidivism of Sex Offenders Released From Prison in 1994** (BJS 2003). This report describes data on the rearrest, reconviction, and reimprisonment of nearly 10,000 male sex offenders in 15 states tracked for three years after being released from prison in 1994. www.ojp.usdoj.gov/bjs/abstract/rsorp94.htm

■ **Race and Incarceration in Maryland** (JPI 2003). This report published by the Justice Policy Institute describes the disproportionately high incarceration rate for African-Americans and Latinos in US prisons, with special emphasis on the impact in Maryland. www.soros.org/initiatives/justice/articles_publications/publications/race_incarceration_md_20031023 ♪

Pro Bono Counsel Needed for Death Row Prisoners

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

Conferences & Seminars

Sponsor: Law Education Institute, Inc., ABA Criminal Justice Section, ABA Family Law Section, and others
Theme: National CLE Conference
Dates: January 3-8, 2004
Place: Aspen, CO
Contact: LEI: (800)-926-5895; web site www.lawedinstitute.com

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2004 Advanced Criminal Law Seminar
Dates: January 25-30, 2004
Place: Aspen, CO
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org/meetings

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

Sponsor: National Institute for Trial Advocacy
Theme: Advanced Criminal Advocacy Trial Skills
Dates: April 21-25, 2004
Place: Louisville, CO
Contact: NITA: tel (800)225-6482; fax (574)271-8375; e-mail nita.1@nd.edu; web site www.nita.org

Sponsor: National Legal Aid and Defender Association
Theme: Defender Advocacy
Dates: June, 2004 (dates TBA)
Place: Dayton, OH
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; e-mail info@nlada.org; web site www.nlada.org

Don't Miss the Training You Need!

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

Also see the "Training Calendar" for new developments.

Sponsor: New York State Defenders Association
Theme: 37th Annual Meeting and Conference
Dates: July 25-28, 2004
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org

Back to the Gideon Putnam!

Following the success of the 2003 NYSDA Annual Meeting and Conference, **WE'RE GOING BACK!** Join us at the Gideon Putnam Hotel and Conference



Center in Saratoga Springs, New York.

July 25-28, 2004

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Fax (518) 584-1354

See more about the Gideon Putnam online:

www.gideonputnam.com

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

Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: June 11-18, 2004
Place: Dubois, WY
Contact: tel (307)739-1870; fax (307)733-0875; website www.triallawyerscollege.com ☪

Job Opportunities

Steuben County seeks a **Public Defender**, a full time position carrying responsibility for providing legal defense services for all indigent persons charged with crimes and all indigent persons entitled to representation in Family Court and Surrogate Court proceedings. Qualifications: Grad of regionally accredited or NYS certified law school and 4 years experience as practicing criminal lawyer, 3 of which much have involved extensive court trial appearances; NYS bar admission at time of appointment. Salary \$65,000-\$85,000 DOE, NYS retirement system and excellent benefits. AA/EOE. Located in scenic Finger Lakes region of NYS. Send resume and cover letter, no later than Dec. 31, 2003 to Robert F. Biehl, Personnel Officer, Steuben County Personnel, 3 East Pulteney Square, Bath NY 14810-1578. Fax (607)776-2345; e-mail bob@co.steuben.ny.us.

The Office of the Appellate Defender (OAD) offers two-year staff attorney positions, with an option for a third year, to lawyers with demonstrated top-level legal research and writing skills and a commitment to providing legal services to the indigent. OAD is a unique hybrid—part law firm, part training program. Staff Attorney openings now exist for Fall 2004; preference will be given to applications received by Dec. 15, 2003. Send cover letter, resume and writing sample to Carolyn Wilson, Administrative Specialist, Office of the Appellate Defender, 45 West 45th Street, 7th Floor, New York, NY 10036.

The Neighborhood Legal Services Program, Inc., of Washington, DC seeks an **Executive Director** to provide strong, visionary leadership and work with the client community, courts, bar, other legal aid providers, LSC and NLSP Board of Directors to ensure that NLSP provides the best

possible service to the community. A job description is available at www.nlsp.org. Send resume, cover letter, salary requirements and references to Camille Holmes, Vice-Chair, NLSP Executive Director Search Committee, P.O. Box 34293, Washington, DC 20043; or to edsearch@nlsp.org

Don't Miss an Application deadline!

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

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

The Fair Trial Initiative (FTI) in North Carolina announces a newly created **Mitigation Fellowship**. The one-year fellowship offers training, supervision, and organizational support to professionals eager to become mitigation specialists for capital defendants. Job description: investigating and generating a comprehen-

sive and detailed narrative of a capital defendant's life. Duties include: extensive interviewing, documenting interviews, retrieving multi-generation records and documents, compiling, producing, and interpreting interviews, records, and documents for the entire defense team, collaborating with other members of interdisciplinary defense teams, and participating with the defense team in the courtroom at trial. Travel in state, limited travel out-of-state on occasion, attendance at selected trainings and conferences on mitigation, routine conferencing with and supervision from LCSW staff, and simple timekeeping and administrative duties as assigned by Executive Director required. Qualifications: Master's degree in Social Work or comparable field; two or more years practice in field; extensive experience interviewing and documenting interviews; experience developing and producing detailed social histories; working knowledge of mental health issues; excellent writing skills; familiarity with criminal justice system; ease with improvising in less than model interview settings and climates; sensitivity in witnessing diverse cultural, racial, and economic experiences. Applicants intending to remain in the state and remain in the field preferred. Competitive salary, health insurance, paid vacation, reimbursement of travel at state rates. EOE. Persons with expertise distinct from what is outlined above are encouraged to apply and to articulate how their varied experience makes them uniquely suited to excel in the fellowship. Application deadline is **Jan. 15, 2004**. Applications postmarked by that date will be accepted. Applicants are encouraged to apply as soon as possible; applications will be considered on a rolling basis. Respond to: Sarah Anthony, Attorney and Mitigation Project Director, Fair Trial Initiative, 201 W. Main Street, Ste. 300, Durham, NC 27701. Tel (919) 680-2986; fax (919) 688-7973 ☪

Immigration Practice Tips

Defense-Relevant Immigration News

By Manny Vargas and Marianne Yang of NYSDA's
Immigrant Defense Project (IDP)*

Updated and Supplemented 3rd Edition of Manual on Representing Noncitizen Defendants Now Available

NYSDA has published and is now distributing the updated 3rd Edition of its immigration resource manual entitled *Representing Noncitizen Defendants in New York State*. This binder-format practice manual offers detailed, practical, straightforward information for criminal defense attorneys about potential immigration consequences for non-citizen clients of specific New York dispositions, and about strategies to pursue to try to avoid these adverse consequences. Prior editions of this manual have been updated and supplemented to include several immigration law developments relevant to state criminal practice since the last edition was issued in 2000. In addition,

New Address, Phone & Fax for the Immigrant Defense Project

We continue to receive letters, faxes, and phone calls directed to our old address. Please note that our new address, hotline phone number, and fax number are:

NYSDA Immigrant Defense Project
2 Washington Street, 7 North
New York, NY 10004
Hotline: (212) 898-4132
Fax: (212) 363-8533

tion, the 3rd Edition includes expanded and improved appendix practice aids (eg, updated Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses, and detailed chart of "aggravated felony" case law determinations nationwide), and a new section and appendix on strategies to avoid adverse immigration consequences in the removal proceedings that take place after the criminal case is completed. This book is available at low cost to the criminal defense community, other immigrant advocates, and immigrants themselves. To order, download the PDF order form on the NYSDA website (www.nysda.org), or contact the Backup Center at (518) 465-3524.

* The IDP provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the Project on Tuesdays and Thursdays from 1:30 to 4:30 pm at (212) 898-4132.

2nd Circuit Limits Use of Information in Pre-Sentence Reports in Deportation Proceedings

Immigration courts may not look to the narrative statement of facts in a pre-sentence report to determine the crime for which a noncitizen has been convicted, the US Court of Appeals for the 2nd Circuit ruled on Sept. 9, 2003. *Dickson v Ashcroft* (346 F2d 44 [2d Cir. 2003]) held that New York first-degree Unlawful Imprisonment (Penal Law 135.10) is divisible into crimes that are categorically grounds for removal—in this case, "crime of violence" aggravated felony—and others that are not. Specifically, the court found that the unlawful imprisonment statute is divisible into two crimes: one, the unlawful imprisonment of a competent adult, which is a crime of violence because it cannot be accomplished without the use or risk of force (see Penal Law 135.10 & 135.00[1][a]), and two, the unlawful imprisonment of an incompetent person or child under sixteen, which is not a crime of violence because it neither has as an element the use of force nor categorically involves a substantial risk that force may be used. See Penal Law 135.10 & 135.00[1][b]).

Reiterating its past pronouncements on the "categorical approach" to criminal statutory interpretation for immigration law purposes, the 2nd Circuit stated that when a statute is divisible, the immigration judge may look to the "record conviction" for the limited purpose of determining whether the noncitizen's conviction was under the branch of the statute that triggers removability, but not to examine the particular factual circumstances underlying that conviction. Under *Dickson*, immigration courts may not rely on the "inherently unreliable" factual narratives in a pre-sentence report to determine the crime for which a noncitizen has been convicted. Applying this ruling to the *Dickson* facts, the court vacated the Board of Immigration Appeal's order of removal, finding that the BIA improperly based its conclusion that *Dickson* had been convicted of a crime of violence on a pre-sentence report narrative statement that indicated that "*Dickson* apparently forced the mother of his child to partake in a car ride against her will while bound."

The bottom line: Defense counsel may be comforted to know that in immigration proceedings arising in the 2nd Circuit, judges should not look to narrative portions of a pre-sentence report to determine whether a conviction falls under a ground of removability. Counsel should remain vigilant, however, about what to keep out of a noncitizen's "record of conviction," which includes: certificate of disposition; charging document; plea agreement and plea colloquy transcript; verdict or judgment of conviction; and record of sentence. Also, because *Dickson* does not control outside the 2nd Circuit, statements in pre-sentence reports might be relied upon if noncitizen clients end up in immigration proceedings elsewhere. There is still reason to be vigilant about challenging unproven statements in pre-sentence reports that might

later be used by immigration authorities to establish a non-citizen defendant's deportability.

NYSDA submitted an *amicus curiae* brief in support of the petitioner in *Dickson*. The brief was drafted, submitted and argued before the 2nd Circuit by Terry Maroney of the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. The petitioner himself is represented by NYSDA member George Terezakis of Mineola.

Defender Organizations Develop In-house Immigration Expertise

More than twenty New York defender organizations and public defender offices now have staff attorneys trained to be in-house immigration experts. Trained by the Immigrant Defense Project (IDP) in May 2003, these attorneys are now available to their colleagues for guidance in defending noncitizen clients in criminal proceedings.

Defense attorneys at the following organizations may consult with their in-house immigration experts to ask noncitizen clients the right immigration-relevant questions, analyze potential immigration consequences and formulate strategies to minimize them, counsel clients on what to expect post-conviction, and provide clients with helpful resource materials:

Appellate Advocates
The Bronx Defenders
Brooklyn Defender Services
Center for Appellate Litigation
Chautauqua County Public Defender
Dutchess County Public Defender Office
Erie County Assigned Counsel Program
Genesee County Public Defender Office
The Legal Aid Bureau of Buffalo
Legal Aid Society of Nassau County
Legal Aid Society of Suffolk County
The Legal Aid Society of New York
Legal Aid Society of New York, Federal Defender Office
Legal Aid Society of Westchester County
Monroe County Public Defender Office
Neighborhood Defender Service
New York County Defender Services
Office of the Appellate Defender
Otsego County Public Defender Office
Queens Law Associates, PC
Saratoga County Public Defender

The IDP conducted the May 2003 trainings in collaboration with in-house immigration experts Bryan Lonagan of The Legal Aid Society of New York and Peter Markowitz of The Bronx Defenders, among others, as part of its ongoing work in partnership with criminal defense counsel so that they may adequately advise and defend non-citizens in criminal proceedings. The Project wel-

comes the opportunity to help develop similar in-house immigration expertise at other defender offices and invites hearing from interested organizations.

New Immigration Resources Available

Defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful the following new or updated resources:

- **The Defending Immigrants Partnership (DIP) page of the website of the National Legal Aid and Defender Association**—For access to this Internet resource, which includes practice tips, case blurbs, how-to question and answer exchanges, selected training resources and model pleadings, agency developments, and state and federal offenses immigration consequences charts, visit the NLADA website page at <http://www.nlada.org/Defender/Defender_Immigrants>.
- **Immigration/Criminal Practice Alert on *Practical Tips to Avoid Aggravated Felonies*, by Bronx Defenders staff attorney and IDP collaborator Peter Markowitz**—See box on p. _ of this Backup Center Report.
- **Updated *Removal Defense Checklist in Criminal Charge Cases***—For access to this resource recently updated to reflect legal developments through Oct. 14, 2003, visit the NYSDA website page at: <http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/03_RemovalDefenseChecklistSept.pdf>.

State Court of Appeals Hears Argument in Two Cases Where Noncitizen Defendants Sought Vacatur of their Guilty Pleas Based on Incorrect Regarding Deportation

[*Ed. Note: These cases were decided after this was written, see p. 3.*]

The New York State Court of Appeals heard argument on Oct. 15, 2003, in two cases in which the noncitizen defendants sought vacatur or withdrawal of their guilty pleas based on the fact that they had been provided incorrect immigration-related information by their defense lawyers. *People v Bruce McDonald*, No. 110, and *People v Jian Jing Huang*, No 115.

In *McDonald*, the petitioner, a Jamaican citizen who has lived in the US for more than 25 years as a lawful permanent resident, sought to withdraw his guilty plea to marijuana sale and possession charges on the ground that he received ineffective assistance of counsel when his defense attorney incorrectly advised him that conviction would not result in deportation. In *Huang*, the petitioner, a Chinese citizen who fears arrest or worse if deported to

China because of his defection to the United States, his conversion to Christianity and his political beliefs, sought to withdraw his guilty plea to second degree kidnapping because his defense attorney incorrectly advised him that there was no Immigration and Naturalization Service detainer pending against him.

While one or both cases raise procedural issues on which the Court's decisions may focus, these cases also may afford the Court an opportunity to revisit the issue of when defense lawyer failure to provide correct advice regarding immigration issues constitutes ineffective assistance of counsel that could invalidate a plea under New York law. In 1994, the New York Court of Appeals held that a counsel's failure to advise a defendant of the deportation consequences of a guilty plea did not, *per se*, constitute ineffective assistance of counsel. See *People v Ford*, 86 NY2d 397 (1994). However, until now, the Court of Appeals has not had the opportunity to make clear, as have other courts, that a noncitizen defendant's showing of reliance on an affirmative misrepresentation about deportation consequences does invalidate a plea. See *eg US v Couto*, 311 F3d 179 (2d Cir. 2002), reported in *Backup Center REPORT*, Volume XVII, No. 6, Nov-Dec 2002, p. 18.

McDonald, previously represented in his NYCPL 440 motion by former IDP attorney Sejal Zota, is currently represented by Al O'Connor of the New York State Defenders Association in Albany. Huang is represented by Daniel A. Warchawsky of the Office of Appellate Defender in New York City. ♠

Immigration/Criminal Practice Alert

PRACTICAL TIPS TO AVOID AGGRAVATED FELONIES

Aggravated felonies ("AF") are one category of crime that may trigger deportation. While we should, of course, always strive to avoid convictions that may trigger deportation, it is particularly important to avoid AF convictions because, in most cases, these convictions render a client mandatorily deportable without any possibility of discretionary relief. AF's also have all sorts of other nasty consequences including: a potential twenty-year prison term for illegal reentry and expedited removal procedures for non-permanent residents. While there are disadvantages for all non-citizens who are convicted of AF's, it is particularly important to avoid AF convictions for Lawful Permanent Residents.

There are twenty-one categories of AF's, which you are free to read at your leisure. See 8 USC 1101(a)(43). I wanted to quickly offer you some tips to avoid two common types of AF's.

AGGRAVATED FELONIES TRIGGERED BY A ONE-YEAR TERM OF INCARCERATION

The following types of convictions will be considered AF's if the client is sentenced to one year or more of incarceration "regardless of any suspension of the imposition or execution of that imprisonment":

Theft
Violent Crimes
Burglary
Counterfeiting/Forgery
Commercial Bribery
Obstruction of Justice (possibly including Hindering Prosecution)
Trafficking in Vehicle ID Numbers
Receipt of Stolen Property
Document Fraud
Perjury/Bribery of a Witness/Subornation of Perjury

Below is a list of strategies designed to avoid triggering the AF grounds listed above. Since this list encompasses most felonies it is necessary to be mindful of the strategies below whenever a non-citizen client is facing a sentence of one year or more.

- *Stack counts to run consecutively*—as long as no individual count results in a sentence of a year or more, a total term of incarceration of more than a year will not trigger these AF grounds.
- *Waive presentence credits*—if a client has served time pre-sentence it may be possible to waive credit for that time in return for an actual sentence imposed of less than a year.
- *Waive future conduct credits*—it may be possible to waive future good conduct credits in return for an actual sentence imposed of less than a year.

AGGRAVATED FELONIES TRIGGERED BY A \$10,000 FINANCIAL INTEREST

The following types of convictions will be considered aggravated felonies if the record of conviction reveals that the financial interest in the crime exceeded \$10,000:

- Crimes Involving Fraud or Deceit (\$10K loss to victim)
- Money Laundering (involving \$10K)
- Tax Evasion (\$10K loss to Government)

Below is a list of strategies designed to avoid the AF with \$10,000 triggers.

- *Keep restitution under \$10,000*
- *During plea allocution contest any allegation in complaint involving \$10,000 or more.*
- *Have client pay a portion of the loss voluntarily pre-sentence to reduce restitution under \$10,000*
- *Make written plea agreement or oral stipulation that the loss to the victim is \$10,000 or less*
- *If all else fails, make sure that the fine is labeled as "Restitution" not "Reparation" PL § 60.27*

THESE STRATEGIES ARE DESIGNED TO GIVE CLIENTS A FIGHTING CHANCE IN SUBSEQUENT IMMIGRATION PROCEEDINGS. THEY DO NOT GURANTEE PROTECTION FROM AN AF CHARGE

—Peter Markowitz, The Bronx Defenders

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

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

United States Supreme Court

Death Penalty (Penalty Phase) DEP; 100(120) (140)
(Right to Counsel)

Standards and Goals (General) SAG; 358(10)

Wiggins v Smith, 539 US ___, 123 SCt 2527,
156 LE2d 471 (2003)

The court in the petitioner's capital case denied a defense motion for a bifurcated sentencing hearing to allow the defense to show that the petitioner was not the principal, and to then, if needed, present mitigation evidence. The attorneys did not introduce evidence of their client's life history. The jury returned a death sentence. The petitioner claimed ineffectiveness of counsel based on the failure to investigate and present mitigating evidence. Reviewing state courts found an informed tactical decision to focus on disproving the petitioner's direct involvement in the murder in lieu of mitigation. A federal habeas corpus writ, granted because rejection of the ineffectiveness claim was an unreasonable application of federal law, was reversed on appeal.

Holding: Defense counsel's investigation underlying their decision not to present mitigating evidence at the sentencing phase of a capital case was not reasonable. *Strickland v Washington*, 466 US 668 (1984). Insufficient efforts were made to uncover the details of the petitioner's life history. *Williams v Taylor*, 529 US 362, 412 (2000). Counsel relied on a few sources of information, *ie*, the presentence investigation report and DSS records, but failed to pursue leads from them. No social history report was ordered, although it was standard practice in similar cases. Counsel's investigation fell short of ABA Guidelines for uncovering "all reasonably available" mitigating evidence. Judgment reversed.

Dissent: [Scalia, J] State court factual determinations are presumed correct unless rebutted by clear and convincing evidence. 28 USC 2254(e)(1). Assuming that burden was met, there was no "reasonable probability" that a social history investigation would have changed the defense or outcome.

Equal Protection (General) EQP; 140(7)

Discrimination (Gender) DCM; 110.5(30)

Sex Offenses (General) (Sodomy) SEX; 350(4) (30)

Geddes v Texas, 539 US ___, 123 SCt 2472,
156 LE2d 508 (2003)

Police entering the petitioner's home found him engaged in a sex act with another man; both were adults. They were convicted of violating a Texas statute prohibiting "deviate sexual intercourse" with someone of the same sex. Tex. Penal Code Ann 21.06(a) (2003). On appeal, the petitioner's argument that the statute violated equal protection and due process was rejected.

Holding: Two adults of the same sex who engaged in sexual conduct with full mutual consent in private had a protected liberty interest under substantive due process. The reasoning and underlying support that led to the decision in *Bowers v Hardwick* (478 US 186 [1986]), upholding a Georgia anti-sodomy statute under the rational-basis test, is rejected. Texas did not have a legitimate interest or the right to criminalize the sexual conduct of same sex adults in private. *Romer v Evans*, 517 US 620 (1996). Judgment reversed.

Concurring: [O'Connor, J] The statute banning sodomy violated equal protection by prohibiting only same-sex sodomy, not heterosexual sodomy. Moral disapproval was not a rational basis for such legislation. *Bowers* should not be overruled.

Dissent: [Scalia, J] Same sex sodomy was not a fundamental right or liberty interest under due process. Texas statute had a rational relation to a legitimate state interest under *Bowers*.

Dissent: [Thomas, J] Despite same sex sodomy law being "uncommonly silly," it did not violate any general right of privacy.

Retroactivity (General) RTR; 329(10)

Sex Offenses (Juveniles) SEX; 350(12)

Stogner v California, 539 US ___, 123 SCt 2446,
156 LE2d 544 (2003)

The petitioner was charged with sex-related child abuse occurring between 1955 and 1973. Under California law, the statute of limitations for those acts was three years, but was revived under a new law if action was taken within a year of a complainant's first report to the police. Cal Penal Code Ann 803(g). The trial court found that the statute violated the *ex post facto* prohibition, but the decision was reversed on appeal. The petitioner reiterated his claim, adding a due process argument. The trial court's denial of relief was affirmed on appeal.

Holding: The statute reviving a time-barred offense retroactively, which law was enacted after the time limit for prosecuting the crime expired, violated *ex post facto* protection. US Const Art I, § 10, cl 1. California's revival statute deprived the petitioner of "fair warning" that his

US Supreme Court *continued*

conduct was still subject to prosecution. *Weaver v Graham*, 450 US 24 (1981). It inflicted punishment on someone who was no longer liable to prosecution, and allowed conviction upon proofs that, at the time the law was passed, had been deemed insufficient by the passage of time. It was within the second category of *ex post facto* laws set out by Justice Chase over 200 years ago. *Calder v Bull*, 3 US 386, 3 Dall 386, 391 (1798). Judgment reversed.

Dissent: [Kennedy, J] California's revival statute did not alter the definition of the original crime. Reviving the prosecution of sexual child abuse, which has lifetime implications, did not make the crime greater than it was when committed. The revival statute included safeguards and evidentiary burdens to prevent its application from being oppressive.

Constitutional Law (United States Generally) CON; 82(55)

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

Virginia v Hicks, 539 US ___, 123 SCt 2191, 156 LEd2d 148 (2003)

The petitioner, City of Richmond, Virginia, privatized streets within a housing development owned by Richmond Redevelopment and Housing Authority (RRHA) to combat crime. RRHA posted no trespassing signs and empowered local police to serve notice on any non-resident found on those streets who did not have a "legitimate business or social purpose" for being there and arrest anyone who remained after being so notified. Va. Code Ann 18.2-119. The respondent had been barred from the premises, and was convicted of trespass for returning. At trial, the respondent claimed the RRHA policy was unconstitutionally overbroad and void for vagueness. On appeal, the court found that as the streets were a "traditional public forum," the policy violated the 1st Amendment. State Supreme Court affirmed on grounds that the policy was unconstitutionally overbroad.

Holding: A no trespass policy that aimed at nonexpressive conduct, *ie* returning after a barment notice, did not violate the 1st Amendment. RRHA's notice-barment and "legitimate business or social purpose" rules applied to everyone entering the housing development streets. The respondent failed to show that the RRHA trespass policy as a whole prohibited a "substantial" amount of protected speech in relation to its many legitimate applications. *Broadrick v Oklahoma*, 413 US 601, 615 (1973). "Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech." While the facial challenge based on over-

breadth failed, as-applied litigation might still be open. Judgment reversed.

Concurrence: [Souter, J] Analysis of the 1st Amendment overbreadth doctrine required focusing on potential applications of the entire trespass policy, written and unwritten.

Constitutional Law (United States Generally) CON; 82(55)

Prisoners (Visitation) PR I; 300(45)

Overton v Bazzetta, 539 US ___, 123 SCt 2162, 156 LEd2d 162 (2003)

The respondents, prisoners and their families, challenged restrictions placed on noncontact visits by the Michigan Department of Corrections limiting the number and nature of family visits, and barring visits for inmates with substance abuse violations. In this class action under 42 USC 1983 they claimed the rules violated the 1st, 8th, and 14th Amendments. The noncontact rules were held to be invalid, and the 6th Circuit affirmed.

Holding: State prison regulations restricting visitor access to inmates with high security classifications to noncontact visits only were valid. Right of association was not a privilege fully enjoyed by prisoners. *Jones v North Carolina Prisoners' Labor Union, Inc.*, 433 US 119, 125 (1977). The other challenged regulations had a rational relation to legitimate penological interests, *ie*, maintaining internal security, protecting child visitors from misconduct, and deterring use of drugs and alcohol. *Turner v Safley*, 482 US 78, 89 (1987). Alternative means of communication with those barred from visiting exist, even if not ideal. Accommodating inmates' visitation requests without restriction presented a significant burden on prison resources and the ability to maintain a safe environment. Temporary withdrawal of visitation privileges to enforce prison discipline was not cruel and unusual punishment. *Sandin v Conner*, 515 US 472, 485 (1995). Judgment reversed.

Concurrence: [Stevens, J] Federal courts must recognize valid constitutional claims of prisoners.

Concurring: [Thomas, J] The issue was whether a state prison sentence validly eliminated a constitutional right belonging to free persons, not whether a constitutional right survived incarceration. State regulations limiting visitation was not punishment under the 8th Amendment. *Hudson v McMillian*, 503 US 1, 18-19 (1992).

Competency to Stand Trial (General) CST; 69.4(10)

Sell v United States, 539 US ___, 123 SCt 2174, 156 LEd2d 197 (2003)

US Supreme Court *continued*

The petitioner, with a history of mental illness, was charged with mail fraud and other federal crimes. His bail was revoked after a claim that he tried to intimidate a witness and he behaved erratically in court. A court-ordered examination found him incompetent to stand trial. Medical staff wanted to administer antipsychotic medication but the petitioner refused. Found to be a danger to himself and others, the petitioner was ordered involuntarily medicated to make him less dangerous and competent to stand trial. District court then found the petitioner was not dangerous, but medication was necessary to make him competent. Affirmed on appeal.

Holding: An accused with a history of mental illness had a liberty interest under the 5th Amendment to avoid forced medication whose only purpose was to make him competent to stand trial for non-violent offenses. This right could only be overcome by an “essential” or “overriding” state interest. *Riggins v Nevada*, 504 US 127, 134 (1992). Involuntary medication could be ordered “only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.” *Washington v Harper*, 494 US 210, 221 (1990). The lower courts failed to consider factors other than competence to stand trial. Judgment vacated and remanded.

Dissent: [Scalia, J] Pretrial forced-medication order was not appealable as a final decision or interlocutory order. 28 USC 1291, 1292. Alternative review was available under the Administrative Procedure Act (5 USC 551 *et. seq.*), or by a claim under *Bivens v Six Unknown Fed. Narcotics Agents*, 403 US 388 (1971).

Appeals and Writs (General)	APP; 25(35)
Courts (Federal)	CRT; 97(10)
Judges (General)	JGS; 215(9)

Nguyen v United States, 539 US __, 123 SCt 2130, 156 LEd2d 64 (2003)

The petitioners were convicted of federal narcotics offenses by the District Court of Guam. Their appeal was heard by a 9th Circuit panel composed of two Article III judges, and one Article IV judge, the Chief Judge of the District Court for the Northern Mariana Islands. No objection was made to the composition of the panel nor was there a request for a rehearing. The petitioners’ convictions were affirmed.

Holding: A federal appeals panel that included a non-Article III judge was not properly constituted. District judges can be designated to sit on the court of appeals

when required, but this did not encompass judges of the District Court for the Northern Mariana Islands, who are not judges within the meaning of 28 USC 292(a). This statutory violation cannot be waived or overcome by stipulation. Judgment vacated.

Dissent: [Rehnquist, J] The Supreme Court’s supervisory power was limited where errors had not been timely raised below. Federal Rules of Criminal Procedure, Rule 52(b); *United States v Olano*, 507 US 725, 731 (1993). Error in the composition of the panel did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.

Counsel (Competence/Effective Assistance/Adequacy)	COU; 95(15)
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Yarborough v Gentry, No. 02-1597, 124 Sct 1; 157 L Ed2d 1 (2003)

In state court, the defendant was tried for assault with a deadly weapon for stabbing his girlfriend. He testified that it was an accident. He also misrepresented his criminal history. During closing argument, the prosecutor accused the defendant of lying. Defense counsel made a rambling closing that emphasized disparity in witness statements and the difficulty of knowing which side was lying. The defendant was convicted. After he lost his state court appeal, his conviction was reversed in federal court.

Holding: The state court’s rejection of an ineffectiveness claim based on closing argument was not an unreasonable application of federal law in habeas corpus review. 28 USC 2254(d)(1); *Williams v Taylor*, 529 US 362, 409 (2000). Effectiveness of counsel encompasses closing arguments. Judicial review of a defense attorney’s closing argument has to be highly deferential under habeas standards. *Bell v Cone*, 535 US 685, 701-702 (2002). Defense counsel made several good points during closing about problems with witness testimony, irrelevance of the prosecutor’s statements about the victim, and the danger of speculating on what really happened. It omitted references to exculpatory evidence, such as the complainant’s drug use, a missing witness, and the nature of the wound suggesting it was accidental. Counsel’s choice to focus on some issues to the exclusion of others supported a presumption it was done for tactical reasons. *Strickland v Washington*, 466 US 668, 687 (1984). The right to counsel mandates “reasonable competence, not perfect advocacy judged with the benefit of hindsight.” *Kimmelman v Morrison*, 477 US 365, 382 (1986). Even counsel’s remark that his client was a “bad person, lousy drug addict, stinking thief, jail bird,” had its purposes. Judgment reversed.

Habeas Corpus (Federal)	HAB; 182.5(15)
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US Supreme Court *continued*

Mitchell v Esparza, No. 02-1369, 124 SCT 7,
157 LE2d 263 (2003)

The defendant was convicted of aggravated murder during the commission of an aggravated robbery and sentenced to death. On his first state postconviction review, he argued that he was not charged as a principal offender, and therefore was not death eligible under Ohio law. Later he claimed ineffective assistance of appellate counsel for failing to raise an 8th amendment challenge to the sentencing procedure. The motion was denied because the defendant failed to show prejudice, and omission of the principal offender instruction was harmless error. Federal habeas review found that the harmless error analysis was inappropriate and the defendant's sentence violated the 8th Amendment. Omitting the principal offender instruction vitiated reasonable doubt.

Holding: Harmless error analysis was appropriate where a state court failed to instruct a capital jury on a single element of an offense. *Sullivan v Louisiana*, 508 US 275 (1993). Federal review was limited to whether the state court judgment "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC 2254(d)(1). It was error for the federal appeals court to reverse the state court's decision when Supreme Court precedent on the issue was ambiguous. Habeas relief is only permitted when the state court's application of harmless error was done in an "objectively unreasonable" way, not if their conclusion was incorrect. *Lockyer v Andrade*, 538 US 63, 75-77 (2003). Since the defendant was the only one charged in the indictment, and no evidence of another actor was presented, the jury's verdict would not have been different with the principal offender instruction. The state court's analysis was reasonable. Judgment reversed.

New York State Court of Appeals

Instructions to Jury (General) ISJ; 206(35)

Motor Vehicles (General) MVH; 260(17)

McAndrews v City of New York, No. 160, 9/16/2003

Holding: The trial court's failure to properly instruct the jury concerning the exacting standard for reckless conduct under Vehicle & Traffic Law 1104(e) was not harmless error. *Saarinen v Kerr*, 84 NY2d 494, 501-502. Order reversed, new trial ordered.

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

People v Jones, No. 162, 9/18/2003

Holding: Amendment to Criminal Procedure Law 450.90 (1) (L 2002, ch 498) permitted the appellants to seek leave to appeal from an order granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel. The law was intended to apply prospectively to Appellate Division orders made on or after the statute's effective date, Nov. 1, 2002. Since the order in the defendant's case was made before the effective date of the statute, no leave can be granted. Appeal dismissed.

[Ed. Note: Appellate Division decision in the following case is at p. 39.]

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

Evidence (Hearsay) EVI; 155(75)

People v Everson, No. 163, 9/23/2003

Holding: General objection to an expert's statement without specific grounds is insufficient to preserve issue for appeal. *People v Tevaha*, 84 NY2d 879, 881. The defense attorney's general objection to expert testimony was sustained by the trial judge, and a limiting instruction given. No objection was made to the adequacy or accuracy of the limiting instruction nor was a specific objection made based on hearsay. The Appellate Division properly found that the trial court erred in granting the defendant's Criminal Procedure Law 330.30(1) motion on a ground that would not have required "a reversal or modification of the judgment as a matter of law by an appellate court." Order affirmed.

Sentencing (Concurrent/Consecutive) (Modification) (Resentencing) SEN; 345(10) (55) (70.5)

People v Richardson, No. 108, 10/21/2003

In 1979, the defendant was convicted of murder and sentenced to 15 years to life. He was paroled, and later returned to prison on a violation. Then he was tried on a new murder charge stemming from 1995. He was convicted on four counts of murder and sentenced to an aggregate of 50 years to life. The commitment order was silent on the relationship between the new sentence and the time already served under the first case. Therefore, the Department of Correctional Services, as required by statute, treated it as running concurrently, making defendant eligible for parole in 35 years. Penal Law 70.25(1)(a). The prosecution moved to reopen sentencing. The court held that it intended the defendant to serve 50 years, and the silent record as to consecutive sentencing was an inad-

NY Court of Appeals *continued*

vertent mistake. The ruling that the sentences were to run consecutively was affirmed on appeal.

Holding: The trial court did not have the power to modify a sentence already commenced making it run consecutively to an undischarged term of imprisonment. Criminal Procedure Law 430.10; *People v Adkinson*, 88 NY2d 561. Courts retain limited power to change clerical errors or mistaken pronouncements contradicting an agreed-upon sentence (*People v Minaya*, 54 NY2d 360, 364 *cert den* 455 US 1024) or conform an illegal sentence to the record (*People v DeValle*, 94 NY2d 870, 871-872). The silence of the trial court and prosecutor invoked the operation of the statute requiring the sentences to run concurrently to the undischarged prison term. Penal Law 70.25(1)(a), 70.30(1)(a); *Matter of Campbell v Pesce*, 60 NY2d 165, 169. Order modified, matter remitted.

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

People v Velasquez, Nos. 117, 122, 10/23/2003

During defendant Foster’s robbery trial, prospective jurors came into chambers to discuss their ability to be fair and impartial. No mention of the defendant’s presence or absence was noted in the record. Defendant Velasquez, on trial for murder, did not attend a bench conference where panelists were questioned about bias. Defense counsel waived *Antommarchi* on the record. Both convictions were affirmed on appeal.

Holding: The defendants’ claimed violation of the right to be present at sidebar conferences with prospective jurors depended on the existence of a sufficient factual record. Criminal Procedure Law 260.20. The defendants were entitled to attend ancillary proceedings having a substantial effect on their defense (*People v Sloan*, 79 NY2d 386, 392), including sidebar conferences in jury selection. *People v Roman*, 88 NY2d 18, 26. No objection was needed. See *People v Antommarchi*, 80 NY2d 247, 250. However, preservation requires an adequate record. See *People v Kinchen*, 60 NY2d 772. The right could be waived. *People v Vargas*, 88 NY2d 363, 375-376. Defendant Foster failed to produce substantial evidence to prove his absence in chambers. *People v Harris*, 61 NY2d 9, 16. In a separate instance, the record shows the defendant spoke although his presence had not been noted. Defendant Velasquez validly waived his attendance. Although better practice would be to state on the record the substance of the waiver, counsel’s *Antommarchi* waiver obviated the need for a court inquiry into its validity. *People v Spotford*, 85 NY2d 593, 598. No reconstruction hearings were needed when records existed, *albeit* insufficient to support the defendants’ claims. Orders affirmed.

Dissent: [Smith, J] Inadequate records required hearings to determine if the defendants were present at juror conferences or validly waived their rights. Presumption of regularity should did not replace a reconstruction hearing. *People v Harrison*, 85 NY2d 794 (1995).

Competency to Stand Trial (General) CST; 69.4(10)

People v Mendez, No. 118, 10/23/2003

After the defendant underwent three psychiatric examinations, the trial court found her competent to stand trial for murder. At trial, her defense of extreme emotional disturbance reduced the verdict to manslaughter. The conviction was affirmed.

Holding: Dissociative personality disorder did not as a matter of law render a defendant incompetent to stand trial. The defendant’s competency to stand trial was based on unanimous opinions of three credible psychiatrists. Review was limited to assessing competency as a matter of law. See *People v Tortorici*, 92 NY2d 757. The prosecution met its burden of proving the defendant competent to stand trial by a preponderance of the evidence. *People v Christopher*, 65 NY2d 417. Competency to stand trial was a legal standard focusing on the defendant’s ability to understand the proceedings and assist in her own defense. Criminal Procedure Law 730.10(1); *Dusky v United States*, 362 US 402 (1960). Order affirmed.

Lesser and Included Offenses (General) (Instructions) LOF; 240(7) (10)

Statute of Limitations (General) SOL; 360(13)

People v Mills, No. 121, 10/28/2003

The defendant was charged with second-degree murder (Penal Law 125.25 [2]) for conduct more than 20 years ago. In pre-trial motions, he requested jury instructions on lesser-included offenses. The court agreed, provided they were supported by the evidence, and with the understanding that if convicted of a lesser crime, the defendant waived his statute of limitations defense. A jury instruction on criminally negligent homicide, with a five-year statute of limitations, was given. Penal Law 125.10; Criminal Procedure Law 300.50 (2), 30.10 (2)(b). The defense reserved the right to appeal the conviction on statute of limitations grounds. Convicted of the lesser offense, the defendant unsuccessfully moved to set aside the verdict. Criminal Procedure Law 330.30. The appellate court affirmed.

Holding: Where an indictment was based on legally sufficient evidence, a statute of limitations defense based on a lesser-included offense was waived by asking for the charge-down. Criminal Procedure Law 70.10 (1); *People v Bello*, 92 NY2d 523, 526. A statute of limitations defense is not jurisdictional and could be waived or forfeited. *People*

NY Court of Appeals *continued*

v Kohut, 30 NY2d 183, 191. Instructing the jury on a lesser-included offense was also waivable unless the defendant objected before the jury retired. Criminal Procedure Law 300.50 (1); *People v Ford*, 62 NY2d 275, 283 (1984). The defendant's request for a lesser-included offense waived his right to raise a statute of limitations claim on appeal. *People v Richardson*, 88 NY2d 1049, 1051 (1996). Since the evidence was sufficient for an indictment on murder, there was no risk of prosecutorial overcharging to avoid the statute of limitations. Order affirmed.

Dissent: [Smith, J] Requesting a lesser-included offense did not waive a statute of limitations defense, and this defendant specifically refused to waive it.

New York State Agencies
(Correctional Services,
Department of) NYA; 266.5(75)

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

Matter of Murray v Goord, No. 109, 10/28/2003

After a trial in 1996, the petitioner was sentenced to concurrent terms of 7½ to 15 years in prison on drug convictions. The next year, he pled guilty to manslaughter and was sentenced to 7½ to 15 years consecutive to his previous sentence. Penal Law 70.25(1). The defendant's drug conviction was reversed on appeal, although the court found no reason to reverse the manslaughter judgment and consecutive sentence. In lieu of a new trial on the drug charges, the defendant pled guilty to one drug charge in exchange for a sentence of 7½ to 15 years to run concurrently with the manslaughter term. The Department of Correctional Services (DOCS) fixed the defendant's parole eligibility date based on consecutive sentences. An article 78 was brought challenging DOCS' decision to treat the sentences as concurrent.

Holding: The Appellate Division correctly found that sentencing discretion belongs to the last judge in the sentencing chain. Penal Law 70.25(1), 70.30(5); Criminal Procedure Law 430.10. DOCS erred by relying on the decision of the second judge in the chain. The authority relied upon by DOCS, *Matter of Muntaqim* (277 AD2d 976 *lv den* 96 NY2d 704), is no longer good law. DOCS must follow the last commitment order. *Middleton v State of New York*, 54 AD2d 450, 452 *aff'd* 43 NY2d 678 for reasons stated below. Order affirmed.

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Counsel (Anders Brief) COU; 95(7)

People v LaBoy, 303 AD2d 162, 754 NYS2d 881
(1st Dept 2003)

Holding: The defendant was convicted of robbery after pleading guilty and was sentenced as a second felony offender. Assigned counsel moved to withdraw, claiming that an appeal would be wholly frivolous. *People v Saunders*, 52 AD2d 833. Appellate counsel seeking to withdraw had to assert an absence of non-frivolous issues for appeal and demonstrate that a conscientious examination of the record and applicable law had been performed. *People v Reyes*, 231 AD2d 478. Appellate counsel incorrectly advised the defendant that his guilty plea prevented challenges to the suppression ruling and the harshness and excessiveness of the sentence. Without a waiver of appeal, both issues survived. CPL 710.70[2]; *People v Thompson*, 60 NY2d 513. Assigned appellate counsel's withdrawal motion granted, and new counsel assigned. *People v Moore*, 208 AD2d 357. Appeal held in abeyance. (Supreme Ct, NY Co [Solomon, J])

Flight (General) FLI; 170(6)

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

In re Steven McC., 304 AD2d 68, 757 NYS2d 259
(1st Dept 2003)

The defendant, a juvenile, was accused of what would constitute adult third-degree criminal possession of a weapon. Police in an unmarked car in a high crime area observed the defendant walking with two others. The officers became interested because one of the group did a "double take" and the rest appeared startled. The defendant moved away and appeared to have put something on the ground near an alleyway. When the officers pulled alongside the defendant and rolled down the window, he "panicked" and started running. He was seen dropping metal objects; a gun and bullets were found. Suppression was denied.

Holding: Flight alone or with equivocal circumstances was insufficient to justify pursuit without reasonable suspicion, since the pursuit was a limited detention. *People v Howard*, 50 NY2d 583, 592 *cert den* 449 US 1023. Police pursuit of a fleeing suspect was justified if the police had reasonable suspicion that the defendant had committed or was about to commit a crime. *People v Martinez*, 80 NY2d 444. The defendant's presence in a high crime area, furtive conduct, gesture appearing to hide something, separation from his friends, and nervous reaction to police provided reasonable suspicion that criminal activity was afoot and supported a common law right of inquiry. *People v DeBour*, 40 NY2d 210, 223. His flight escalated it to reasonable suspicion justifying the pursuit. *See*

First Department *continued*

People v Pines, 99 NY2d 525. Judgment affirmed. (Family Ct, NY Co [Richardson, J])

Family Court (General) FAM; 164(20)
 Juveniles (Neglect) JUV; 230(80)

In re Iris B, 304 AD2d 301, 756 NYS2d 740
 (1st Dept 2003)

Holding: While the respondent had a history of drug abuse and had neglected the child’s older sibling through drug abuse before this child’s birth, the respondent established without contradiction that at the time of the fact-finding hearing she was regularly and voluntarily participating in a rehabilitation program. The petitioner failed to adduce sufficient evidence to support a finding of neglect in view of that participation and lack of any indication that the child had actually been impaired or was actually in imminent danger of becoming impaired due to drug abuse by the respondent. *See* Family Court Act 1012(f)(i)(B), 1046(a)(iii). Order of disposition reversed, neglect finding vacated. (Family Ct, New York Co [Cohen, J])

Homicide (Murder [Sentence]) HMC; 185(40[v])
 Sentencing (General) (Pronouncement) SEN; 345(37) (70)

People v Wiggins, 304 AD2d 322, 758 NYS2d 26
 (1st Dept 2003)

Holding: The defendant was convicted of first-degree murder and sentenced to life in prison without possibility of parole. Penal Law 125.27[1][a][vi]. The court erred in believing that there was “no other option” and that its hands were tied, and sentencing the defendant without considering other options under the statute, such as a life term of imprisonment with a minimum ranging from 20 to 25 years. Penal Law 60.06. The defendant’s other issues, including that Penal Law 125.27(1)(b) includes only persons 19 years or older, are rejected. On remand, the court is to consider all sentencing options. Judgment modified. (Supreme Ct, Bronx Co [Richardson, J])

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

People v Harris, 304 AD2d 355, 759 NYS2d 6
 (1st Dept 2003)

The defendant was sentenced on multiple charges to an aggregate term of 85 years to life.

Holding: The sentence was excessive overall. The defendant was improperly sentenced as a persistent vio-

lent felony offender on the third-degree robbery and fourth-degree grand larceny convictions, since these were not violent felony offenses. In the interest of justice the defendant’s sentence is reduced by substituting second felony offender adjudications for those convictions in place of persistent violent felony offender adjudications, and making all sentences run concurrently, resulting in an aggregate term of 25 years to life. Judgment modified. (Supreme Ct, NY Co [Scherer, J])

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

People v Banuchi, 304 AD2d 402, 760 NYS2d 10
 (1st Dept 2003)

The defendant was convicted of second-degree robbery and fourth-degree grand larceny, and sentenced as a persistent violent felony offender to 16 years to life based on two prior violent felony weapons convictions.

Holding: The court erred in sentencing the defendant as a persistent violent felony offender based on convictions for attempted third-degree criminal possession of a weapon (Penal Law 110.00, 265.02 [1]), since they were not violent felony offenses. Penal Law 70.08 (1)(a). A third-degree weapons charge becomes a Class E violent felony offense only when it was the lesser-included offense of a count in the indictment. Penal Law 70.02 [1][b][d]; Criminal Procedure Law 220.20 [1]. The defendant’s earliest weapons conviction was based on a plea to a Superior Court Information, not to a lesser-included offense of an indictment. *See People v Dickerson*, 85 NY2d 870. During the defendant’s plea allocution to his second weapons conviction, he did not admit that the first conviction was a violent felony. As a result, there was only one prior violent felony conviction. Judgment modified, remanded for resentencing. (Supreme Ct, NY Co [Sonberg, J])

Grand Jury (Procedure) GRJ; 180(5)

People v Aarons, 305 AD2d 45, 759 NYS2d 20
 (1st Dept 2003)

Holding: During the grand jury presentation in the defendant’s case, the foreperson informed the prosecutor that there were insufficient votes to reach a decision. The prosecutor ordered the grand jurors to stop deliberations and return the following week to hear more testimony. After that testimony, the grand jury then voted a true bill. The preliminary vote was not a dismissal of the charges. The court erred by granting the defendant’s application to dismiss the indictment as defective. Criminal Procedure Law 190.75(1) requires that the grand jury file its finding of dismissal with the court. The statute limits grand jury dispositions; dismissal must be in accordance with CPL 190.75. *See* Criminal Procedure Law 190.60(4); *People v*

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Medina, 283 AD2d 250. There has to be some formality to a grand jury's dismissal. *People v Kelly*, 140 Misc 377, 379. Under statutory and common law, there is a presumption of regularity in grand jury proceedings. Without substantial evidence to rebut that presumption, failure to indict was not a dismissal. *People v Dominique*, 90 NY2d 880, 881. Judgment reversed. (Supreme Ct, Bronx Co (Benitez, J))

Dissenting: [Ellerin, J] The prosecutor re-submitted evidence to the grand jury after it failed to indict without judicial leave. Historically, the correct rule under common law and statute was that a grand jury's failure to indict was a dismissal.

Search and Seizure (Search Warrants [Suppression]) (Warrantless Searches) SEA; 335(65[p]) (80)

Trial (Presence of Defendant) TRI; 375(45)
People v Merejildo, 305 AD2d 143, 762 NYS2d 338 (1st Dept 2003)

Holding: The suppression court properly found it necessary to conduct most of the hearing on probable cause *ex parte*. The court engaged in a "sensitive balancing" of the informant's safety against the defendant's right to an adversarial proceeding. See *People v Castillo*, 80 NY2d 578, 582 *cert den* 507 US 1033. The defendant claimed that *Castillo* procedures do not apply to warrantless searches because there is no presumption of validity like that attaching to a warrant. Whether *Castillo*-type procedures could ever be used to protect an informant's safety as to a purely warrantless search need not be decided here, because the information from the informant was the basis not only for the warrantless search of the defendant's person and vehicle, but also for the search warrant issued for a different vehicle. The court properly considered the warrant, supporting affidavit, and related proceedings. While the warrant court had additional information and did not pass directly on the validity of the warrantless search, its acceptance of the informant's reliability and basis of knowledge indirectly upheld the warrantless search. The defendant received a fair opportunity to litigate the suppression claim. Compare *Alderman v US*, 394 US 165, 182-183 (1969). *In camera* review of the sealed portions of the record, and the record as a whole, supports the findings below. Judgment affirmed. (Supreme Ct, New York Co [Altman, J])

Rape (Evidence) PAR; 320(20)
People v Loja, 305 AD2d 189, 761 NYS2d 7 (1st Dept 2003)

Holding: The complainant and the defendant "were involved in some kind of sexual situation." The critical issue was whether or not that situation was consensual, or if the complainant fabricated a claim of sexual assault to cover up an affair. A co-worker testified that the complainant had responded to his arrival at work in a normal voice from the back. The defendant emerged with unbuttoned shirt and opened pants after the complainant had run out, dressed normally without bruises or scratches. The defendant said that the complainant had thought the co-worker was the complainant's ex-husband arriving. The complainant did not respond to this comment, made within her hearing. The co-worker testified that he had never seen the complainant and the defendant act romantically toward one another. In addition to character evidence (positive as to the defendant, negative as to the complainant) and the defendant's testimony, the defense sought to offer the testimony of a mutual friend that he had seen the complainant repeatedly touching the defendant's leg and putting her head on the defendant's shoulder. This evidence was precluded; the prosecutor argued it was not evidence of anything romantic, which he agreed would have been appropriately offered. In summation, the prosecutor responded to the theory of fabricated rape by saying there was no evidence of a sexual relationship between the complainant and the defendant. The goal of the proffered evidence was not to violate the rape shield law (Criminal Procedure Law 60.42) by imputing unchastity to the complainant, but to throw light on the disputed issue of consent. *People v Jovanovic*, 263 AD2d 182 *app dismd* 95 NY2d 946. The defendant is entitled to retrial. Judgment reversed. (Supreme Ct, New York Co [Stackhouse, J])

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

Robbery (Defenses) (Degrees and Lesser Offenses) ROB; 330(5) (10)

People v Jones, 305 AD2d 264, 759 NYS2d 467 (1st Dept 2003)

Holding: The court erred by denying the defense request for a jury instruction on the affirmative defense of first-degree robbery set out in Penal Law 160.15(4), along with second-degree robbery. The confession admitted as part of the prosecution's direct case contained a statement that the defendant carried a toy gun during the robberies. This provided a reasonable basis on which the jury could have concluded that the firearm displayed was not a loaded weapon from which a shot could be discharged. See *People v Smith*, 55 NY2d 888. The instruction was warranted despite the defense presentation of inconsistent defenses. *People v Butts*, 72 NY2d 746, 748. Under the circumstances of this case, reduction of the first-degree robbery convictions to second-degree robbery and resen-

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tencing on those convictions is an appropriate remedy. The prosecution concedes that the defendant was incorrectly sentenced as a second violent felony offender on third-degree possession of a weapon convictions, which was not a violent felony. Penal Law 265.02(1). The defendant's claims as to the dismissal of an absent juror, discharge of a sworn juror as unqualified, improper prosecution summation, admission of hearsay, and other issues are without merit, unpreserved, or harmless error. Judgment modified, sentences reversed as noted, remanded for resentencing on those convictions. (Supreme Ct, Bronx Co [Fisch, JJ])

Ethics (Defense) ETH; 150(5)

Matter of Levy, 307 AD2d 47, 760 NYS2d 455 (1st Dept 2003)

Holding: A client who had been arrested in Canada and detained in Alabama for an alleged tax fraud scheme contacted the respondent "to enlist his assistance and/or obtain an experienced criminal attorney." The respondent agreed in September 1998 to hold about \$69,000 in a "trust" account for the representation of this client, to whom the respondent had also leased office space for some months. After the respondent appeared in federal court in Alabama, the client decided to retain local counsel and directed the respondent to release the funds to the new lawyer. The respondent, believing he would continue representation in other respects, sent the new lawyer a check for \$25,000. In October 1998, the respondent transferred \$5,000 from the escrow account to his business account. He refused to forward the \$39,923 balance to the client's mother upon the client's request, alleging concerns about money laundering. The new lawyer refused to accept the remaining funds to hold in trust. After further requests by the client, the respondent returned \$28,128.87. The referee rejected the fear of money laundering charges defense, citing lack of evidence that the funds constituted the proceeds of a crime, the respondent's failure to seek any ethical opinion or advice about these concerns, the respondent's own unpersuasive testimony regarding his interpretation of the law, repeated failures to turn the money over to a court, and transfer of over \$8,000 to the respondent for reasons other than representation (eg lease of office space). Several charges stemming from this and other conduct were affirmed. The two-year suspension recommendation, confirmed by a hearing panel, was not confirmed. Continued mishandling of money and a failure to offer credible explanations for the conduct warrant a three-year suspension.

Competency to Stand Trial (General) CST; 69.4(10)

In re Lovell v Goodman, 305 AD2d 314, 759 NYS2d 480 (1st Dept 2003)

Holding: The petitioner, indicted for second-degree assault and related offenses, was found by two psychiatric examiners to be an incapacitated person. A third expert opined that there was a strong possibility that the petitioner's altered mental state resulted from organic illness. The court ordered the petitioner to undergo neurological testing, which the petitioner refused. Defense counsel asked that the petitioner be committed to the custody of the Commissioner of Mental Health. The court ordered the petitioner taken to Bellevue Hospital Prison for a thorough evaluation, including drawing of blood, imaging of his brain, and a lumbar puncture, under sedation despite any objection. The court also ordered that one of the court-appointed experts consult with hospital staff. This was error. Upon the finding that the petitioner is an incapacitated person, the court was required to issue an order of commitment. See Criminal Procedure Law 730.50; *Brusco v Braun*, 84 NY2d 674, 679. The clear, unambiguous statute leaves no room for construction or judicial interpretation. See *New Amsterdam Casualty Co v Stecker*, 3 NY2d 1, 6. McKinney's Cons Laws of NY, Book 1, Statutes §76, §94. The respondent's contention that the proceeding must be dismissed for failure to join the district attorney is without merit. The prosecutor was served with a copy of the petition and notice of petition, and was present at, or knew of, court appearances during the underlying criminal actions where the defendant's capacity was addressed. Petition for mandamus granted, petitioner declared incompetent, respondent directed to commit the petitioner. (Supreme Ct, New York Co [Goodman, JJ])

Confessions (Duress) CNF; 70(25) (42) (50)
(Interrogation) (Voluntariness)

People v Kollar, 305 AD2d 295, 760 NYS2d 449 (1st Dept 2003)

Holding: After surrendering to police in the evening, the defendant was read his *Miranda* rights (*Miranda v Arizona*, 384 US 436 [1966]) at 12:15 am. Handcuffed, alone in an interrogation room with the detective, the defendant said he did not want to answer questions. The detective asked no more questions about the shooting. He did fail to "scrupulously honor" the defendant's invocation of his right against self-incrimination by engaging the defendant in conversation. There was nothing "benign" about the conversation. Unlike the record in *People v Ferro* (63 NY2d 316) this record is not silent as to the intent of the police. The detective set out to establish a rapport with the defendant and induce a change of mind about refusing to discuss the incident. The conversation, during which the

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defendant disclosed a recent hospitalization for mental illness, was designed to and did subtly coerce a waiver of the defendant's rights. His initial, written statement should have been suppressed, along with the subsequent videotaped statement. The prosecutor who took the videotaped statement had a copy of the initial statement in her hand, and referred to it. The same detective who took the written statement remained with the defendant throughout the videotaped statement. That the defendant was moved from the interrogation room to the squad room, and that the defective completed paperwork during a short period, did not constitute a break in the interrogation. Judgment reversed, remanded for new trial. (Supreme Ct, Bronx Co [Marcus, JJ])

Dissent: [Lerner, JJ] Suppression was properly denied.

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

Sentencing (Excessiveness) (General) SEN; 345(33) (37)

People v Rosenthal, 305 AD2d 327, 760 NYS2d 460 (1st Dept 2003)

The defendant pled guilty to attempted second-degree robbery in exchange for a definite sentence of one year. At sentencing, the court agreed that the defendant would instead be permitted to enter a residential drug program, advising the defendant that if she failed to cooperate, or left the program, she would receive the "maximum amount of time, which is 1-1/3 to 7 years incarceration." After leaving the program upon the death of a close friend and entering another program, which she failed by testing positive for drugs, the defendant was sentenced to five years imprisonment and two years post-release supervision.

Holding: At sentencing, the court and counsel had apparently discovered that this offense had occurred after a change in the law, making the appropriate sentencing range a determinate sentence of no less than two, no more than seven, years (Penal Law 70.02[3][c]), with a mandatory period of post-release supervision of between 1½ and 3 years. Penal Law 70.45(2). The defendant sought to vacate her conviction because she was not advised about post-release supervision, her plea was not knowing and voluntary, and she was denied the effective assistance of counsel. She also asserted on appeal that the sentence was excessive. The sentence was excessive; disposition on that basis renders the other arguments academic. *See US v Good*, 25 F3d 218. Judgment modified, sentence reduced to 3 years imprisonment, 2 years post-release supervision, and otherwise affirmed. (Supreme Ct, Bronx Co [Sussman, JJ])

Second Department

Counsel (Conflict of Interest) COU; 95(10) (30) (39)
(Right to Counsel) (Standby
and Substitute Counsel)

People v Brown, 305 AD2d 422, 759 NYS2d 168 (2nd Dept 2003)

Holding: The defendant was denied the right to counsel when the court refused to substitute new counsel without conducting an adequate inquiry into the defendant's allegations. Counsel told the court that a grievance proceeding against her prevented her from providing effective representation. This raised the possibility of irreconcilable differences and an actual conflict of interest, entitling the defendant to new assigned counsel. *See People v Sides*, 75 NY2d 822, 824. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Latella, JJ])

Sentencing (General) SEN; 345(37)

People v Smith, 305 AD2 432, 758 NYS2d 519 (2nd Dept 2003)

Holding: "The remarks of the sentencing court demonstrated that it improperly considered crimes of which the defendant was acquitted as a basis for sentencing (*see People v Innis*, 288 AD2d 236; *People v Santiago*, 277 AD2d 258, *lv denied* 98 NY2d 772)." Judgment modified, sentence vacated, matter remitted for resentencing. (Supreme Ct, Kings Co [Kriendler, JJ])

Counsel (Conflict of Interest) COU; 95(10) (30) (39)
(Right to Counsel) (Standby
and Substitute Counsel)

People v Reilly, 305 AD2d 430, 759 NYS2d 178 (2nd Dept 2003)

Holding: Before the pretrial suppression hearing began, defense counsel raised the possible need for his testimony at that hearing. In an *ex parte* order of proof, counsel said that he had been present at a lineup where the defendant had been identified, and that police misconduct had made the procedure unduly suggestive. The officer conducting the lineup had twice signaled the witness of the defendant's seat number after alerting the witness that the defendant was in the lineup. The witness had made "a misidentification" at a prior lineup. The court directed counsel to proceed, saying that if it became necessary for counsel to be a witness, the court might get a replacement attorney. On cross-examination, the officer denied signaling the witness. The court erred by denying counsel's renewed request to testify. *Cf People v Chipp*, 75 NY2d 327 *cert den* 498 US 833. Appeal held in abeyance,

Second Department *continued*

matter remitted for a hearing on the suppression of identification testimony. (Supreme Ct, Kings Co [Lott, J])

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

People v Maglione, 305 AD2d 426, 759 NYS2d 174 (2nd Dept 2003)

After the defendant's failure to complete the drug program on which his guilty plea had been based, the court learned that the defendant had five prior New Jersey convictions. At issue is one entitled "Certain Persons Not to Have Weapons," which makes possession of a firearm a second-degree crime. NJ Stat 2C:39-7(b). The court found this to be equivalent to the New York felony of third-degree Criminal Possession of a Weapon. See Penal Law 265.02(1). The defendant was sentenced as a second felony offender.

Holding: The elements of the New Jersey and New York crimes did not coincide as required. See *People v Gonzalez*, 61 NY2d 586, 589. New York's statute (Penal Law 254.00[3]) gives a more limited meaning to "firearm" than the term has in New Jersey, where "firearm" includes any rifle or shotgun. See NJ Stat 2C:39-01(f). Where the foreign statute encompasses conduct that would not be considered a felony in New York (See *People v Trudo*, 153 AD2d 994), the foreign conviction cannot be used to find the defendant a prior felony offender. Judgment modified, sentence vacated, matter remitted for resentencing. (Supreme Ct, Kings Co [Ferdinand, J])

Civil Practice (General) CVP; 67.3(10)

Prosecutors (General) PSC; 310(20)

Chetrick v Cohen, 305 AD2d 359, 759 NYS2d 166 (2nd Dept 2003)

Holding: The plaintiffs, who are attorneys, were the subjects of a joint insurance fraud investigation by the defendants, current or former members of the prosecutor's office. Two indictments were dismissed, and this action was commenced. Before discovery was provided, the defendants moved for summary judgment on the basis that as quasi-judicial officers they had absolute immunity as to all causes of action asserted. The court erred in granting the motion on the basis of only the amended complaint and answer thereto. The defendants "are not entitled to absolute immunity for official actions taken by them under any and all circumstances, and at all times (see *Rodriguez v City of New York*, 193 AD2d 79; *Rosen & Bardunias v County of Westchester*, 158 AD2d 679, appeal denied 76 AD2d 703, cert denied, 498 US 1086; *Cunningham v State of New York*, 71 AD2d 181." The defendants failed to meet their burden of showing that immunity was war-

ranted here. The moving papers supported only by an attorney's affirmation and the amended complaint and answer were insufficient to show they were entitled to absolute immunity as a matter of law. Order and judgment modified, and as modified, affirmed. (Supreme Ct, Suffolk Co [Underwood, J])

Contempt (Procedure) CNT; 38(10)

Caiola v Allcity Insurance Company, 305 AD2d 350, 758 NYS2d 683 (2nd Dept 2003)

The appellant was sanctioned on two different occasions in different matters for engaging in frivolous conduct. See 22 NYCRR 130-1.1. He did not pay the court-imposed sanctions by the deadlines, and the court *sua sponte* commenced criminal contempt proceedings. The appellant sought prohibition in an article 78 proceeding, which was denied, and the court adjudicated the appellant in criminal contempt.

Holding: "Where, as here, a court commences a criminal contempt proceeding against an alleged contemnor based on his willful disobedience of the court's 'lawful mandate' (Judiciary Law § 750[A][3]), the failure to personally serve the alleged contemnor with notice of the proceeding is a jurisdictional defect (see *Matter of Howard T.P. v Maria B.*, 237 AD2d 443; *Matter of Minter*, 132 AD2d 701, 703 *Matter of Murray*, 98 AD2d 93, 98). The appellant is not collaterally estopped from contesting the issue of personal jurisdiction by virtue of this court's decision and order in the CPLR article 78 proceeding finding that the Supreme Court possessed subject matter jurisdiction (see *Matter of Herskowitz v Tompkins*, 184 AD2d 402, 403)." Order and judgment reversed, contempt findings vacated, proceeding dismissed without prejudice to recommencement. (Supreme Ct, Westchester Co [DiBlasi, J])

Article 78 Proceedings (General) ART; 41(10)

Matter of Eberhardt, 305 AD2d 501, 759 NYS2d 542 (2nd Dept 2003)

Holding: Prohibition may lie against prosecutors in their quasi-judicial role of "represent[ing] the public in bringing those accused of crime to justice" (*Matter of Schumer v Holtzman*, 60 NY2d 46, 51 . . .). Where alternative remedies are inadequate to redress a particular grievance, prohibition may lie, eg where review is sought not of an excess of jurisdiction but the entertainment of the case at all. See *Matter of Baltimore Mail S. S. Co. v Fawcett*, 269 NY 379, 384 cert den sub nom *Madsen v Baltimore Mail S.S. Co.*, 298 US 675. A declaratory judgment action, the only alternative remedy here, has no coercive effect. The petitioners are not seeking review of the constitutionality of the provisions of the Yonkers City Code that rely on the definition of "vicious animal" found in section 65-1. Nor

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do they seek a declaration that the provisions in question conflict with Agriculture and Markets Law 197(5), given that one petitioner has prevailed in three prosecutions in Yonkers City Court on that issue. What the petitioners seek to prevent is repeated prosecution under the code provisions determined to be invalid. The petitioners having established a clear legal right to the relief sought and no other adequate remedy existing, it was an improvident exercise of discretion to deny such relief. Judgment reversed, petition granted, respondents prohibited from enforcing and prosecuting city code violations in question. (Supreme Ct, Westchester Co [Nastasi, JJ])

Family Court (General) FAM; 164(20)

Matter of Rodriguez v Rodriguez, 305 AD2d 608,
759 NYS2d 369 (2nd Dept 2003)

Upon being advised that the subject child had been hospitalized for mental illness and released, the court issued an order authorizing visitation between the appellant mother and the child “as directed by his treating physicians.” The child’s doctors refused to talk to the mother or allow visitation. Four months later, she appeared in court, noted that she had had no contact with her child in the interim, asked that arrangements be made for some visitation, and asked that the child’s doctors be directed to issue a report.

Holding: The order permitting visitation only as allowed by the child’s doctors improperly divested the court of the power to determine visitation. *See Matter of Tamara G.*, 295 AD2d 194, 201. “Predictably, that arrangement proved to be unworkable.” There must be a hearing and new determination with respect to visitation, after appointment of a new Law Guardian for the child. Order modified, matter remitted. (Family Ct, Richmond Co [Cohen-Gallet, R])

Counsel (Conflict of Interest) COU; 95(10) (15)
(Competence/Effective Assistance/Adequacy)

Guilty Pleas (Withdrawal) GYP; 181(65)

People v Caccavale, 305 AD2d 695, 760 NYS2d 210
(2nd Dept 2003)

Holding: The defendant’s right to counsel was adversely affected when his attorney specifically denied allegations in the defendant’s *pro se* motion to withdraw his guilty plea. The defendant alleged that counsel said “that he was going ‘to blow trial’ because he didn’t have any money for defense counsel to represent him.” The attorney denied this and “stressed what he had done on

the defendant’s behalf,” essentially becoming a witness against, and taking a position adverse to, the defendant. The court should have assigned new counsel before deciding the motion. *See People v Rozzell*, 20 NY2d 712. Appeal held in abeyance, matter remitted for hearing on the motion to withdraw the plea, at which appellate counsel shall represent the defendant. (County Ct, Westchester Co [Perrone, JJ])

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

Sentencing (General) SEN; 345(37)

People v Melio, 304 AD2d 247, 760 NYS2d 216
(2nd Dept 2003)

Holding: Other courts have held that mandatory post-release supervision (PRS) is a direct consequence of a guilty plea about which a defendant must be informed before the plea is entered. *Eg People v Goss*, 286 AD2d 180. PRS is rehabilitative, not punitive (*see* Senate Mem in Support, 1998 McKinney’s Session Laws of NY, at 1493), making it arguably collateral, but it has “a ‘definite, immediate and largely automatic effect on [a] defendant’s punishment . . .’” *People v Ford*, 86 NY2d 397, 403. A bare allegation that a defendant would not have taken the guilty plea if informed of PRS does not necessarily entitle the defendant to vacatur of the plea. It may be harmless error. *See eg US v Syal*, 963 F2d 900, 905 (6th Cir); *State v McDermond*, 112 Wash App 239. Here, defense counsel said at the plea that the case had been “discussed, conferred, and negotiated over a lengthy period.” The original offer was 10 years, twice what the defendant ultimately received. “One may assume that, generally, a defendant is most concerned with the period of incarceration and not the period of parole or supervised release (*see People v Catu*, 193 Misc2d 623, 626.)” The defendant pled to one count in satisfaction of the full indictment, his probation was terminated, and he was advised about SORA provisions, potentially more onerous than PRS. The defendant waited nearly a year to seek vacatur; while there was no reference to PRS at sentencing, the defendant does not say when he first learned of it from “corrections officials.” Delay would undermine his claim. *See People v Nixon*, 21 NY2d 338, 355 *cert den sub nom Robinson v New York*, 393 US 1067. Judgment roll enlarged on the court’s own motion, matter remitted for a hearing on whether the defendant would have pled guilty if informed of PRS, and whether he was told by his attorney about PRS before sentencing. (Supreme Ct, Suffolk Co [Jones, JJ])

Identification (Eyewitness) IDE; 190(10)

Misconduct (Prosecution) MIS; 250(15)

Second Department *continued*

People v Jones, 305 AD2d 698, 760 NYS2d 227
(2nd Dept 2003)

Holding: The prosecutor improperly elicited direct examination testimony from a detective that police had arrested a nontestifying co-defendant, interviewed him at the station house, gone to a location, and arrested the defendant twenty minutes after arresting the co-defendant. This questioning “was indicative of a deliberate attempt by the prosecutor to create in the juror’s minds the impression that the codefendant implicated the defendant (see *People v James*, 289 AD2d 506, 407 . . .).” Disallowing cross-examination of the complainant about how long it took him to identify the defendant at a lineup was error where the reliability of this sole eyewitness was crucial at trial. See *People v Williamson*, 79 NY2d 799, 800-901. The errors were not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Cooperman, J])

Family Ct (General) FAM; 164(20)
Juveniles (Delinquency—Procedural Law) JUV; 230(20)

Matter of Christopher A., 305 AD2d 670,
760 NYS2d 208 (2nd Dept 2003)

Holding: The Office of Children and Family Services (OCFS) sought, in juvenile delinquency proceedings, a one-year extension of the respondent’s placement. Family Court directed that a six-month period of aftercare follow a six-month extension of placement. By directing the type and length of treatment, the court usurped the discretion of OCFS to fashion a particular treatment program under Executive Law 504, 510-a. The contention of OCFS that the respondent should remain in his current placement through the period for which aftercare was improperly ordered is rejected. The extension ordered was within the court’s discretion under Family Court Act 355.3(4). There is no indication that the court intended the respondent’s placement to be extended for a year. Order modified by deleting the provision directing six months of aftercare. (Family Ct, Suffolk Co [Freundlich, J])

Family Ct (General) FAM; 164(20)
Juveniles (Paternity) (Support Proceedings) JUV; 230(100) (135)

Matter of Dowed v Munna, 306 AD2d 278,
761 NYS2d 261 (2nd Dept 2003)

Holding: The Family Court’s denial of the petitioner’s request to testify via telephone, audiovisual hookup, or other electronic means under the Uniform Interstate Family Support Act was an improvident exercise of dis-

cretion in light of the circumstances. The petitioner had cohabited with the respondent in New York for three and a half years, and gave birth to two children. The petitioner had then moved to Washington State, married, and changed the children’s last names to that of her new husband. After ten years, the petitioner separated from her husband, and filed a petition against the respondent seeking to establish paternity and child support. That petition was denied and the proceedings dismissed. The doctrine of equitable estoppel may be invoked in paternity proceedings to further the best interest of the child. See *Matter of Charles v Charles*, 296 AD2d 547, 549. However, it is generally not available to a party seeking to disavow the allegation of parenthood in order to avoid child support. See *Ocasio v Ocasio*, 276 AD2d 680. Order reversed, proceeding reinstated, matter remitted. (Family Ct, Richmond Co [Porzio, J])

Family Ct (General) FAM; 164(20)
Juveniles (Visitation) JUV; 230(145)

Matter of Kocowicz, 306 AD2d 285,
760 NYS2d 334 (2nd Dept 2003)

Holding: The petitioner, an incarcerated father, was prohibited by a 1998 protective order from initiating contact with his son. The Family Court erred by denying his petition for permission to have contact without ascertaining the preferences of the 15-year-old son. The court lacked a sufficient basis on which to form an opinion as to what disposition was in the son’s best interests. See *Matter of Machado v Del Villar*, 299 AD2d 361. When the matter is remitted for a hearing, the court or the Law Guardian must have direct contact with the son to ascertain his wishes. The petitioner’s contention that he was denied legal representation lacks merit, as the record shows he was told of his right to counsel and chose to waive it. Order reversed, petition reinstated, matter remitted. (Family Ct, Queens Co [Rood, R])

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

People v Casa, 306 AD2d 353, 760 NYS2d 544
(2nd Dept 2003)

Holding: The defendant was entitled to a hearing regarding his status as a second felony offender. See Criminal Procedure Law 400.21. Since he did not receive a copy of his predicate felony statement before sentencing (see Criminal Procedure Law 400.21[2][3]), the defendant’s request for an adjournment of sentencing was erroneously denied. He was entitled to at least two days. See Criminal Procedure Law 400.21(6). Judgment modified, sentences vacated, matter remitted for resentencing. (County Ct, Suffolk Co [Spinner, J])

Second Department *continued*

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

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

People v Folks, 306 AD2d 355, 760 NYS2d 856 (2nd Dept 2003)

Holding: The defendant's contention that his pleas should have been vacated because he was not advised that he would be subject to post-release supervision is unreserved for review. *See People v Higgins*, 304 AD2d 773. (Supreme Ct, Kings Co [Firetog, J])

Civil Practice (General) CVP; 67.3(10)

Unlawful Imprisonment (General) UNI; 377(17)

Carlton v Nassau County Police Dept, 306 AD2d 365, 761 NYS2d 98 (2nd Dept 2003)

Holding: Issues of fact exist as to whether police officers had probable cause to arrest the plaintiff without a warrant at his home for theft of services under Penal Law 165.15(2). An affidavit by a restaurant owner did say that the plaintiff had left a restaurant without paying his bill. While information provided by an identified citizen accusing another person of a specific crime is, as a general rule, sufficient to provide probable cause (*See Mercado v City of New York*, 269 AD2d 576), failure to make further inquiry when a reasonable person would do so may show lack of probable cause. *See Colon v City of New York*, 60 NY2d 78, 82. Here, the police knew that the bill in question was disputed and the plaintiff had provided his business card to the restaurant owner. The defendant was not entitled to dismissal of claims of false arrest, false imprisonment, and deprivation of civil rights under 42 USC 1983 and the 14th Amendment. The cause of action alleging libel and slander must be dismissed because the statements that the plaintiff had been arrested for theft of services were true. *See Brian v Richardson*, 87 NY2d 46, 50-51. The cause of action for negligent investigation did not state a cause of action separate and distinct from those for false arrest and imprisonment and malicious prosecution. *See Jessic v Long Is. Sav. Bank*, 81 AD2d 2551. Order modified, and as modified, affirmed. (Supreme Ct, Nassau Co [Burke, J])

Admissions (Evidence) (General) (Voluntariness) ADM; 15(15) (17) (35)

Plea Bargaining (General) PLE; 284(10)

People v Hunt, 306 AD2d 497, 762 NYS2d 416 (2nd Dept 2003)

Plea negotiations led to an agreement that the defendant would plead guilty to two nonviolent felonies and receive a sentence of four to eight years. Such a plea was precluded by the indictment; the prosecutor agreed to go back to the grand jury for a new indictment. To ensure that the defendant did not change his mind about pleading guilty, the court required the defendant to make a limited allocution in open court confessing to the crime. The defendant agreed that if he did not plead guilty, the allocution could be used against him at trial. He did change his mind, his motion to suppress the allocution was denied, and he was convicted. The complainant had not been able to identify the defendant at trial.

Holding: *People v Spitaleri* (9 NY2d 168) held that a withdrawn guilty plea is out of the case forever and for all purposes. The reasoning in *Spitaleri* was that where it is unfair to hold a defendant to a guilty plea, it would also be unfair to use the plea against the defendant at trial. Here, the defendant never entered a plea that he then withdrew. Rather, he changed his mind after the prosecution had obtained a new indictment to effectuate a plea agreement. The defendant, correctly found to have voluntarily and knowingly agreed that the allocution could be used if he changed his mind, cannot now claim that fairness dictates he not be held to that agreement. *See People v Curdgel*, 83 NY2d 862. Judgment affirmed. (Supreme Ct, Richmond Co [Rooney, J])

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

Matter of Bruce K., 306 AD2d 479, 761 NYS2d 513 (2nd Dept 2003)

Holding: As to one of two orders of disposition, the record indicates while the court fully advised the juvenile appellant of his rights before he made admissions, the appellant's father, who was responsible for the appellant's care, "was not allocated as to his understanding of the consequences of his son's admission (Family Court Act § 321.3[1]; *see Matter of Anthony S.*, 302 AD2d 531, 532." That order of disposition is reversed, order vacated, and matter remitted; the other order is affirmed. (Family Ct, Dutchess Co [Brands, J])

Gun Control GNC; (General) 182(10)

Weapons (Firearms) WEA; 385(21)

Matter of Caso v Nassau County Police Department, 306 AD2d 473, 761 NYS2d 303 (2nd Dept 2003)

Holding: Police responding to an altercation in which the petitioner was involved arrested the petitioner and transported him to the county medical center for treatment and psychiatric evaluation. They secured his residence, from which they removed pistols, rifles, and a

Second Department *continued*

shotgun. Two days later the petitioner was discharged following a determination that he did not pose a danger to himself or others. Charges stemming from this arrest and from a later one for allegedly violating an order of protection were dismissed. The police department revoked the petitioner’s pistol permit and refused to return the rifles and shotgun. Supreme Court denied a petition seeking return of the rifles and shotgun, for which no permit is required, stating that police custody of the long guns was proper until the petitioner’s status to possess them was clarified. The petitioner is entitled to a hearing to determine his suitability to possess the rifles and shotgun. *Cf* Penal Law 265.00(16). The continued police custody of the guns is proper. Judgment reversed, matter remitted for a hearing. (Supreme Ct, Nassau Co [Lally, J])

Domestic Violence (General) DVL; 123(10)
 Family Court (General) FAM; 164(20)

Matter of Alfeo v Alfeo, 306 AD2d 471, 761 NYS2d 505 (2nd Dept 2003)

Holding: The court erred by effectively denying the petition for an order of protection without a fact-finding or dispositional hearing. *See* Family Court Act 842; *Matter of V.C. v H.C.*, 257 AD2d 27. The court also erred in finding that it could not grant an order of protection because one had been issued by a criminal court. Family Court and criminal courts have concurrent jurisdiction over certain family offenses. *See* Family Court Act 812(1). A complainant may commence a proceeding in either or both courts, and each court has the authority to issue temporary or final orders of protection. *People v Wood*, 95 AD2d 509, 512-513; *see* Family Court Act 812(2), 821-a(2)(b), 828, 841(d), 842, and Criminal Procedure Law 530.12. Double jeopardy claims may come into play where there are allegations that an order of protection has been violated. *See* Family Court Act 846-a. Such considerations are not relevant where an order of protection, which is not punitive and does not at this stage involve incarceration, is sought. *See People v Markidis*, 184 Misc2d 116. Order reversed, matter remitted. (Family Ct, Kings Co [Wright, J])

Family Court (General) FAM; 164(20)

Matter of Suffolk County Department of Social Services, o/b/o Matthew v Harry, 306 AD2d 490, 761 NYS2d 291 (2nd Dept 2003)

Holding: The Family Court, upon confirming a Hearing Examiner’s finding that the father was in willful contempt of a child support order, directed the father’s incarceration for six months unless he purged the con-

tempt by paying \$3,500. The court exceeded its statutory authority by also directing the father to pay \$197 per day to the county for his incarceration, which was beyond the court’s authority. As a court of limited jurisdiction, the court could not exercise powers beyond those given to it by statute. *See Matter of Pearson v Pearson*, 69 NY2d 919, 920. The powers set out in Family Court Act 454 do not include the power to impose incarceration costs. Order reversed insofar as appealed from, portion imposing incarceration costs deleted. (Family Ct, Suffolk Co [Spinner, J])

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

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

People v Anderson, 306 AD2d 536, 761 NYS2d 855 (2nd Dept 2003)

Holding: Submission of an annotated verdict sheet to the jury was not reversible error. The use of such annotations was authorized by statutory amendment after this trial. Procedural statutes are generally construed to operate retroactively. *See* McKinney’s Cons Laws of NY, Book 1, Statutes § 55. The legislative history of the 2002 amendments to Criminal Procedure Law 310.20(2) and “the fact that the provision at issue was inserted in a statute governing procedure in criminal cases establishes that the Legislature intended the amendment” to operate retroactively. *See People v Sorbello*, 285 AD2d 88. Judgment affirmed. (Supreme Ct, Kings Co [Brennan, J])

Third Department

Confessions (Notice of Use at Trial) CNF; 70(46)

People v Johnson, Jr., 303 AD2d 830, 758 NYS2d 687 (3rd Dept 2003)

The defendant’s brother, after visiting the defendant in jail, contacted the state police and gave a statement suggesting that the defendant had killed the decedent. The state police and prosecutor’s office paid the brother \$1,000. The brother testified at the grand jury that the defendant admitted using bloody bags left in a vacant lot to line the trunk of his car before loading the decedent’s body into it, and that the defendant had asked another brother to dispose of certain items. The defense unsuccessfully sought to suppress any testimony based on the brother’s statements because the brother had acted as an agent of the police. The defendant was convicted of second-degree murder.

Holding: The police gave the brother no instructions and offered no assistance in getting the defendant’s inculpatory statements. Brief mention of a fund available for providing information about the case was at most “generalized encouragement.” *People v Duerr*, 251 AD2d 161, 162

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lv den 92 NY2d 949. There was no conduct warranting a finding of agency for suppression purposes.

The defendant was not denied effective assistance of counsel. Counsel's references in *voir dire* and opening statement to the defendant's incarceration appeared to gauge and discourage prejudice stemming from the fact that the defendant had been charged and was in custody. See *Holbrook v Flynn*, 475 US 560, 567 (1986). Eliciting or permitting testimony about uncharged prior acts was consistent with the defense theory that the police had "rushed to judgment" in presuming the defendant was responsible for the decedent's death. Counsel's failure to ask for limiting instructions with respect to the uncharged acts was not so egregious as to compromise the right to a fair trial. See *People v Flores*, 84 NY2d 184, 188-189. Judgment affirmed. (County Ct, Madison Co [Di Stefano, JJ])

Confessions (Counsel) CNF; 70(23) (40) (50)
(Instructions) (Voluntariness)

People v Johnson, 303 AD2d 903, 757 NYS2d 349
(3rd Dept 2003)

Schenectady police officers went to Mississippi looking for the defendant. Without their knowledge, a Mississippi investigator obtained a fugitive warrant on the mistaken belief that New York charges had been filed. The defendant was arrested in near-by Alabama by the New York officers accompanied by a Mississippi officer. Before any interrogation, an Alabama sheriff arrived and determined that the defendant agreed to go back to Mississippi with the New York police. There, after *Miranda* warnings, the defendant described his participation in these crimes.

Holding: The defendant's right to counsel did not attach before questioning because no accusatory instrument had been filed in New York; the Mississippi warrant was not an accusatory instrument because it charged no crime. See Criminal Procedure Law 1.20(1); *People v Gloskey*, 105 AD2d 871, 872. Nor did it constitute significant judicial activity. See *People v Sugden*, 35 NY2d 453, 461. Even if it did, the defendant's waiver was effective. See *People v Coleman*, 43 NY2d 222, 226. The New York officers' apprehension of the defendant was a citizen's arrest. See Ala Rules of Crim Pro 4.1(b)(1)(i). The arrival of the Alabama officer within 35 minutes satisfied the requirement that the defendant be delivered to an Alabama judge or law enforcement without unnecessary delay. See Ala Rules of Crim Pro 4.1(b)(2); Ala Crim Pro Code 15-10-7(e). The defendant then chose to go to Mississippi with the New York officers. Suppression is not mandated. While the Criminal Jury Instruction on voluntariness includes a requirement that a statement must be found truthful to be

used (1 CJ1 11.01 at 656), Criminal Procedure Law 710.70(3) does not refer to truthfulness. The charge given was not error. Judgment affirmed. (County Ct, Schenectady Co [Eidens, JJ])

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

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

People v de Maio, 304 AD2d 988, 760 NYS2d 558
(3rd Dept 2003)

The defendant pled guilty to driving while intoxicated (DWI) and first-degree aggravated unlicensed operation, with recommendations that his sentences be one and a third to four years and one to three years, respectively. At the plea, the judge told the defendant that if he failed to surrender himself at the jail or to appear at sentencing, a different sentence might be imposed. The defendant did not comply with these conditions. He was sentenced to consecutive terms of two to six years and one and a third to four years.

Holding: Concurrent sentences are mandated when one act constitutes two offenses, or one offense and a material element of another, unless the multiple offenses, while part of a single transaction, are committed through separate and distinct acts. *People v Ramirez*, 89 NY2d 444, 451. Because DWI can constitute a material element of first-degree aggravated unlicensed operation, it was incumbent on the prosecution to show that one of the exceptions applies. The indictment here charged driving under the influence as an element of the aggravated unlicensed operation, and both offenses were alleged to have occurred at the same date, place, and time. The prosecution relies on *People v Richburg* (287 AD2d 790, 792 *lv den* 97 NY2d 687) with no concomitant case-specific factual analysis. That case does not hold that felony DWI and first-degree aggravated unlicensed operation cannot fall within the parameters of the concurrent-sentence statute, Penal Law 70.25(2). The prosecution failed to meet the burden of showing identifiable separate acts. Judgment modified, sentences to run concurrently, and as modified, affirmed. (County Ct, Montgomery Co [Catena, JJ])

Evidence (Other Crimes) EVI; 155(95)

People v Milot, 305 AD2d 729, 759 NYS2d 248
(3rd Dept 2003)

The defendant was convicted of two counts of burglary for twice entering his neighbor's apartment with intent to commit a crime and taking personal property. The sole defense was insanity.

Holding: The court, after finding the defendant's statement admissible, declined after a *Molineux* (*People v Molineux*, 168 NY 264) colloquy to redact that statement to omit the comment "I used to do burglaries and I have not

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done one in three years. In the month of February of [2000] I wanted to see if I still had the touch.’” This comment was both an admission of guilt and proof of motive. See *People v Alvino*, 71 NY2d 233, 241-242. As the defendant had raised an insanity defense, his stated motive and subjective mental state were material. See *People v Bolarinwa*, 258 AD2d 827, 829-830 *lv den* 93 NY2d 1014. While the court should have expressly set out its discretionary balancing of probative value and need for the evidence against any potential prejudicial effect, “the court’s proper exercise of its discretion is implicit” viewed in the context of the combined suppression hearings and counsel’s opposition based on prejudicial effect. *Cf People v Chaney*, 298 AD2d 617, 618-619. Any error was harmless. Nor did the court err in allowing the prosecution to examine its own psychiatric expert and the defense psychologist as to their knowledge of the defendant’s prior guilty pleas and convictions, which had a tendency to disprove the claim that the defendant was unable to appreciate the wrongfulness of the charged conduct. See *People v Santarelli*, 49 NY2d 241, 249. The jury was instructed to limit the use of this evidence, and the prejudicial effect did not outweigh the probative value. Judgment affirmed. (County Ct, Broome Co [Smith, JJ])

Search and Seizure (Arrest/Scene of the Crime Searches [Automobiles and Other Vehicles]) (Stop and Frisk) SEA; 335(10[a]) (75)

People v Williams, 305 AD2d 804, 759 NYS2d 580 (3rd Dept 2003)

Officers with warrants to arrest two men, from whom they had just purchased drugs, stopped the men’s car, which was also occupied by the defendant. The police removed the defendant from the car, handcuffed him, and patted him down. One of the officers then noticed that the defendant had a large pocket on his pant leg containing a small clear ziplock bag in which were smaller baggies containing a white, chunky substance. The defendant was convicted of drug possession.

Holding: The court properly refused to suppress the evidence found on the defendant. The officers were entitled to direct the defendant out of the car, which was legally stopped. See *People v Robinson*, 74 NY2d 773, 775 *cert den* 493 US 966. That they drew their guns on him and handcuffed him did not necessarily turn the detention into an arrest. See *People v Allen*, 73 NY2d 378, 379-380. The test is whether the police action was reasonable. *Terry v Ohio*, 392 US 1, 20 (1967). With a warrant, knowledge of the recent drug sale and of one of the other men’s request a week earlier for a gun, and experience making it rea-

sonable to suspect that one or both the suspects might be armed, the police reasonably took precautionary measures to ensure their safety. Ineffective assistance of counsel is not shown on the record. Judgment affirmed. (County Ct, Tompkins Co [Rowley, JJ])

Dissent: [Crew III, JP] The frisk of the defendant was not justified at inception or reasonably related in scope to the circumstances. The officer saw the defendant’s pocket contents only after holding him for some time. That the defendant was in the presence of men known to have engaged in criminal activity did not justify the frisk. See *People v Otty*, 223 AD2d 364. There was no evidence that another tried to pass anything to the defendant or of other furtive conduct to justify a belief that the defendant was armed and dangerous. Even if a frisk was justified, the full-blown seizure here was not supported by the circumstances.

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

Forensics (General) FRN; 173(10)

People v Dearstyne, Jr., 305 AD2d 850, 761 NYS2d 118 (3rd Dept 2003)

The defendant’s 1991 conviction of attempted first-degree rape was affirmed in 1995. In 1997, the defendant sought under Criminal Procedure Law 440.10 and 440.20 to vacate the judgment, and under CPL 440.30(1-a) to have DNA testing ordered. He sought to preclude a prosecution response, and to obtain county funds for expert witnesses and consultants under County Law 722-c. The court denied the 440 motion without a hearing, and also denied the request for DNA testing. A *pro se* motion for DNA testing was denied without a hearing.

Holding: While the motion to preclude and the Sept. 18, 1998 722-c ruling are not appealable (see CPL 450.10), the 722-c ruling is appealable under the denial of the 440.10 motion. See CPL 470.15(1). The affidavits explaining how expert testimony might have helped at trial failed to show that experts were necessary for success on the 440.10 motion, that their testimony would show that the defendant received ineffective assistance of counsel, or that extraordinary circumstances warranted spending over the \$300 fee cap. Denial of the relief sought was not an abuse of discretion. Where the defendant was convicted of attempted rape, with no allegations of ejaculation or penetration, a showing that his semen was absent would not necessarily impact the verdict. See *People v Pugh*, 288 AD2d 634, 635. The court did not err in refusing to consider facts in unsworn documents. CPL 440.30(1). The ineffective assistance of counsel claims are unsupported by sworn allegations of facts, or meritless. Orders affirmed, appeals dismissed. (County Ct, Rensselaer Co [McGrath, JJ])

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

Sentencing (Determinate Sentencing) (General) SEN; 345(30) (37)

People v Vahedi, 305 AD2d 866, 758 NYS2d 874 (3rd 2003)

Holding: With new assigned counsel, the defendant sought to vacate his sentence so that he could withdraw his guilty plea or have the sentence modified because he was not told at the time of his plea that the determinate sentence would be followed by five years postrelease supervision. Notwithstanding his failure to make an appropriate motion below, in the exercise of interest of justice jurisdiction (*see* CPL 470.15[3][c]) relief is granted. The case establishing that a defendant is entitled to relief when not advised before entering a guilty plea of the direct consequence of postrelease supervision (*People v Goss*, 286 AD2d 180) was decided while the defendant's appeal was pending. *See People v Jachimowicz*, 292 AD2d 688. The defendant is not entitled to modification of the sentence (*See People v Cass*, 301 AD2d 681), but is entitled to withdraw his plea. *See People v Ventura*, 301 AD2d 967. Judgment reversed, matter remitted. (County Ct, Ulster Co [Bruhn, J])

Double Jeopardy (General) DBJ; 125(7)

Witnesses (Experts) WIT; 390(20)

People v Doherty, 305 AD2d 867, 762 NYS2d 432 (3rd Dept 2003)

Holding: The defendant was properly convicted of count five, first-degree sodomy, and count six, endangering the welfare of a child, for the same sexual act with the same complainant. *See People v Bacchus*, 175 AD2d 248, 249 *lv den* 79 NY2d 824. Allowing an expert to testify generally about child sexual abuse accommodation syndrome was not error. The testimony was offered to assist the jury in understanding unusual conduct of the complainants, especially their failure to reveal the abuse. The expert in no way directly impugned the defendant or bolstered any complainant's testimony. *See People v Carroll*, 95 NY2d 375, 387. The expert offered no opinion directly linked to the evidence in the case (*see People v Carroll*, 300 AD2d 911, 914), and the jury was told that the expert had not interviewed any of the complainants or the defendant. There was no basis upon which to suppress the defendant's statement. The verdict was not against the weight of the evidence. While the defendant testified and denied all allegations, the complainants testified with particularity about sex-related act or acts that the defendant committed

against them. While some complainants had trouble recalling exact dates and were cross-examined about motives to fabricate, they all remained steadfast that the incidents took place. Judgment affirmed. (County Ct, Clinton Co [Ryan, J])

Search and Seizure (Arrest/Scene of the Crime Searches [Scope] (Prisoners) SEA; 335(10[m]) (59)

People v Kelley, 306 AD2d 699, 762 NYS2d 438 (3rd Dept 2003)

Holding: *People v More* (97 NY2d 209, 214 n) did not resolve the constitutionality of the search here, conducted at the police station after the defendant was lawfully arrested for driving without a license, driving an uninspected vehicle, and failure to have a side mirror. The defendant's efforts to categorize the search as a body cavity search rather than a strip search are not supported by the record. In *More*, the Court of Appeals specifically did not address searches at a police station or correctional facility. "That the police department's written search policy was unconstitutional is irrelevant, as the officers failed to even follow that insufficient policy by obtaining the shift commander's approval before performing the strip search. Regardless of the officers' reasons, we can comb the record for object reasonable suspicion to justify the search considering the totality of the circumstances (*see Sarnicola v County of Westchester*, 229 F Supp 2d 259, 269 [2002]. . . ." The circumstances here created a reasonable suspicion that the defendant was concealing weapons or contraband on his person, justifying the search. He was on parole for robbery; his parole officer did not know that the defendant, from the Bronx, was in Kingston; the defendant gave false answers at the scene and was nervous and fidgety; his passenger mentioned seeing someone with the same name as an incarcerated gang member; the defendant admitted smoking marijuana earlier that day; the defendant could not give the address for the "moving job" he claimed brought him to Kingston; and he gave false information about the minor in his vehicle. *Compare People v Taylor*, 294 AD2d 825, 826-827; *People v Martinez*, 268 AD2d 266, 267 *lv den* 94 NY2d 950. Judgment affirmed. (County Ct, Ulster Co [Bruhn, J])

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

Lesser and Included Offenses (Definition) (General) LOF; 240(5) (7)

Witnesses (Experts) WIT; 390(20)

People v Crandall, 306 AD2d 748, 763 NYS2d 847 (3rd Dept 2003)

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Holding: The incident in question was unwitnessed and occurred between two persons who were in an ongoing sexual relationship. The trial turned almost entirely upon their credibility. Allowing the prosecution’s expert to opine that a cervical abrasion was consistent with the complainant’s claim that the defendant forcibly inserted his fingers into the complainant’s vagina, but denying the defense expert an opportunity to provide a contrary opinion, was error. It was also error for the court to reduce (under Criminal Procedure Law 210.20 [1-a]) the sole count in the second indictment from first-degree criminal contempt to second-degree. Though unpreserved, the issue is reviewed as a matter of discretion in the interest of justice. While conduct sufficient to constitute first-degree criminal contempt (Penal Law 215.51[b][ii]) would undoubtedly qualify as conduct described in Penal Law 215.50(3), the latter statute provides an exception for conduct involving or growing out of a labor dispute. The exception is a material element, a jurisdictional requirement that must be pleaded in the indictment. *See eg People v Shaver*, 290 AD2d 731, 732. Where it is theoretically possible to commit an offense under 215.51(b)(ii) and not under 215.50(3), the latter is not a lesser-included offense of the former. Judgment modified, convictions of first-degree sexual abuse and second-degree criminal contempt reversed, one indictment dismissed, matter remitted for retrial on sexual abuse. (Supreme Ct, Rensselaer Co [Sheridan, JJ])

Discrimination (Race) DCM; 110.5(50)
 Juries and Jury Trials (Challenges) JRY; 225(10) (60)
 (Voir Dire)
 People v Van Hoesen, 307 AD2d 376, 761 NYS2d 404
 (3rd Dept 2003)

Holding: The court’s denial of a defense challenge to the prosecution’s striking of an African-American potential juror was error. The defendant is an African-American male. The prosecutor preemptively struck four of six African Americans in the venire, at least one of whom had an apparent pro-prosecution background. *See People v Chdress*, 81 NY2d 263, 266. Juror nine had said that as an African-American female, she had seen and heard things growing up, which she would not call biases, that were “who I am.” She said she would put the facts in front of her and weigh them. When the prosecutor asked if her perspective as an African-American female would enter into her decision, she said she couldn’t say one way or the other, that she would weigh the facts. In purporting to provide a race-neutral reason for challenging this juror, the prosecutor referred to these statements, but there was

nothing in the comments to suggest that the juror’s life experience would bias her in favor of the defense or against the prosecution. Rather, the prosecutor relied on “the stereotypical assumption that an African-American perspective would be biased against the prosecution (*see People v Pierrot*, 289 AD2d 511, 512...)” Judgment reversed, remitted for new trial. (Supreme Ct, Albany Co [Lamont, JJ])

Sex Offenses (Sentencing) SEX; 350(25)
 People v Sturdivant, 307 AD2d 382, 762 NYS2d 443
 (3rd Dept 2003)

The Board of Examiners of Sex Offenders assessed the defendant as having 65 points on the risk assessment scale, giving him a presumptive classification as a risk level one sex offender. *See* Correction Law article 6-C. The Board recommended a level three classification for reasons that included the extended duration of the abuse of the 11-year-old complainant, the defendant’s conduct with knowledge that others had abused the complainant, and his sexual contact with other children.

Holding: The prosecution failed to put into evidence the material now claimed as the basis for the court’s classification of the defendant as a risk level three sex offender. More fundamentally, the court failed to set forth the findings of fact and conclusions of law upon which its decision was based. *See* Correction Law 168-n (3). Decision withheld, matter remitted for findings of fact and conclusions of law. (County Ct, Tompkins Co [Barrett, JJ])

Misconduct (Prosecution) MIS; 250(15)
 People v Russell, 307 AD2d 385, 761 NYS2d 400
 (3rd Dept 2003)

Holding: The prosecutor’s summation was replete with inappropriate remarks, including references to the defendant’s statements as lies and tall tales, comments that the defendant’s appearance suggested dishonesty, description of the defendant’s Bible as a prop, and characterization of the defendant’s weeping on the stand as an attempt to evoke sympathy. Not all these errors were preserved, but the case is reversed in the interest of justice. *See* Criminal Procedure Law 470.15(6)(a); *People v Skinner*, 298 AD2d 625, 626. The defendant’s credibility was central to his defense that he had been hired by a demolition company to clean the dwelling in question and had taken only items he believed had been discarded. The court’s instructions did not cure the error where the judge merely said that the jury should consider the prosecutor’s arguments in assessing credibility. The defendant was denied a fair trial. *See eg People v La Porte*, _ AD2d _ (1st

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Dept 6/12/03). Judgment reversed, matter remitted for new trial. (County Ct, Schenectady Co [Tomlinson, JJ])

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

Sentencing (Determinate Sentencing) (General) SEN; 345(30) (37)

People v Swansbrough, 307 AD2d 389, 762 NYS2d 450 (3rd Dept 2003)

Holding: The defendant did not appeal his 1999 plea-based conviction, which occurred before the decision in *People v Goss* (286 AD2d 180), which took corrective action for trial court failure to advise a defendant of postrelease supervision. A trial court's duty to advise defendants of the direct consequences of guilty pleas, and the distinction between direct and collateral consequences of a sentence, were recognized in this state before *Goss*. See *People v Ford*, 86 NY2d 397, 402-403. The record here would have been sufficient to raise the issue on direct appeal, and the defendant could have raised it despite his waiver of the right to appeal, as happened in *Goss*. The court erred in vacating the defendant's judgment of conviction. Order reversed, motion denied. (County Ct, Tompkins Co [Sherman, JJ])

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

Matter of Sharpe v Selsky, 764 NYS2d 221 (3rd Dept 2003)

Holding: Substantial evidence of the charged misconduct of refusing to obey a direct order and smuggling supports the determination that the petitioner violated prison disciplinary rules. See *Matter of Rivera v McGinnis*, 290 AD2d 800 *lv den* 98 NY2d 601. The misbehavior report contains a nurse's account of telling the petitioner to swallow three tablets of prescription pain medication, then swabbing his mouth and finding all three pills inside his lower lip. The petitioner said he was waiting until after dinner to swallow them to minimize digestive effects. At the hearing the petitioner conceded that he agreed with the misbehavior report's content, adding that as a recovering alcoholic he is opposed to taking potentially addictive medications, and that the medication in question upsets his stomach. This was insufficient to mitigate the charges, as prisoners may not select which orders to obey. See *Matter of Filsaime v Sabourin*, 288 AD2d 516, 517. Determination confirmed. (Transferred from Supreme Ct, Albany Co)

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

Sentencing (Enhancement)

SEN; 345(32)

People v Caldwell, 764 NYS2d 496 (3rd Dept 2003)

Holding: When the defendant agreed to plead guilty to fifth-degree drug possession and first-degree assault in satisfaction of several charges, he executed a written waiver of the right to appeal. He was to receive sentences of one to three years and a determinate 10 years, to run consecutively. He was advised at the plea that he would have to acknowledge his waiver of appeal at sentencing. The court properly denied without a hearing the defendant's motion before sentencing to withdraw his plea. A hearing is required only when a genuine question of fact as to the plea's voluntariness is presented in the record. *People v Bagley*, 298 AD2d 616 *lv den* 99 NY2d 580. The defendant contends that he is innocent, but he did not protest his innocence at any stage. He alleges ineffective assistance of counsel, but there is nothing to indicate that counsel did not offer competent representation or that the defendant was coerced into pleading guilty. There was no abuse of discretion in denying the motion. See *People v Kagonyera*, 304 AD2d 984, 985. Imposition of an enhanced sentence on the assault charge was error. While the court did tell the defendant at the plea that acknowledgment of his waiver of the right to appeal was part of the plea bargain, the court did not say that reaffirming the waiver was a condition of the bargain itself and that failure to do so would result in a higher sentence. No enhanced sentence could be imposed. See *People v Pham*, 287 AD2d 789, 790; *cf People v Paige*, 266 AD2d 587, 588 *lv den* 94 NY2d 827. Judgment modified, assault sentence modified to a determinate 10 years, and as modified, affirmed. (County Ct, Schenectady Co [Eidens, JJ])

Defenses (Agency) (Entrapment)

DEF; 105(3) (30)

Instructions to Jury (Theories of Prosecution and/or Defense)

ISJ; 205(50)

People v Delaney, 765 NYS2d 696 (3rd Dept 2003)

Holding: The court erred in refusing to instruct the jury on the agency defense. Viewed in the light most favorable to the defendant, there was some evidence that supported the inference that the supposed agent was in effect acting as an extension of the buyer. *People v Ortiz*, 76 NY2d 446, 448 *amended* 77 NY2d 821. The undercover officer admitted that he initiated contact and suggested the drug transaction. The defendant testified that he was first contacted by a good friend of his brother, who told him the person who turned out to be undercover would be calling with details of a favor for the friend and his brother. The defendant said he agreed to mail the heroin as a favor, that the undercover had told him how much money would be sent, how to package the drugs, and where to send them, and that the defendant made no profit on the

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deal. The agency defense should have been charged. *See People v Roche*, 45 NY2d 78, 86-87 *cert den* 439 US 958. An entrapment charge was properly denied, as there was no suggestion that the undercover actively persuaded the defendant to engage in the transaction—he merely offered the defendant an opportunity to commit the crime. *People v Brown*, 82 NY2d 869, 872. While the date that the grand jury heard the defendant’s case was moved up, he did appear. He was represented by counsel and made no request for an adjournment or added time to call witnesses. Under these circumstances, he received adequate notice of the grand jury. *See People v Sawyer*, 274 AD2d 603, 606 *affd* 96 NY2d 815. Judgment reversed, remitted for new trial. (County Ct, Albany Co [Czajka, J])

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

People v Terry, 765 NYS2d 702 (3rd Dept 2003)

Holding: There is no evidence that the defendant agreed to waive his right to testify at trial. After proofs were closed, the defendant told the court at a charge conference that he wanted to testify and his attorney would not discuss it with him. The court told defendant to speak with counsel, and said that the proof was closed. During the prosecutor’s summation, the defendant personally objected to being called a predator, and repeatedly asked to testify. After the defendant was convicted of third-degree robbery, counsel moved to set aside the verdict based in part on his failure to timely seek to reopen proofs for the defendant to testify. The court refused, considering the defendant’s failure to testify to have been a trial tactic in light of a *Sandoval* ruling that would have admitted much of the defendant’s criminal record. But it is clear from the record that the defendant, who would have denied the robbery, believed that his record would help this case because it would show he had sold fake cocaine before and had no violent record. A witness had testified that the complainant, who claimed the defendant threatened her and took \$145, was angry with the defendant on that date for having sold her fake cocaine. A defendant retains the ultimate right to decide whether or not to testify. *People v Petrovich*, 87 NY2d 961, 963. The right to testify is fundamental. *People v Mason*, 263 AD2d 73, 76; *see* US Const, 14th Amend; NY Const, art 1, §6. There is no way to know if the defendant’s testimony would have resulted in a different verdict. The order of trial set by CPL 260.30 is not rigid; the court retains power to alter the order of proof at least until submission to the jury. *People v Whipple*, 91 NY2d 1, 6. Judgment reversed, remitted for new trial. (Supreme Ct, Albany Co [Teresi, J])

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

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

People v Reynolds, 766 NYS2d 142 (3rd 2003)

The defendant was sentenced as a persistent violent felony offender for second-degree assault and as a second felony offender for first-degree promoting prison contraband after a jury trial. On appeal, he raised, among other things, ineffective assistance of counsel. The conviction was affirmed; his subsequent motion to vacate the judgment for ineffective assistance was denied without a hearing.

Holding: The defendant claimed that counsel advised him in writing that during plea bargaining it had been agreed that the defendant would not be treated as a persistent offender upon conviction after either a plea or a trial. This constitutes an exception to the general rule (*see* CPL 440.10[2][a]) that a defendant cannot raise grounds in a 440.10 motion that were previously decided on the merits in a prior appeal. A claim of ineffective assistance based on alleged failure to provide proper advice about sentencing exposure is not typically demonstrable on the main record, and is properly raised in a Criminal Procedure Law 440.10 motion. *See People v Brown*, 45 NY2d 852, 853-854. The defendant averred that he rejected a plea offer and went to trial based on counsel’s representations, raising an issue sufficient to require a hearing. *See People v Perron*, 273 AD2d 549, 550. The prosecution’s contention that the issue should have been raised at sentencing is rejected; the defendant was still represented by the same attorney now claimed to be ineffective. *See People v Johnson*, 288 AD2d 501, 503. The defendant is currently represented by the same office that represented him at trial and sentencing. Appointment of an attorney not associated with that office is directed. Order reversed, matter remitted. (County Ct, St. Lawrence Co [Nicandri, J])

Grand Jury (Procedure) GRJ; 180(5)

Misconduct (Judicial) MIS; 250(10)

Matter of Cantwell v Ryan, 766 NYS2d 135 (3rd Dept 2003)

After a Clinton County grand jury returned a no true bill on murder in the matter of an individual who, believing his home was about to be burglarized, had killed someone, a member of the grand jury met with the petitioner district attorney and the respondent judge. This grand juror believed that if other charges had been considered, a different result might have been obtained. The respondent directed the petitioner to resubmit the matter to another grand jury for consideration of manslaughter and criminally negligent homicide. Following reargu-

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ment, the respondent amended the decision to provide that the petitioner present whatever lesser charges he deemed appropriate.

Holding: The respondent has in essence issued an order of mandamus at the behest of a grand juror. This the respondent was without authority to do. *See eg Matter of Bytner v Greenberg*, 214 AD2d 931. Reliance on Criminal Procedure Law 190.75(3) is misplaced, for that allows a court, when a charge has been dismissed, to direct resubmission of “such charge,” not other charges. District attorneys have the exclusive obligation and authority to decide when and how a suspect is to be prosecuted. *See eg County Law 700(1); People v Di Falco*, 44 NY2d 482, 486. Courts should not interfere with the prosecutor’s discretion to decide whether to prosecute a particular suspect. *See eg People v Eboli*, 34 NY2d 281. Judges are to impartially preside over and adjudicate criminal proceedings, not intrude on the prosecutor’s role by directing that charges other than ones previously dismissed be presented. Petition granted, the respondent prohibited from enforcing the orders.

Evidence (Circumstantial Evidence) EVI; 155(25)

Instructions to Jury (Circumstantial Evidence) ISJ; 205(32)

People v Spencer, No. 13971 (3rd Dept 2003)

Holding: The court erred by denying a defense request for a circumstantial evidence charge that would “convey that the evidence must exclude beyond a reasonable doubt every reasonable hypothesis of innocence.” The court gave the standard circumstantial evidence charge since it believed that the case presented a mix of direct and circumstantial evidence. While there was evidence of the defendant’s dominion and control over the premises, including his own admission that he lived there and testimony by the owner that he did, there was no direct evidence of his actual physical possession of the drugs found in a cabinet in his apartment. *See People v Brian*, 84 NY2d 887, 889. To find he had control over the drugs required an additional inference, requiring the instruction reasonably requested by counsel. *See People v David*, 234 AD2d 787, 790 *lv den* 89 NY2d 1034. The other male adult in the apartment when the drugs were found testified that he lived there also (though just for two months), that the drugs were his, and that he had pled guilty to possession of the cocaine; the evidence against the defendant was not overwhelming. The failure to properly charge the jury was not harmless error, but raised the danger the jury may have leaped logical gaps in the offered proof to draw unwarranted conclusions based on

low probabilities. *People v Ford*, 66 NY2d 428, 442. Judgment reversed, new trial ordered on second count. (County Ct, Albany Co [Herrick, J])

Sex Offenses (Sentencing)

SEX; 350(25)

People v Hoppe, No. 14201, 3rd Dept, 11/13/03

Holding: After being convicted of first-degree sexual abuse and first-degree reckless endangerment in 1995, the defendant was sentenced to consecutive terms of three to six years. Before the defendant was released on parole, the Board of Examiners of Sex Offenders recommended that he be classified at level three under the Sex Offender Registration Act (SORA). *See Correction Law art 6-C*. The risk assessment instrument presumptively placed the defendant in the level two category. The record contains “an absence of proof indicating the reasons for the recommended departure or the facts and circumstances considered by County Court in adopting the Board’s recommendation.” The prosecution concedes that the court did not provide findings of fact and conclusions of law as required by Correction Law 168-n(3). Also, the record does not indicate that the defendant was notified of his right to have counsel present at the risk classification hearing, as required by SORA, or that the defendant waived this right. This must be complied with upon remittal. Order reversed, matter remitted. (County Ct, Broome Co [Smith, J])

Constitutional Law (General)

CON; 82(20)

People v Schehr, No. 14551, 3rd Dept, 11/13/03

Holding: The requirement that a prosecutor consent to the sentencing option of parole supervision for drug treatment under Criminal Procedure Law 410.91(4) has not been shown to violate the separation of powers doctrine. While the ultimate determination of appropriate sentence is left to the court (*People v Farrar*, 52 NY2d 302, 307), the legislature has authority to limit the sentencing options available to the judiciary. *People v Eason*, 40 NY2d 297, 301. The statute in question limits a court’s discretion by requiring prosecutorial consent, but does not constrain the judge to sentence a defendant in a particular way. The defendant has not met his heavy burden of establishing that the law violates the separation of powers doctrine. *People v Mack*, 304 AD2d 847, 848. Judgment affirmed. (County Ct, Tompkins Co [Sherman, J])

Fourth Department

Conflict of Interest (General)

COI; 75(10)

Family Court (General)

FAM; 164(20)

Fourth Department *continued*

Matter of Jimmy D., 302 AD2d 892, 753 NYS2d 789
(4th Dept 2003)

Holding: This neglect proceeding against a father was not collaterally estopped by the fact that the petitioner’s employees testified in a custody matter between the father and the mother. The custody trial did not begin until this neglect finding had been made; there were no bases on which to preclude the neglect proceeding. That the Wyoming County Attorney had represented the mother in an unrelated worker’s compensation matter did not create an impermissible conflict of interest. An Assistant County Attorney who did not share an office with the County Attorney prosecuted this matter. No actual prejudice or risk of abuse of confidence was shown. See *People v English*, 88 NY2d 30, 33-34. There was no showing that the outcome of this proceeding could substantially affect an interest of the County Attorney.

Nor was there a conflict of interest where the County Attorney, who supervised the Assistant County Attorney and the county’s assigned counsel program, had refused payment to the respondent’s assigned attorney for some services rendered in the custody proceeding. The denial was based, *inter alia*, on the County Attorney’s perception that some of those services were unnecessary. The alleged conflict arises from the County Attorney prosecuting a proceeding involving the respondent while allegedly threatening to penalize his assigned counsel for mounting a vigorous defense for respondent in a related proceeding. The respondent’s attorney conceded, however, that the representation he provided was not influenced by the fee dispute. There is no evidence that the fee dispute had any impact on the representation of the respondent. Order affirmed. (Family Ct, Wyoming Co [Griffith, J])

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

People v Dinkle, 302 AD2d 1014, 755 NYS2d 189
(4th Dept 2003)

Holding: The defendant was denied the effective assistance of counsel with regard to the count of the indictment charging first-degree possession of drugs. Counsel pursued no defense at trial with respect to that charge, did not challenge the strength of the prosecution’s case on that count through cross-examination, and effectively conceded the defendant’s guilt in summation by acknowledging that paraphernalia of drug sales was found in the defendant’s possession. This was not a matter of an alternative, but unsuccessful, trial strategy. Cf *People v Benevento*, 91 NY2d 708, 714-715. Judgment mod-

ified, count two reversed, new trial on that count ordered. (Supreme Ct, Monroe Co [Mark, JJ])

Dissent: [Pigott and Pine, JJ] The judgment should be reversed in its entirety. By contending that counsel provided no defense to the top count, the defendant did not concede that counsel provided meaningful representation on the other charges. A single substantial error so seriously compromised the right to a fair trial that a new trial on all counts is required. *People v Hobot*, 84 NY2d 1021, 1022.

Competency to Stand Trial (General) CST; 69.4(10)

People v Garrasi, 302 AD2d 981, 754 NYS2d 799
(4th Dept 2003)

After killing his son in 1983, the defendant was institutionalized until 1991 upon a plea of not responsible by reason of mental disease. He returned to live with his wife until his illness worsened; he killed her in 1998. After being found competent to stand trial, he testified in support of a self-defense claim. Conflicting medical testimony was adduced with regard to whether he lacked criminal responsibility due to mental illness. He was convicted of second-degree murder and other offenses.

Holding: Defense counsel did not seek further competency determinations during trial, and the court did not err in failing to *sua sponte* reopen the competency hearing. See *People v Tortorici*, 92 NY2d 757, 766 *cert den* 528 US 834. The defendant’s testimony was “clear, lucid, coherent and logical. See *People v Graham*, 272 AD2d 479, 480 *lv den* 95 NY2d 865. By the date of sentencing, the defendant showed signs of unfitness to proceed. His comments to the court at sentencing were clearly delusional. The court abused its discretion in failing to *sua sponte* order a competency hearing before proceeding. See *People v Armlin*, 37 NY2d 167, 171-173. The court has the authority and a continuing obligation to address competency to proceed whenever it finds circumstances warrant a hearing. Judgment modified, sentence vacated, matter remitted. (Supreme Ct, Erie Co [Forma, JJ])

Appeals and Writs (Judgments and Orders Appealable) (Scope and Extent of Review) APP; 25(45) (90)

Counsel (Anders Brief) COU; 95(7)

People v Boone, 753 NYS2d 415 (4th Dept 2003)

Holding: Assigned appellate counsel sought to be relieved on the grounds that no nonfrivolous issues exist. “The aggregate sentence of 15-1/3 to 18 years is the statutory maximum. The plea agreement did not include a negotiated sentence. Because Supreme Court did not advise defendant of the potential maximum terms of incarceration, the waiver by defendant of the right to appeal does not encompass a challenge to the severity of

Fourth Department *continued*

the sentence (see *People v Cormack*, 269 A.D.2d 815, 703 N.Y.S.2d 808; *People v Wynn*, 262 A.D.2d 1052, 691 N.Y.S.2d 807). Therefore, a nonfrivolous issue exists concerning whether the sentence is unduly harsh or severe. Thus, we relieve counsel of his assignment and assign new counsel to brief that issue as well as any other issues that counsel's review of the record may disclose." Motion granted, case held, decision reserved, new counsel to be assigned. (Supreme Ct, Erie Co [Rossetti, J])

Death Penalty (General) (States DEP; 100(80) (156[gg])
[New York])

Juries and Jury Trials (Challenges) JRY; 225(10) (15) (60)
(Competence) (Voir Dire)

People v Parker, 304 AD2d 146, 755 NYS2d 521
(4th Dept 2003)

Holding: General constitutional challenges to the death penalty need not be addressed as the defendant was sentenced to life imprisonment without parole. There is no constitutional impediment to "death-qualifying" juries. The defendant's prosecution was not affected by the ruling, after his conviction and sentence, in *Matter of Hynes v Tomei* (92 NY2d 613, 626-627 cert den 527 US 1015), that the New York statutory scheme was unconstitutional insofar as it could be said to chill the right to trial by reserving the maximum penalty for those defendants who exercised their right to a trial. Here, the defendant risked death, but suffered no detriment; he cannot raise an issue based on what might have occurred. *Parker v US*, 400 F2d 248, 252 cert den 393 US 1097.

While two prospective jurors initially seemed confused about the burden of proof, their statements as a whole, examined with due deference to the court below, do not show that the court erred in denying challenges to those jurors for cause. The court properly allowed challenges for cause as to jurors who said that while there were appropriate cases for the death penalty, they would have trouble taking part in imposing it. See Criminal Procedure Law 270.20(1)(f). It was within the court's discretion to determine that a prospective juror's promise to be impartial after initially stating that she did not agree with the death penalty was not credible. See *gen People v Arnold*, 96 NY2d 358, 363. The court properly accepted a cause challenge to a prospective juror who could not promise that the possibility of the death penalty would not influence his decision about guilt or innocence. The court properly dismissed a seated juror who, after "biblical research" concluded that she could never vote for the death penalty.

The defendant failed to show systematic exclusion of a particular group inherent in the selection process when challenging the under-representation of African-Americans and young people on the jury panel from which jurors were drawn. He also failed to meet his burden of proving the degree of under-representation over time.

Error in allowing the prosecution to use classic front and profile mug shots of the defendant in a photo array was harmless in light of the overwhelming evidence of guilt. A technical correction as to the sentence imposed on court seven must be corrected. Judgment modified to run the sentence on count seven concurrently with that imposed on count one. (County Ct, Erie Co [D'Amico, J])

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

People v Davis, 302 AD2d 866, 754 NYS2d 481
(4th Dept 2003)

Holding: The defendant was illegally sentenced as a second felony offender. The prosecution and court failed to comply with the statute. See *People v Welch*, 234 AD2d 404, 404-405. The prosecution's contention that the defendant waived compliance with Criminal Procedure Law 400.21 by stipulating at trial to the prior felony conviction is rejected. See CPL 200.60(3)(a). Judgment modified, sentence vacated, matter remitted for resentencing. (County Ct, Chautauqua Co [Ward, J])

Evidence (Sufficiency) EVI; 155(130)

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

People v Gonzalez, 302 AD2d 870, 755 NYS2d 146
(4th Dept 2003)

Holding: The evidence was insufficient to sustain the conviction of depraved indifference murder. Evidence showed that the defendant kicked in the door of a barber shop he had just left, pulled a gun, and shot the decedent from 6 or 7 feet away, continuing to fire as the decedent lay prone on the floor. Medical testimony indicated that the decedent suffered multiple gunshot wounds, several from only inches away, any one of which could have been fatal. The defendant's statement to police was that he feared the decedent, had been carrying the gun for protection, panicked when he saw the decedent, and blanked out. This is a case where the defendant is guilty of an intentional shooting or no other. *People v Wall*, 34 AD2d 215 *aff'd* 29 NY2d 863, 864. The prosecution's contention that the jury could have found recklessness based on the defendant's statement is rejected. Judgment modified, second-degree murder conviction reversed, that count dismissed. (County Ct, Monroe Co [Geraci, Jr., J])

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Dissent: [Hayes, J] The jury could reasonably have found that the defendant acted recklessly by being aware of and consciously disregarding the risk of carrying a loaded weapon and shooting someone with it.

Equal Protection (Discriminatory Enforcement) EQP; 140(5)

People v Everette, 302 AD2d 937, 753 NYS2d 918 (4th Dept 2003)

Holding: While the defendant showed that he was the first prisoner in two years to be prosecuted for felony possession of prison contraband, the prosecution showed that the charge resulted from a new joint policy of the prosecutor’s office and correctional facility officials to more vigorously prosecute inmate crimes. The prosecution established that several other prisoners had been prosecuted, making the defendant’s prosecution merely the first. The defendant has not shown that the law was enforced “with an ‘unequal hand.’” *People v Blount*, 90 NY2d 998, 999. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, JJ])

Judgment (Acquittal) JGT; 220(5)

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

People v Holmes, 302 AD2d 936, 753 NYS2d 917 (4th Dept 2003)

Holding: The court erred by denying challenges for cause of two potential jurors who expressed a tendency to give more credibility to police testimony. These potential jurors then remained mute when the court asked the panel if there was anyone who could not follow the instruction to treat police officers’ testimony the same as nonpolice testimony. A question to the entire panel did not force each of these potential jurors to confront the crucial question of whether they could be fair in light of their expressed predisposition. *People v Arnold*, 96 NY2d 358, 363-364. The defendant having been acquitted of count one, that count is dismissed without prejudice to the filing of any appropriate charge under that count. Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Mark, JJ])

Instructions to Jury (Intoxication) ISJ; 205(40)

Weapons (Firearms) (Possession) WEA; 385(21) (30)

People v Ressler, 302 AD2d 921, 754 NYS2d 485 (4th Dept 2003)

Holding: The court’s refusal to instruct the jury on intoxication was error; intoxication could negate the defendant’s knowing possession of the firearm (see Penal Law 265.02[1] [4]) and awareness that the firearm was loaded (see Penal Law 265.02[4]). See also *People v Turner*, 141 AD2d 878 *lv den* 72 NY2d 962. The time at which the defendant came into possession of the weapon, when he was concededly not intoxicated, is not the period relevant to the instant charges, which are limited to the time and place in the indictment. The record is silent as to whether the defendant possessed the weapon while not intoxicated on the date in question. The evidence as to the element of knowledge was not overwhelming, so the failure to instruct the jury on intoxication was not harmless error. See *People v Cesare*, 68 AD2d 938. Where licensure was not at issue, the court also erred in telling the jury that the defendant’s failure to produce a license was presumptive evidence that the defendant was not licensed to possess the gun. This error was harmless. That the gun in the defendant’s possession at arrest belonged to a member of the sheriff’s department was not relevant to the charges of possession of a weapon. See *People v Rivera*, 256 AD2d 1098, 1098-1099 *lv den* 93 NY2d 977. Judgment reversed, new trial granted. (County Ct, Wyoming Co [Griffith, JJ])

Dissent: [Wisner and Scudder, JJ] Refusing to give the charge was harmless error; the defendant was seen with the gun in the kitchen, and there was no evidence that he was in the kitchen after he became intoxicated.

Weapons (Firearms) (Possession) WEA; 385(21) (30)

People v Pulley, 302 AD2d 899, 754 NYS2d 808 (4th Dept 2003)

Holding: Where the prosecution’s evidence showed that police saw the defendant place something on the passenger side floor of his vehicle during police pursuit, the jury could have found that the defendant possessed the weapon found there but did not intend to use it against another. Fourth-degree possession of a weapon (Penal Law 265.01[1]) is a proper lesser-included offense of second-degree possession of a weapon (Penal Law former 265.03). The court erred in denying the defense request to charge the jury as to the lesser offense. While Penal Law 265.15(4) sets out a statutory presumption that a person possessing a weapon intends to use it unlawfully against another, that presumption is merely permissive. Where the jury could have rejected the permissive inference, the defendant was entitled to this requested charge-down. As the gun was loaded, the defendant was not entitled to a charge-down in count two from third-degree possession of a loaded weapon (Penal Law 265.02[4]) to fourth-degree possession of a weapon. Judgment modified, new trial granted on count one. (Supreme Ct, Monroe Co [Mark, JJ])

Fourth Department *continued*

Family Court (General) FAM; 164(20)

Matter of James V., 302 AD2d 916, 754 NYS2d 506
(4th Dept 2003)

Holding: The court reserved decision on the issue of whether the respondent had permanently neglected her child and sought an additional psychological evaluation to help in determining whether the petition should have been brought under Social Services Law 384-b(4)(c), alleging that the respondent was unable to care for the child due to mental illness or retardation. After a report by a court-appointed psychologist that the respondent was not so debilitated, “the court properly determined from the evidence at the fact-finding hearing that respondent permanently neglected her son based on her failure to plan for his return, not based on her mental condition (*see generally* *Matter of Shanika F.*, 269 AD2d 818, 819).” The court’s error in allowing counsel for the foster parents to question witnesses at the hearing was harmless. While the form order says a dispositional hearing was held, the other parties do not dispute the respondent’s contention that no such hearing was held. The record is silent as to any consent to dispensing with this required hearing. *See* Family Court Act 625(a); *Matter of Verquan B.*, 225 AD2d 1062. Order modified, matter remitted for a dispositional hearing. (Family Ct, Cayuga Co [Corning, J])

Appeals and Writs (General) APP; 25(35)

Family Court (Violation of Family Court Orders) FAM; 164[60]

Matter of Sean T., 302 AD2d 990, 755 NYS2d 153
(4th Dept 2003)

The respondent was found by Monroe County Family Court to have violated a modified order of probation. The modification required that the respondent reside with his mother in Rochester rather than with his grandmother in Syracuse. The mother agreed that the respondent could go to Syracuse for 6 days for a football tournament. The respondent reported to his probation officer in Syracuse and did not return to Monroe County.

Holding: The Monroe County Family Court discounted the testimony of the respondent’s grandmother that Onondaga County probation told her and the respondent that Monroe County lacked jurisdiction and that the respondent would be in violation of probation if he returned to Monroe County. There was no evidence refuting the grandmother’s testimony or her credibility. The court credited the testimony of a Monroe County probation officer that Monroe County probation was not

informed until several weeks later that the respondent had been so advised. In the exercise of independent power of factual review, a different credibility determination is made on appeal. *See Matter of Michael C.*, 170 AD2d 998, 999. Under the circumstances, it cannot be said that the respondent willfully violated his probation. *See gen* Family Court Act 779. Amended order reversed, violation petition denied. (Family Ct, Monroe Co [Kohout, J])

Evidence (Sufficiency) EVI; 155(130)

People v Eldridge, 302 AD2d 934, 755 NYS2d 193
(4th Dept 2003)

The defendant was convicted of second-degree murder and related crimes.

Holding: While the prosecution proved beyond a reasonable doubt that the defendant’s co-defendants planned and participated in a shooting, there was insufficient proof that the defendant agreed with either of the other two to engage in or cause the charged conduct. There was therefore insufficient evidence to convict the defendant of second-degree conspiracy. No evidence showed that the defendant was present at the scene or possessed a weapon at the time of the crime. *See People v Ross*, 208 AD2d 962, 963. There was no evidence that he knew of the plan, shared the codefendants’ intent, or aided them in any way. *See People v Nieves*, 135 AD2d 579, 581 *lv den* 71 NY2d 1031. At best, the defendant was shown to have been near the scene of the shooting shortly after it occurred. This was legally insufficient to establish the defendant’s guilt of second-degree murder, attempted first-degree robbery, first-degree reckless endangerment, and second-degree possession of a weapon beyond a reasonable doubt. *See People v Forte*, 223 AD2d 358, 360 *lv den* 88 NY2d 878. Judgment reversed, indictment dismissed. (County Ct, Onondaga Co [Burke, J])

[Ed. Note: The following opinion was upheld by the Court of Appeals, see digest p. 17.]

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

Evidence (Hearsay) EVI; 155(75)

People v Everson, 303 AD2d 1027, 757 NYS2d 196
(4th Dept 2003)

Holding: The court erred by setting aside the jury verdict based on an error that would not require relief by an appellate court as a matter of law. Criminal Procedure Law 330.30(1); *see People v Hector*, 295 AD2d 212, 213 *lv den* 98 NY2d 730. The defendant’s general objection at trial to an expert’s testimony regarding the nature of the complainant’s injuries did not preserve the issue of whether that opinion was impermissibly based on double hearsay.

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See *People v Pierre*, 300 AD2d 1070. Order reversed, verdict reinstated. (Supreme Ct, Onondaga Co [Brunetti, JJ])

Dissent: [Green and Gorski, JJ] The defendant was charged with first-degree assault and endangering the welfare of a child for engaging in conduct that created a grave risk of death and cause physical injury (pulmonary hemorrhaging). The medical examiner testified that exposure to mold was a potential cause of the injury and that a large amount of mold was present in the maternal grandmother’s basement, but that the complainant’s clothing had not been laundered in that basement. A hearsay objection was sustained because the testimony was based on witness statements in police reports. The medical examiner was allowed to testify that she had eliminated mold as a potential explanation of the complainant’s injury based on the hearsay that the complainant had not been exposed to the mold. Counsel repeatedly objected to the opinion “because of the premise upon which the opinion was based,” citing *People v Eberle* (265 AD2d 881) explaining that the opinion was based upon hearsay in police reports. The purpose of objection was fulfilled, and the error was not harmless.

Defenses (Justification) DEF; 105(37)

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

People v Collier, 303 AD2d 1008, 757 NYS2d 662 (4th Dept 2003)

Holding: The court erred by refusing to instruct the jury on justification, where the evidence would have allowed the jury to decide that the defendant’s actions were justified. See *People v Mahar*, 79 NY2d 978, 982. The prosecution’s contention that a justification charge was precluded by the defense claim that the shooting was accidental is rejected. See *People v Hill*, 226 AD2d 309, 310 *lv den* 88 NY2d 937. The defendant’s state of mind was critical to the justification defense; the court erred by not allowing the defendant to testify about his knowledge of the decedent’s reputation for violence. See *People v Miller*, 39 NY2d 543, 548-549. As the defendant was acquitted of the lesser charge of first-degree manslaughter under count one, that count is dismissed without prejudice to representing any appropriate charge thereunder to another grand jury. Judgment reversed, new trial granted on counts three and four. (County Ct, Monroe Co [Marks, JJ])

Accusatory Instruments (General) ACI; 11(10) (20)
(Variance of Proof)

People v Burns, 303 AD2d 1032, 757 NYS2d 199 (4th Dept 2003)

The defendant was acquitted of first-degree criminal contempt and second-degree aggravated harassment. He was convicted of second-degree criminal contempt.

Holding: The defendant correctly claims that reversal is required because the jury could have convicted him under count four based on an act for which he was not indicted under that count. Though unpreserved, this error is reviewed because to be tried on and convicted of only the crimes charged in the indictment is a fundamental right. *People v McNab*, 167 AD2d 858. Count three, as limited by the prosecution’s bill of particulars, charged the defendant with second-degree aggravated harassment under Penal Law 240.30(1) for allegedly contacting his former girlfriend by letter, with the statutorily required intent. Count four charged second-degree contempt (Penal Law 215.50[3]) for contacting the girlfriend by telephone on the date of the letter, in violation of a “no contact” order of protection. The court told the jury that it must find the defendant guilty of count four if it found that the defendant had engaged in intentional disobedience or resistance to an order of protection. This erroneously failed to limit to the alleged telephone call the conduct for which the defendant could be convicted. The error was compounded by the prosecutor’s summation, which characterized both the phone call and letter as violations of the order. The girlfriend had testified with respect to more than one alleged violation of the order. It is impossible to tell whether different jurors convicted the defendant based on different acts. Or, the jury could have wrongly convicted him based on the letter. Judgment reversed, indictment dismissed. (County Ct, Monroe Co [Geraci, Jr., JJ])

Due Process (Substantive Due Process) DUP; 135(40)

Sex Offenses (Sentencing) SEX; 350(25)

Doe v NYS Division of Parole, 303 AD2d 973, 757 NYS2d 183 (4th Dept 2003)

Holding: The court erred in denying the petitioner’s challenge to his classification as a level three risk under Correction Law 168 *et seq.*, the Sex Offender Registration Act (SORA). The proceeding should have been dismissed as moot under *Doe v Pataki* (3 FSupp2d 456). The petitioner was a member of the class of plaintiffs in *Doe* who were found to have been denied their procedural due process rights because their risk level was determined without notice and an opportunity to be heard. An injunction barred the classification of class members at any risk level above level one unless they were reclassified in accordance with procedures that satisfied due process. No such procedures were held as to the petitioner, and the respondent concedes that the petitioner is deemed a risk level

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one without the necessity of the instant petition. Judgment reversed, proceeding dismissed. (Supreme Ct, Erie Co [Flaherty, J])

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

Matter of Tumminia v Selsky, 303 AD2d 1006, 756 NYS2d 805 (4th Dept 2003)

Holding: “Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination directing that he be placed in administrative segregation (*see* 7 NYCRR 301.4 [b]). Respondent concedes that petitioner was denied his right to call witnesses at the Tier III hearing pursuant to 7 NYCRR 254.5 (a) based on the Hearing Officer’s failure to ascertain why several inmates had refused to testify (*see Matter of Dawes v Selsky*, 286 AD2d 806, 808; *Matter of Johnson v Goord*, 247 AD2d 801, 802). We therefore annul the determination, grant the petition in part and remit the matter to respondent for a new hearing (*see Matter of Rondon v Selsky*, 274 AD2d 713, 714; *Matter of Blake v Coughlin*, 189 AD2d 1016, 1017-1018).” Determination annulled, petition granted in part. (Transferred from Supreme Ct, Cayuga Co)

Search and Seizure (Search Warrants [Suppression]) SEA; 335(65[p]) (70)
(Standing to Move to Suppress)

People v Couser, 303 AD2d 981, 756 NYS2d 686 (4th Dept 2003)

The defendant was incarcerated while awaiting trial in Monroe County. A search pursuant to a warrant was conducted of his cell by Syracuse police officers looking for evidence of the defendant’s involvement in the killing of a complaining witness’s mother.

Holding: The court erred in denying the defendant’s suppression on the ground that the defendant lacked standing to challenge the search of his jail cell. As a pre-trial detainee, the defendant retained a sufficient expectation of privacy to challenge an investigatory search. *US v Barr*, 796 F2d 20, 24 (2nd Cir 1986) *cert den* 479 US 1055 *reh den* 480 US 926. The court’s alternative finding was correct insofar as there was probable cause to support the search warrant and a *Franks (v Delaware)*, 438 US 154 [1978] hearing was unnecessary. However, the court erred in finding that the search warrant was not overbroad to the extent that it authorized seizure of papers relating to the homicide of the decedent. *See People v Brown*, 96 NY2d 80, 84-85. While police had probable cause to search for three particular items, this did not permit an inference of prob-

able cause to search for other things. An authorized search for one item is not a device allowing general exploratory searches. *People v Baker*, 23 NY2d 307, 312. Severance is feasible, so the entire warrant is not invalidated. Case held, matter remitted for a hearing to determine what evidence should be suppressed as fruit of the invalid portion of the warrant. (County Ct, Onondaga Co [Fahey, J])

Double Jeopardy (Dismissal) (General) DBJ; 125(5) (7)

People v Yank, 305 AD2d 1001, 758 NYS2d 575 (4th Dept 2003)

While an appeal by the prosecution of a suppression order was pending in this state case, a federal grand jury indicted the defendant, who pled guilty to federal charges including conspiracy to violate federal drug trafficking laws. After the prosecution moved for an order settling the record in the state appeal, the defendant moved to dismiss the state indictment under the double jeopardy provisions of Criminal Procedure Law 40.20.

Holding: The court properly dismissed the indictment. “Where, as here, a defendant has been prosecuted and convicted in federal court for conspiracy to violate the federal drug laws (21 USC § 846), the state may not subsequently prosecute that defendant for acts that “could have been received as proof of the [federal] conspiracy. . .” *People v Abbamonte*, 43 NY2d 74, 84. The prosecution’s contentions concerning the suppression order are mooted by this decision. Order affirmed. (Supreme Ct, Onondaga Co [Brunetti, J])

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

Sentencing (Enhancement) SEN; 345(32)

People v Sundown, 305 AD2d 1075, 758 NYS2d 736 (4th Dept 2003)

Holding: The defendant’s waiver of appeal does not encompass this challenge to the enhanced sentence imposed below. The court did not advise the defendant before the waiver of appeal about the potential periods of incarceration that could be imposed. (*see People v Lococo*, 92 NY2d 825, 827) or of conduct that could result in an enhanced sentence (*see People v Evans*, 302 AD2d 893, 894), or of the potential periods of incarceration for an enhanced sentence (*see People v Harris*, 289 AD2d 1068 *lv den* 98 NY2d 637). While the defendant failed to preserve his claim by objecting to the enhanced sentence, by moving to withdraw the plea, or by moving to vacate the judgment, it is reviewed as a matter of discretion in the interest of justice. The court erred in imposing an enhanced sentence without having advised the defendant that a harsher sentence than bargained for could be imposed if he failed to appear for sentencing or drove a vehicle. *People v Ortiz*, 244 AD2d 960, 961. Such conditions were

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attached only to the defendant's release on his own recognition, not the plea. See *People v McAllister*, 216 AD2d 961, 961-962. Judgment modified, sentence vacated, matter remitted. (Supreme Ct, Erie Co [Rossetti, J])

Informants (General) INF; 197(20)
 People v Pace, 305 AD2d 984, 758 NYS2d 568 (4th Dept 2003)

Holding: The informant's testimony was not incredible as a matter of law either because he received favorable treatment for the testimony (see *People v Walts*, 267 AD2d 617, 620 *lv den* 95 NY2d 859) or because he acknowledged prior criminal and amoral conduct (see *People v Batista*, 235 AD2d 631, 631-632 *lv den* 89 NY2d 1088). These facts were addressed in direct and cross-examination, and the jury had an opportunity to assess the informant's credibility and testimony. The court did not err in refusing to charge the jury that it must acquit the defendant if it discredited the testimony of the informant. The charge as a whole, including an appropriate charge on reasonable doubt, adequately conveyed the appropriate standards. Judgment affirmed. (County Ct, Niagara Co [Noonan, J])

Dissent: [Lawton, J] The protections offered by Criminal Procedure Law 60.50 are inadequate as to jailhouse snitches. The unreliability of such informants is described in *Symposium: Thinking Outside the Box: Proposals for Change: Closing Remarks* (23 Cardozo L Rev 899, 900-901 [2000]). A conviction based on the uncorroborated testimony of a jailhouse informant should be deemed as a matter of law to be based on insufficient evidence. No such basis for reversal being available in existing law, which should be remedied by the Legislature or Court of Appeals, this judgment should be reversed as being against the weight of the evidence.

Impeachment (Of Defendant [Including Sandoval]) IMP; 192(35)
 People v Brazeau, 304 AD2d 254, 759 NYS2d 268 (4th Dept 2003)

Holding: The court did not err in permitting the prosecutor to cross-examine the defendant, without prior notice, about his use of 26 aliases. A *Sandoval* compromise was reached whereby the prosecutor would ask if the defendant had been convicted of "at least one felony." It was not mandatory to litigate the admissibility of alias evidence in the *Sandoval* context as was done in *People v Walker* (83 NY2d 455). Unlike prior criminal, vicious, or immoral conduct, there is nothing inherent in alias evidence that suggests a need for extraordinary caution. Nor

did the court below abuse its discretion in allowing two limited questions about the defendant's use of false names. The defendant failed to preserve by objection the issue of whether he was entitled to notice of the prosecution's intent to use alias evidence. The other issues raised are without merit. Judgment affirmed. (County Ct, Niagara Co [Broderick, Sr., J])

Guilty Pleas (General) (Vacatur) GYP; 181(25) (55)
 Sentencing (Concurrent/Consecutive) SEN; 345(10)
 People v Ingoglia, Jr., 305 AD2d 1002, 759 NYS2d 620 (4th Dept 2003)

The court advised the defendant when he pled guilty to third-degree grand larceny that the court could not direct, but only recommend, that the sentence for this offense run concurrently with a prior undischarged sentence. The court added that whether the sentence would run concurrently was up to the Division of Parole. The commitment said the sentence was to be concurrent. Corrections notified the court that the sentence was illegal, and the court issued a new commitment. The defendant's motion to vacate the judgment was denied.

Holding: Because the court and the parties mistakenly believed that Parole had the discretion to run the sentence concurrently, while the law requires that the sentence be consecutive to the prior undischarged term (*People v Scott*, 237 AD2d 543, 544 *lv den* 89 NY2d 1100) the court should have vacated the sentence and given the defendant a chance to withdraw the plea. Order reversed, sentence vacated, matter remitted. (County Ct, Monroe Co [Maloy, J])

Counsel (Conflict of Interest) COU; 95(10)
 Evidence (Missing Witnesses) EVI; 155(86)
 People v Lewis, 305 AD2d 993, 758 NYS2d 725 (4th Dept 2003)

Holding: The evidence at a *Sirois* hearing (see *Matter of Holtzman v Hellenbrand*, 92 AD2d 405) supported the court's conclusion that the defendant had caused the unavailability of a witness, whose statement was then admitted at trial. The witness had received a phone call threatening his family if he testified about purchasing cocaine from the defendant a few hours before a search warrant was executed. The defendant denied making or causing such a call; he admitted that his attorney had told him about the witness's statement. The defendant was not denied effective assistance of counsel when his lawyer was placed under oath at the *Sirois* hearing and said that the lawyer had told no one other than the defendant about the witness's statement. Judgment affirmed. (County Ct, Steuben Co [Furfure, J])

Fourth Department *continued*

Dissent: [Gorski and Lawton, JJ] The defendant's 6th Amendment right of confrontation was violated when the witness's statement was admitted at trial without the requisite showing that the witness was unavailable due to the defendant's misconduct. *See People v Geraci*, 85 NY2d 359, 366-369. The missing witness did not testify at the hearing; a police officer recounted the story of the telephone call from an unidentified man. Further, reversal is required because the defendant's lawyer became a witness against him. The prosecutor, though not sworn, also confirmed to the court the substance of the police testimony; counsel should have made a motion seeking to disqualify the prosecutor from trying the case. *See People v Paperno*, 54 NY2d 294, 299-300.

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

People v Laraby, 305 AD2d 1121, 762 NYS2d 456
(4th Dept 2003)

Holding: The prosecution candidly agrees that the defendant was denied the effective assistance of counsel. From the inception of his representation, retained counsel made clear that the defendant's cases were not a priority for him. Before trial on the first indictment, he filed no motions as to either indictment, and consistently requested adjournments due to other matters. Counsel was ill prepared for the hearings he did attend, and "demonstrated an utter lack of proficiency in criminal law matters." His conduct at trial of the first indictment reflected a total lack of preparation; he called a witness who undercut his defense strategy. At the end of the second day of trial, "he admitted that he had been 'trying to get out of this as quick as I could for as long as I [could].'" The court denied the defendant's request for substitution of counsel based on the attorney's poor performance. The defendant pled guilty to both indictments and waived her right to appeal. "Because defendant's pleas were infected by ineffective assistance of counsel (*cf. People v Petgen*, 55 NY2d 529, 535, *rearg denied* 57 NY2d 674) and defendant entered the pleas because of her attorney's poor performance, we reverse the judgments, vacate defendant's pleas of guilty and remit the matters to Ontario County Court for further proceedings on the indictments." (County Ct, Ontario Co [Doran, JJ] ⚖)

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