



Public Defense Backup Center
REPORT

Volume XXII Number 3

June-July 2007

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Our 40th Anniversary Noted Amid Much Activity

NYSDA turns 40 this year. But marking the milestone has not been the Association's priority in 2007. Rapid developments affecting criminal practice and public defense have required our full attention, leaving little time for the Board and staff to celebrate.

This is also the 10th Anniversary of NYSDA's Immigrant Defense Project (IDP). IDP's tenth year brings a relocation of its office (see box, p. 3), publication of the 4th Edition of its well-known immigration manual, *Representing the Immigrant Defendant in New York* (see ad, p. 4), and a recommitment to assisting criminal defense lawyers and immigrant clients across the state with the immigration consequences of criminal proceedings.

The Association continues to work for solutions to systemic problems affecting public defense lawyers and clients. We provide information to study commissions and policy makers. And, through its website, statewide and regional training events, the *REPORT*, direct defender services calls from lawyers and others across the state, NYSDA's Backup Center continues to provide news and assistance to the defense community. As the following items demonstrate, the defense community can look to NYSDA for information on new legislation (such as the law providing for civil commitment of sex offenders), developing case law (including Confrontation Clause cases following *Crawford v Washington*), and much more.

High Courts' Decisions Noted

End-of-term US Supreme Court decisions and several New York Court of Appeals cases are summarized in this issue of the *REPORT* (beginning at p. 5). The nation's highest court ruled, among other things, that an automobile passenger is seized for 4th Amendment purposes when the police pull over the vehicle in which the passenger is riding (*Brendlin v California*, __US__, 127 S Ct 2400) and, shockingly, that a federal appeals court lacks jurisdiction over an appeal filed outside the statutory period for appeals whose filing period has been reopened, even where the appeal was filed within a short additional time mistakenly allowed by a district court order (*Bowles v Russell*, __US__, 127 S Ct 2360).

Recent New York Court of Appeals decisions included:

- *People v Bratton*, No. 79 (6/12/07)—a parole officer who failed to contact the Parole Board or a Parole official to seek a warrant for a parolee based on actions in the officer's presence lacked authority to make a warrantless arrest;
- *People v Long*, No. 128 (6/12/07)—denial of a suppression hearing was proper where the defendant, who had ample access to information underlying her arrest, including the prosecution "write-up" read at arraignment, failed to specifically challenge the basis of the informant's knowledge; and
- *People v Nieves-Andino*, No. 103 (6/28/07)—where police responding to a shooting found an injured person alive and in need of medical care, questioning that person about the shooter was reasonable to prevent further harm and the resulting statements were not testimonial, permitting them to be admitted as excited utterances after the person making them died.

Direct Appeal is Route for Challenge to Silence about Post-Release Supervision

The Court of Appeals also held that a claim for plea withdrawal, based on the trial court's failure to inform the defendant about a post-release supervision component to the sentence (see *People v Catu*, 4 NY3d 242), is cognizable on direct appeal as a matter of law, even absent a plea-withdrawal motion. Moreover, direct review is essentially the only available avenue for a post-conviction *Catu* challenge. The court noted that aside from direct appeal, there is no other practical means of litigating a *Catu* claim. A motion to withdraw the plea on this ground prior to sentencing is improbable, since "a defendant can hardly be expected to move to withdraw his plea on a ground of which he has no knowledge." A defendant who learns of post-release supervision for the first time at sentencing is still

Contents

Defender News	1
Conferences & Seminars	4
Job Opportunities	4
Case Digest:	
US Supreme Court	5
NY Court of Appeals	8
Third Department	12
Fourth Department	14

without recourse, the court said, because under CPL 220.60(3), a plea-withdrawal motion may only be made "before the imposition of sentence." *People v Louree*, 8 NY3d 541 (see summary of opinion at p. 8).

Andrew Fine of The Legal Aid Society's Criminal Appeals Bureau has observed following *Louree*: "More significantly for our practice, the court specifically ruled that a *Catu* claim is not cognizable in a 440 motion, because 'the omission at issue is clear from the face of the record.' . . . [8 NY3d at 541 and fn 1]. Though *Catu* himself raised the issue via 440, the prosecution didn't argue that the 440 was improper, and hence 'we had no occasion to decide' the cognizability issue there. Though the court's formulation here is sweeping ('we decide that a defendant may not' properly raise a *Catu* objection by way of a CPL article 440 motion'), its reasoning is seemingly inapplicable to 440 claims based on ineffectiveness (failure to advise the client about PRS). From this point forward, though, direct appeal is the way to go. For clients whose direct appeals have been exhausted and wish to attack their pleas, a 440 based on ineffective assistance should be considered."

New and Significant Trial Court and Federal Court Decisions Available on www.nysda.org

While state trial court and federal court opinions are not included in *REPORT* case summaries (which are also available on the NYSDA website and on CD-ROM by subscription to the Case Digest System), selected new and notable decisions from these courts may be found on the Breaking News portion of NYSDA's home page as well as on the relevant Hot Topics pages and in other areas of the website, or in the *REPORT*.

Some cases remind lawyers that they must identify error clearly. A divided federal appeals court, for instance, recently ruled that a defendant who failed to raise in state court the impropriety of being held by civilians for identification by the complainant could not raise the issue in federal habeas proceedings. *Garvey v Duncan*, 485 F3d 709 (2nd Cir 2007).

Information on significant 2nd Circuit decisions and others is noted on the Courts—Federal page of the NYSDA website. From disappointing defense habeas losses ("Court Rejects Excuse for Late Habeas Try," [7/5/07] and "Habeas Revoked After Witness Recants Claims," [6/21/07]) to ever-developing search and seizure issues ("Troopers' Trickery in Searching Cars Ruled Constitutional," [6/6/07]), the page provides at-a-glance highlights. When links to the relevant information are found to be no longer available or limited to subscribers, attorneys can call the Backup Center for assistance in obtaining citations to a particular case.

Sex Offenders Face Civil Commitment

Passage of the Sex Offender Management and Treatment Act (SOMTA), providing for civil confinement

of sex offenders, created new substantive and procedural questions for defense lawyers and clients – overnight. As noted in the last issue of the *REPORT*, the Association quickly developed SOMTA training materials. The topic is included on the program for the Annual Meeting and Conference, which will be occurring as this issue of the *REPORT* comes off the press.

New instructions and comment for trials under SOMTA, from the Pattern Jury Instruction Committee, have just been posted on the Internet (www.nycourts.gov/judges/MHLArt10.pdf), and the lower Hudson Valley is bracing for its first SOMTA trial, in Westchester County, later this summer. (www.thejournalnews.com, 7/3/07.) The Backup Center will continue to disseminate information and analyze developments regarding SOMTA.

Human Trafficking Legislation Signed

On June 6, 2007, Governor Eliot Spitzer signed new human trafficking legislation. It creates a class D felony for those who engage in labor trafficking, but focuses more heavily on trafficking for sexual purposes, creating a class B felony for those who engage in sex trafficking and purporting to remove ambiguity in existing law to assure that prosecutors can charge those who run "Prostitution Tourism" businesses with felonies. It also elevates the crime of patronizing a prostitute from a Class B to a Class A misdemeanor. Proponents of the legislation said that because local rather than federal law enforcement officials are the more likely to encounter trafficking victims, this state law was not duplicative. (www.nytimes.com, 5/17/07.)

More information on this and other new laws will be included in the annual Legislative Review article that will appear in the *REPORT* and on the web at the end of the legislative session.

Public Defense Backup Center REPORT

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XXII Number 3

June-July 2007

Managing Editor

Charles F. O'Brien

Editor

Mardi Crawford

Contributors

Phyllis Alberici, Stephanie Batcheller,
Scott Lipnick, Al O'Connor, Ken Strutin

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

THE REPORT IS PRINTED ON RECYCLED PAPER

What Bills are Still Out There?

Further expansion of the state's DNA databank, bills allowing cameras in courtrooms, and reinstatement of capital punishment were among proposals that did not pass before the summer break. Legislation passed by both houses to prohibit placing state prisoners with serious mental illnesses in solitary confinement has not been signed. The Governor opposes the bill as too expensive. Proponents say that a recent legal settlement providing some protections for mentally ill prisoners and money for more treatment does not go far enough. (www.timesunion.com, 6/5/07; www.law.com [NYLJ], 7/10/07, <http://polhudson.lohudblogs.com>, 6/4/07.)

Other bills still awaiting the Governor's action at press time include legislation (S6277) that would raise first-offense failure to register or verify as a sex offender from a Class A misdemeanor to a Class E felony. Defense lawyers should be aware of this, as clients may be slow to notify DCJS about their ever-changing addresses. Note, however, offenders who have finished their sentences and are recommitted to prison on this Class E felony will not be vulnerable to civil commitment because failure to register has not been made an Article 10 offense.

Also awaiting gubernatorial action is a bill that would allow state police troopers to resume negotiating tickets. (www.law.com [NYLJ], 7/10/07; www.zwire.com [Daily Freeman], 6/26/07.) The practice was halted last year, as noted in the April-May 2006 *REPORT*. Watch the NYSDA website for further developments on this and other legislation.

Public Defense Issues Are a NYSDA Priority

In addition to the substantive and procedural legal issues that we provide information on, the Association studies and analyzes systemic problems and makes recommendations to appropriate entities about solving those problems. As the *REPORT* went to press, Executive Director Jonathan E. Gradess was preparing testimony to present at a hearing scheduled by the new State Commission on Sentencing Reform (see the last issue of the *REPORT*). In May, he appeared on a panel discussing "The Future of Public Defense in New York: Options for Reform," as part of the 2007 Warren M. Anderson Legislative Breakfast Seminar Series, with CLE credit provided by the Albany Law School's Institute of Legal Studies. Lloyd Constantine, Senior Advisor to the Governor, also appeared on the panel. During his presentation, he said that the Governor supports the recommendations made last year by the Kaye Commission.

State Bar Announces Support for Kaye Commission Recommendations

On July 2, 2007, the New York State Bar Association endorsed the Kaye Commission's findings and recom-

NYSDA's Immigrant Defense Project (IDP) has MOVED!

New Contact Info:

3 West 29th St., Suite 803

New York, NY 10001

HOTLINE (Main Number): 212-725-6422

Fax: 1-800-391-5713

mendations for creation of a statewide public defender system headed by an independent public defense commission. Approving a report by the State Bar's Special Committee to Ensure Quality of Mandated Representation, the resolution passed by the House of Delegates calls on the prestigious group to actively promote legislation to implement the Kaye Commission's recommendation. (www.nysba.org, 7/2/07; www.law.com [NYLJ], 7/11/07.)

Vincent E. Doyle III, of the Buffalo firm Connors & Vilardo, chairs the Special Committee. In recognition of his many efforts to improve the quality of public defense provided in New York State, Doyle has been named the 2007 recipient of NYSDA's Service of Justice Award, to be presented at NYSDA's Annual Meeting.

The State Bar endorsement of the Kaye Commission recommendations confirms that, as the Kaye Commission's report said, the time for action on public defense reform is now. Bills that would implement the recommendations were introduced as the *REPORT* went to press.

Eyewitness Identification Issues

Last year, an Illinois police study purported to undermine procedural reforms being adopted around the country to improve the reliability of eyewitness evidence. (See the *REPORT*, April-May 2006). Now, a blue ribbon panel of social scientists brought together by the John Jay College of Criminal Justice Center for Modern Forensic Practice has said the Illinois Eyewitness Identification Field Study was flawed. (<http://johnjay.jjay.cuny.edu>, 7/9/07.)

Meanwhile, the Eyewitness Identification Reform Blog (<http://eyeid.blogspot.com>) has posted a set of questions that identification expert Gary Wells recommends the media ask local prosecutors and law enforcement officials about their eyewitness identification procedures. We reprint the questions here, with thanks to Professor Wells.

(continued on page 15)

CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: Winning the Battle of Experts
Dates: August 1-4, 2007
Place: San Francisco, CA
Contact: Gerald Lippert: tel (202)872-8600 x 236; fax (202)872-8690; email gerald@nacdl.org; website www.nacdl.org

Sponsor: National Alliance of Sentencing Advocates & Mitigation Specialists
Theme: 2007 Mitigation Institute & Advanced Sentencing Training
Dates: August 8-10, 2007
Place: Chicago, IL
Contact: NASAMS (a section of the National Legal Aid and Defender Association)

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Appellate Practice
Date: September 7, 2007
Place: Brooklyn, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Association of Criminal Defense Lawyers & The Southern Center for Human Rights
Theme: 10th Annual Making the Case for Life Seminar: Making the Case for Life X
Dates: September 21-23, 2007
Place: Las Vegas, NV
Contact: Terrica Redfield: tel (404)688-1202; fax (202)872-8690; email at tredfield@schr.org; website www.nacdl.org/

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 12, 2007
Place: New York City
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Nyack Trainer
Date: November 2, 2007
Place: Nyack, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4468; email nysacdl@aol.com; website www.nysacdl.org

Job Listings are also available at
www.nysda.org

Job Opportunities
(under NYSDA Resources)

Find: Notices Received After REPORT deadline
Links to More Detailed Information

Job Opportunities

Franklin County Conflict Defender Office has an immediate opening for an entry level **Assistant Conflict Defender**. The position is in a busy office providing criminal defense services to those unable to afford counsel as well as Family Court representation in cases requiring assigned counsel. Assistant will be expected to handle Family Court appearances and misdemeanor cases in local criminal court. Salary negotiable, +/- \$35,000 range depending on experience and qualifications. Recent law school graduates are strongly encouraged to apply. Send resume and cover letter, including salary history, to the Franklin County Personnel Office, 355 West Main Street, Suite 428, Malone NY 12953

Franklin County Public Defender Office has an immediate opening for an entry level **Assistant Public Defender**. The position is in a busy office providing criminal defense services to those unable to afford counsel as well as Family Court representation in cases requiring assigned counsel. Assistant will be expected to handle Family Court appearances and misdemeanor cases in local criminal court. Salary negotiable, +/- \$35,000 range depending on experience and qualifications. Recent law school graduates are strongly encouraged to apply. Send resume and cover letter, including salary history to: Franklin County Personnel Office, 355 West Main St, Suite 428, Malone NY 12953

Hiscock Legal Aid Society, Syracuse, seeks **Attorney** to represent adults in Family Court matters, including Abuse/Neglect, Custody/Visitation and Support Violation cases. High volume caseload. Demonstrated commitment to public interest law and to serving the indigent required. Family Court experience preferred. Admission to New York Bar required. Salary: \$36,000 + DOE. Generous benefits. EOE; persons of color & bilingual persons encouraged to apply. Applicants should send cover letter and resume, including three references to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY13202. ☎

The Immigration Manual Has Been Updated!

Representing Immigrant Defendants in New York
Fourth Edition (2006)
by Manuel D. Vargas

*Get the information you need for representing
defendants in criminal cases who are not US citizens!*

To order, go to www.immigrantdefenseproject.org
or www.nysda.org (look for Immigrant Defense
Project under NYSDA Resources) or
call the Backup Center (518) 465-3524

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 (Jury Selection) DEP; 100(95)

Uttecht v Brown, __US__, 127 Sct 2218 (2007)

The defendant's murder conviction and death sentence were affirmed on appeal in state court. Denial of his federal writ of habeas corpus was reversed on appeal on the grounds that the trial judge improperly removed a juror for cause based on the prosecution's argument that juror Z could not be impartial.

Holding: The rule that systematic removal of venire persons opposed to the death penalty is unconstitutional since it creates a jury panel willing to favor a death sentence was formulated in a case where jurors had unlimited discretion in deciding what punishment to impose. See *Witherspoon v Illinois*, 391 US 510 (1968). After juries' discretion was circumscribed in death cases, a different standard was required: "[W]hether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v Witt*, 469 US 412, 424 (1985). The trial judge's decision on this issue is entitled to deference. 28 USC 2254(d)(1)-(2); *Darden v Wainwright*, 477 US 168 (1986). The Circuit Court here erred by not deferring to the trial court's assessment. The prosecution challenged juror Z based on his position on the death penalty; he appeared confused about the conditions when death was appropriate. Despite the court's instructions, juror Z had serious misunderstandings about the burden of proof and the meaning of life without parole. He was removed. The state appeals court's decision upholding the removal was not contrary to or an unreasonable application of Supreme Court precedent. The court applied the *Witherspoon-Witt* rule, recognized the need for deference to the trial judge, and noted that defense counsel did not object. Juror Z misstated the law and misunderstood the burden of proof. See *Early v Packer*, 537 US 3, 9 (2002). The trial court acted within its discretion. Defense counsel's failure to object deprived the court of an opportunity to address the issue, or develop a more detailed record. Judgment reversed.

Dissent: [Stevens, J] The record provided no support for removing juror Z for cause. Although he showed some doubts about the death penalty, he did agree to consider it. See *Gray v Mississippi*, 481 US 648 (1987).

Dissent: [Breyer, J] Defense counsel's "no objection" in response to the judge's removal of juror Z had no weight in the analysis. It was not required under state law.

Civil Rights Actions (USC § 1983 Actions) CRA; 68(45)

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

Erickson v Pardus, __US__, 127 Sct 2197 (2007)

The petitioner, an inmate in a Colorado prison, filed a 42 USC 1983 action in federal court against prison doctors, alleging that they had wrongfully stopped a treatment program for his liver disease, which would have life-threatening consequences. Dismissal of the complaint as based on conclusory allegations was affirmed on appeal.

Holding: Allegations of deliberate indifference to serious medical needs make out a claim under the 8th Amendment. See *Estelle v Gamble*, 429 US 97, 104-105 (1976). The petitioner had been diagnosed with hepatitis C, and started to receive treatment involving self-injections over the course of a year. A missing syringe that appeared modified for injecting illegal drugs later turned up in the trash. Prison officials blamed the petitioner for taking it and removed him from the treatment program, believing that he was using drugs that undermined the effectiveness of the program. The petitioner alleged that the doctors did not follow department protocols in removing him from the program, and he was continuing to endure liver damage as a result. He had asked for expedited review due to the imminent risk of serious physical harm due to lack of treatment. His complaint was dismissed for not stating that a substantial harm had occurred. Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." The judge had to accept all the factual allegations as true when ruling on a motion to dismiss. Stating that withholding treatment was endangering his life and that prison officials refused to provide help was sufficient under the procedural rules. Since the petitioner acted pro se he was entitled to have his papers liberally construed. Federal Rule of Civil Procedure 8(f). The allegations were not conclusory and the court was not justified in dismissing the complaint. Judgment vacated and remanded.

Dissent: [Scalia, J] Certiorari should have been denied.

Dissent: [Thomas, J] Exposure to risk of injury was insufficient to state a claim under the 8th Amendment. Cruel and unusual punishment historically concerned only injuries relating to a criminal sentence.

Due Process (General) DUP; 135(7)

Habeas Corpus (Federal) HAB; 182.5(15)

Fry v Plier, 551 US __, 127 Sct 2321 (2007)

The petitioner was convicted of a double homicide after two hung juries. He had raised an alternate suspect defense, but the trial court excluded a new witness who would have testified that she heard another man taking responsibility for a murder. On appeal, the defendant claimed that the trial judge denied him of his right to present a defense. See *Chambers v Mississippi*, 410 US 284 (1973). Without reaching the *Chambers* issue, the appeals

US Supreme Court *continued*

court held that there was no abuse of discretion and no “possible prejudice.” It did not articulate which harmless error standard had been applied. There was no further state review. In federal court, the judge found that the state judge improperly excluded the evidence, but the ruling did not have a “substantial and injurious effect on the jury’s verdict.” Denial of relief was affirmed on appeal.

Holding: The standard for harmless error review depends on the posture of the case. On direct review of a federal constitutional error in state court, such error must be found harmless beyond a reasonable doubt. See *Chapman v California*, 386 US 18, 24 (1967). However, in a habeas proceeding under 28 USC 2254, the level of review is lessened due to concerns about finality, comity, and federalism. See *Brecht v Abrahamson*, 507 US 619 (1993). This lower standard provides that an error is harmless unless it “had substantial and injurious effect or influence in determining the jury’s verdict.” See *Kotteakos v US*, 328 US 750, 776 (1946). An exception is made to this standard where there has been an egregious error or pattern of prosecutorial misconduct. The application of the *Brecht/Kotteakos* standard does not depend on whether the state court identified the constitutional error and applied the *Chapman* rule. See *Penry v Johnson*, 532 US 782, 795 (2001). The Anti-terrorism and Effective Death Penalty Act (AEDPA) did not replace *Brecht* with *Chapman*. AEDPA was intended to narrow habeas relief; therefore, it is appropriate to apply *Brecht* in assessing the prejudicial effect of a federal constitutional error in a state trial. Judgment affirmed

Concurring in Part, Dissenting in Part: [Stevens J] In view of the two hung juries and serious questions about the petitioner’s identification, it violated due process to exclude credible evidence of a third-party suspect. Under *Brecht*, it was not harmless error. *US v Scheffer*, 523 US 303, 315 (1998)

Concurring in Part, Dissenting in Part: [Breyer J] The case should be remanded to determine if there was a *Chambers* error under the *Brecht* standard.

Appeals and Writs (Time) APP; 25(95)

Habeas Corpus (Federal) HAB; 182.5(15)

Bowles v Russell, ___US___, 127 SCt 2360 (2007)

The petitioner was convicted of murder in 1999 by a state court. He filed a federal habeas petition in 2002, which was denied on Sept. 9, 2003. He failed to file a notice of appeal within 30 days of entry of final judgment. Federal Rule of Appellate Procedure 4(a)(1)(A); 28 USC 2107(a). He moved to reopen the time to file the notice under Rule 4(a)(6), which permitted a 14-day extension. 28 USC 2107(c). On Feb. 10, 2004, the motion was granted for 17 days, until February 27. The petitioner filed his notice of appeal on February 26. In the appellate court, the respondent claimed the notice was untimely, depriving the circuit court of jurisdiction. The appeal was dismissed.

Holding: The time limit for filing a notice of appeal in a civil case is mandatory and jurisdictional. See *Griggs v Provident Consumer Discount Co.*, 459 US 56, 61 (1982). The Court lacks power to create equitable exceptions to a jurisdictional mandate legislated by Congress. The “unique circumstances” doctrine previously used in *Harris Truck Lines, Inc. v Cherry Meat Packers, Inc.* (371 US 215 [1962]) and *Thompson v INS*, 375 US 384 (1964) is overruled. It would be up to Congress to develop rules that excused compliance with statutory time limits. Judgment affirmed.

Dissent: [Souter, J] The time limit is not a jurisdictional requirement, but rather a claims processing rule similar to a statute of limitations. It does not identify a class of cases that could be heard by the courts. The petitioner was entitled to rely on the district court’s extension of time on equitable grounds.

Search and Seizure (Automobiles and Other Vehicles) (Standing to Move to Suppress) SEA; 335(15) (70)

Brendlin v California, 551 US ___, 127 SCt 2400 (2007)

Police stopped a car to verify that the temporary registration matched the vehicle. The officer recognized the petitioner, who was a passenger, and determined that he was a parole violator with an outstanding no-bail warrant for his arrest. The officer, having seen the petitioner open and close the passenger door, ordered the petitioner out of the car at gunpoint and arrested him. A search incident to his arrest revealed an orange syringe cap. A search of the driver disclosed syringes and a plastic bag of a green leafy substance. The officers then searched the car, finding tubing, a scale, and other things used to produce methamphetamine. The petitioner’s suppression motion was denied. His conviction was reversed on appeal on the ground that he had been seized during an illegal traffic stop. That was reversed on appeal to the state Supreme Court.

Holding: A seizure by law enforcement occurs when a person’s freedom of movement has been terminated or restrained by an officer’s use of physical force or show of authority. *Florida v Bostick*, 501 US 429, 434 (1991). An unintended person may become the object of a detention provided the officer’s actions were willful, not accidental, and there was “actual submission” to the seizure. See *California v Hodari D.*, 499 US 621, 626 (1991). In ambiguous cases, a seizure occurs when “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,” *United States v Mendenhall*, 446 US 544, 554 (1980). When police stop a vehicle, the driver (*Delaware v Prouse*, 440 US 648, 653 [1979]), and everyone else in it are seized. *Berkemer v McCarty*, 468 US 420, 436-437 (1984). The police had no justification for pulling over the car in which the petitioner was riding. It was reasonable for the petitioner, a passenger, to have believed that he was subject to the police officer’s control by the officer’s display of authority, and not free to leave. The petitioner demonstrated submission

US Supreme Court *continued*

by staying inside. He was seized from the moment the car stopped. Judgment vacated and remanded.

Sentencing (Aggravated Penalties) SEN; 345(5) (39) (47.5) (Guidelines) (Mandatory)

Rita v United States, No. 06-5754, 6/21/2007, 551 US __

The petitioner was convicted in federal court of perjury, making false statements and obstructing justice. The presentence report recommended a Guidelines sentence of 33-to-41 months in prison. At sentencing, the petitioner asked for a reduction. His arguments were based on special circumstances, poor health, fear of retaliation in prison based on past government service, and his military record. Rejecting these arguments, the court sentenced him to the lowest Guidelines range, 33 months. The sentence was affirmed.

Holding: A circuit court “presumption of reasonableness” for a “within-Guidelines” sentence imposed by a district court judge is permissible under *US v Booker* (543 US 220 [2005]). The presumption is not binding, reflects the purpose of the Guidelines, and applies only on appeal. Where the conclusions of the sentencing judge and Sentencing Commission as to the appropriate sentence in a particular case are the same, there is increased likelihood that the statutory objectives of 18 USC 3553(a) have been met. In spite of the presumption, the sentencing judge was not required to impose the sentence. The court had the option to impose a higher-than-Guidelines term based on the existence of jury-determined facts, thus the presumption did not violate the 6th Amendment. However, appellate courts should not adopt a presumption of unreasonableness for variances from the Guidelines. The petitioner’s special circumstances did not make his within-Guidelines sentence unreasonable. Judgment affirmed.

Concurrence: [Stevens, J] Pre-*Booker* precedent for evaluating sentencing decisions under the Guidelines applies to the appropriateness of sentences under the advisory Guidelines. These sentences must be judged in view of the Guidelines sentencing factors. While appeals judges may find sentences reasonable, they ought to defer to the individualized sentencing findings of the district judge, which may include characteristics outside the Guidelines. Guidelines Manual §§5H1.1-6, 11, and 12. Here, the district court’s decision was not an abuse of discretion. Still, the court overlooked the petitioner’s military service in calculating his sentence.

Concurrence: [Scalia, J] Consistent with *Booker*, reasonableness review ought to be limited to sentencing procedures mandated by statute, thus maximizing sentencing uniformity on the basis of judge-found facts.

Dissent: [Souter, J] To comport with *Apprendi*, a discretionary within-Guidelines sentence should carry no presumption of reasonableness. Congress can remedy 6th Amendment Guidelines problems by imposing a requirement that juries, not judges, determine the facts necessary for sentence in the upper ranges.

Death Penalty (General)

DEP; 100(80)

Habeas Corpus (Federal)

HAB; 182.5(15)

Competency to Stand Trial (General)

CST; 69.4(10)

Panetti v Quarterman, No. 06-6407, 6/28/2007, 551 US __

The petitioner was sentenced to death in Texas. His state post-conviction and first federal habeas petition were denied. When an execution date was set, the petitioner’s challenge to his competency to be executed was denied without a hearing, and dismissed on appeal. He filed a second federal habeas petition claiming that he was not competent under *Ford v Wainwright* (477 US 399, 409-410 [1986]), and his execution was barred by the 8th Amendment. The respondent claimed that the federal court lacked jurisdiction and the state standard was appropriately applied. During the federal action, the petitioner returned to state court with evidence from a psychologist and law professor who concluded he did not understand the reasons he was about to be executed. Two court appointed experts found him competent. The court denied his motions for appointment of counsel and funds to hire experts. His competency motion was denied. In a federal court hearing, the petitioner called as witnesses a psychiatrist, a professor, and two psychologists. While finding the state court’s proceedings constitutionally inadequate, the federal court denied the writ on the merits. The ruling was affirmed.

Holding: The petitioner’s second or successive habeas petition was not precluded under the Anti-terrorism and Effective Death Penalty Act, since it concerned a *Ford*-based incompetency claim. 28 USC 2244(b)(2)(A)-(B). The “principles of comity, finality, and federalism” are not violated by allowing a second petition in these circumstances. See *Miller-El v Cockrell*, 537 US 322, 337 (2003). “An empty formality requiring prisoners to file unripe *Ford* claims neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies.” Since the state court did not meet federal constitutional standards in dismissing the petitioner’s competency challenge, the decision was not entitled to deference. He made a substantial showing of incompetency. The state failed to provide the requisite fair hearing and opportunity to be heard, including presentation of expert evidence. There was no hearing and no transcripts, the petitioner’s counsel received mistaken information, and the court relied solely on its experts. The petitioner’s simple “awareness of” the reasons for his sentence, as determined by the circuit court, was insufficient. The question was whether he had a “rational understanding” of those reasons in view of his delusional state. The appeals court’s narrow reading of *Ford* prevented a full development of the issue in the district court. See *Roper v Simmons*, 543 US 551, 560-564 (2005). Judgment reversed, matter remanded.

Dissent: [Thomas, J] The petitioner’s competency to stand trial and waive counsel were determined in earlier

US Supreme Court *continued*

proceedings, and no evidence showed that his condition had worsened. This claim could have been raised on the first writ, and was therefore barred. *See Stewart v Martinez-Villareal*, 523 US 637, 640, 645-646 (1998). The petitioner did not satisfy the *Ford* threshold requirements. The state reasonably applied the *Ford* standard and its conclusion deserved deference. The substantive requirement that petitioner should have been “aware of” the reason for his execution did not encompass a “rational understanding” standard.

New York State Court of Appeals

Insanity (Civil Commitment) **ISY; 200(3)**

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

State of NY ex rel Harkavy v Consilvio, No. 70, 6/5/2007

Convicted sex offenders reaching the end of their prison terms were directly transferred to a nonsecure mental health facility (later modified to be secure) under Mental Hygiene Law art 9. On appeal, the Court of Appeals held they were improperly committed under art 9, and entitled to the notice and hearing rights under Correction Law 402. *State of NY ex rel Harkavy v Consilvio*, 7 NY3d 607 [*Harkavy I*]). The case was remanded to evaluate the need for continued confinement. Again following the procedures of Article 9, the Office of Mental Health transferred 10 of the inmates to a secure facility. Petitioner, Mental Hygiene Legal Services, filed a habeas petition claiming that the offenders were improperly committed under article 9, instead of Correction Law 402, and that placement in a secure facility violated due process and equal protection. Supreme Court conditionally granted the motion and ordered immediate hearings, but found the direct placement in a secure facility was not per se erroneous. The ruling was reversed on appeal as to writ.

Holding: During the pendency of this appeal the Court of Appeals decided *Harkavy I*, and the legislature then enacted the Sex Offender Management and Treatment Act (SOMTA). Laws of 2007, ch 7. The new statute, Mental Hygiene Law art 10, was intended to reach sex offenders currently detained in an OMH facility under either article 9 or Correction Law 402. Mental Hygiene Law 10.06(b). Article 10 provides a probable cause hearing and jury trial to determine the existence of “mental abnormality.” It gives the court the power to determine if the accused is a dangerous sex offender requiring secure confinement or merely a sex offender subject to strict and intensive supervision. These offenders, improperly committed per *Harkavy I*, were entitled to the procedural safeguards of SOMTA. The constitutionality of secure confinement under Article 9 became academic under the new statute, which only permits secure confinement for dangerous offenders. Order reversed and remanded.

Accusatory Instruments (General)

ACI; 11(10)

People v Sedlock, 8 NY3d 535 (2007)

The defendant was charged with forcible touching, Penal Law 130.52, for unspecified conduct that took place over a seven-month period, from December 2002 through June 2003. Allegations of a particular act in 2001 were mentioned in a supporting deposition and the bill of particulars imprecisely mentioned another incident during the seven-month period. The defendant’s conviction after jury trial was affirmed.

Holding: The purpose of an accusatory instrument is to provide the defendant with sufficient information about the offense to allow him to prepare a defense, *People v Morris* (61 NY2d 290, 293), and prevent a double jeopardy violation by specifically identifying the alleged crime. While the time interval alleged does not have to be exact, it has to reasonably serve the function of protecting a defendant’s constitutional right to be informed of the nature and cause of the accusation. *People v Keindl*, 68 NY2d 410, 417. A nine-month time frame has been found per se unreasonable. *People v Beauchamp*, 74 NY2d 639, 641. Still, there is no bright line rule for excessive time periods. Each case must be judged on such factors as the age and intelligence of the victim; the context of the case; and nature of the offense, such as whether it would have occurred at a set time or been readily discovered. The complainant here was 16 or 17 years old at the time, and information was available for older incidents, so there was no justification for the prosecution’s failure to provide more details. Order reversed.

Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy])

GYP; 181(25)

People v Louree, 8 NY3d 541 (2007)

The defendant pled guilty to attempted possession of a weapon with a sentence promise of one year in prison, or two years if his prior Connecticut conviction turned out to be a felony. Since he requested a long sentencing adjournment, the judge required him to also enter a guilty plea to third-degree possession of a weapon, which he could withdraw if he appeared at sentencing, did not get arrested again, and cooperated in the preparation of the pre-sentence report. No mention of post-release supervision was made. The defendant did not show up for sentencing, was arrested for robbery, and did not cooperate with the Probation Department. His Connecticut conviction qualified as a felony. His eventual prison sentence of seven years was affirmed.

Holding: Due process imposed on the court an obligation to ensure that the defendant had a full understanding of the plea and its consequences, and that his plea was knowing, intelligent and voluntary. *See People v Ford*, 86 NY2d 397, 402-403. This included advising him of the direct consequences of his plea, including the imposition of post-release supervision. *See People v Catu*, 4 NY3d 242. The defendant was not required to show that he

NY Court of Appeals *continued*

would have rejected the plea if he had known about the additional sentence, and it made no difference that post-release supervision was within the sentencing range. See *People v Van Deusen*, 7 NY3d 744, 745-746. It would have been disingenuous to ask the defendant to object to a condition of which he was not informed, and at sentencing it was too late to raise it. CPL 220.60(3). Where the omission of the post-release condition by the court was clear from the record, it could not be raised in a CPL 440 motion. Order reversed, matter remanded.

Dissent: [Pigott, J] The defendant failed to preserve the issue by raising it at sentencing. See *People v Fulton*, 30 AD3d 961 *lo den* 7 NY3d 789.

Conspiracy (Evidence) CNS; 80(20)**People v Washington, No. 71, 6/7/2007**

While in jail pending trial on charges of child endangerment, the defendant confided to another inmate that he was willing to pay to have the complainant killed. The inmate was an informant, who, after release, went back to the jail to follow-up with the defendant under police surveillance. The defendant changed the object of his plan to someone name Seven who allegedly shot him in the head some months before. He said that he would pay \$4000 to have Seven killed. An undercover police officer posing as a contract killer joined the discussions, which included how to identify Seven, how to locate him with the help of the defendant's contacts, and that no action was to be taken until the defendant was released. The defendant's ensuing conviction of second-degree conspiracy was affirmed.

Holding: Conditioning the contract killing on the defendant's release from jail did not make the agreement illusory, but formed a part of the plan agreed on. Penal Law 105.15 required that the defendant intended to commit a class A felony by agreeing with one or more persons to engage in murder. A conspiracy comprises an agreement to commit the underlying act and an overt act by one of the conspirators toward accomplishing the goal. *People v Caban*, 5 NY3d 143, 149. Here, an act had been discussed, a price set, and steps taken to identify the target. The defendant's proviso of waiting until he was released did not impair the plan; it was a component of it. He reasonably believed that his release would occur, which made it a time factor. See *US v Anello*, 765 F2d 253, 262 (1st Cir 1985); *US v Brown*, 946 F2d 58, 61 (8th Cir 1991). Order affirmed.

Search and Seizure (Stop and Frisk) SEA; 335(75)**People v Long, No. 128, 6/12/2007**

The defendant's motion for a *Mapp/Dunaway* hearing was denied because it did not raise a factual dispute concerning reasonable suspicion for her detention and arrest. Her conviction was affirmed.

Holding: The defendant's suppression motion was insufficient. Factual allegations in a defense motion are to

be measured by "(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion, and (3) defendant's access to information." *People v Mendoza*, 82 NY2d 415, 426. The defendant had ample access to information about the information underlying her arrest, where, among other things, the prosecution's "write-up" was read at arraignment. She failed to specifically challenge the basis of the informant's knowledge. See *People v Bryant*, 8 NY3d 530 (5/3/2007). Order affirmed.

Arrest (General) (Warrantless) ARR; 35(12) (54)**Parole (General)** PRL; 276(10)**People v Bratton, No. 79, 6/12/2007**

The defendant did not cooperate with his parole officer's request to submit to a urine test, and he was arrested for obstruction of governmental administration and resisting arrest. The parole officer had called the local police to make the arrest, but did not contact the Parole Board or a Division official for a parole violation warrant. After a bench trial, the judge acquitted the defendant of the obstruction charge but convicted him of resisting arrest. The conviction was affirmed by County Court.

Holding: The parole officer violated statutory requirements by not contacting the Parole Board or a Division official before having the defendant arrested. See Executive Law 259-i(3)(a)(i); 9 NYCRR 8004.2(a). There was no authority for making a warrantless arrest, despite the violation occurring in the presence of the parole officer. A parole officer's status as a peace officer (CPL 2.10[23]) only provides the power to arrest someone for an "offense." CPL 140.25(1)(a). Most conditions of parole, such as failure to submit to a urine test, do not qualify. Penal Law 10.00(1). Order reversed, complaint dismissed.

Appeals and Writs (Judgments and Orders Appealable) APP; 25(45)**Statute of Limitations (Tolling of)** SOL; 360(20)**People v Parilla, No. 76, 6/12/2007**

While serving a sentence on a former conviction, the defendant was ordered to give a DNA sample under Executive Law 995 for the state databank. Based on the resulting information, he was indicted for two 1993 incidents of rape and sodomy. Although represented by counsel, he filed a pro se motion to dismiss based on the statute of limitations. His lawyer did not adopt the motion; the court indicated it would be denied in light of the tolling provisions. See CPL 30.10(4)(a)(ii). The defendant pled guilty and waived his right to appeal, with a sentence promise of concurrent 6 to 12 year prison terms. After reviewing the probation report, the court increased the sentence offer to 7 to 14 years. The defendant agreed. After sentencing, he filed a CPL 440 motion claiming ineffectiveness of counsel due to, among other things, his lawyer's failure to raise the statute of limitations. The motion was denied. His conviction was affirmed.

NYS Court of Appeals *continued***Escape (Elements) (Evidence)** ESC; 145(15) (20)**People v Antwine, No. 104, 6/28/2007**

After being arrested for stealing a car with children inside and crashing into another vehicle, the defendant was taken to the precinct. He complained of a hernia and toothache; police brought him to a hospital and handcuffed him to his bed. He claimed the cuffs were too tight; as the officer loosened them, the defendant freed himself from the cuffs and ran away. The officer caught him about 30 feet down the hall, but he got away again. The defendant turned down the corridor and made it through the first set of exit doors, 12 feet away, before being tackled and restrained. His convictions of grand larceny, endangering the welfare of a child, and second-degree escape were affirmed.

Holding: The evidence was legally sufficient to sustain a charge of second-degree escape. Under Penal Law 205.10 (2), persons are guilty of escape second when they escape from custody after being arrested or convicted of a C, D or E felony. The defendant claimed that his escape was incomplete because he did not make it past the hospital doors. See *People v Neely*, 248 AD2d 996. The threshold requirement for escape under this subsection is the "realm of custody" established by the police. Penal Law 205.00 (2). It also requires a "conscious purpose to evade custody." Criminal Jury Instruction 2d Penal Law 205.10 (2); *People v Hutchinson*, 56 NY2d 868, 870. Evidence that the defendant freed himself from the restraint or control of the police in the hospital and ran away supported the escape charge. Merely pushing off the handcuffs, while still in the officer's control, was not escape, but an attempt at best. The defendant's subsequent actions put him outside the officer's control, forcing her to give chase, endangering her and others. Judgment affirmed.

Double Jeopardy (General) DBJ; 125(7)**In the Matter of Polito v Walsh, No. 90, 6/28/2007**

The petitioners were indicted in federal court for Murder in Aid of Racketeering (18 USC 1959 [a] [Violent Crimes in Aid of Racketeering]) for a killing said to have been done to enter or improve their position in a crime family. Their convictions were reversed on the grounds that the racketeering element of the homicide was not proven. A state grand jury indicted them for the same murder. The petitioners' article 78 proceeding in the Appellate Division to prohibit prosecution was denied.

Holding: New York's double jeopardy statute, CPL 40.20 (2)(f), prohibits prosecution for the same offense unless the case has been terminated in another jurisdiction because of insufficient evidence concerning an element not found in New York law. The petitioners' federal case was terminated due to insufficient evidence of racketeering. Aid of racketeering was not an element of the New York murder statute. However, the petitioners

claimed protection under CPL 40.20 (1), prohibiting prosecution for the "same offense" without exceptions. "Offense" is narrowly limited to conduct violating a statutory provision. CPL 40.10 (1). If the same conduct violates two or more statutory sections, each violation is a separate offense. *Matter of Klein v Murtagh*, 34 NY2d 988, *affg on op below* 44 AD2d 465. Under *Blockburger v US* (284 US 299, 304 [1932]), in determining whether there were two offenses or only one the court has to find "whether each provision requires proof of a fact which the other does not." The petitioners argued that since the federal statute required proof of all the elements of the New York murder law, it was the same offense, and since it met the federal constitutional requirement (US Const. Amend V), New York's double jeopardy statute could not offer them less protection. The interesting question of whether CPL 40.20(1) "is narrower than, or identical in coverage to, constitutional double jeopardy protection" need not be resolved here. The petitioners did not raise a constitutional challenge to their prosecution. Nothing in CPL 40.20 (1) indicates that it incorporates the *Blockburger* definition of "same offense" but not the dual sovereignty limitation. CPL 40.20 (2). And the dual sovereignty doctrine has not been completely rejected. See *Bartkus v Illinois*, 359 US 121 (1959). There was no double jeopardy bar. Order affirmed.

Defenses (Justification) DEF; 105(37)**Instructions to Jury (Theories of Prosecution and/or Defense)** ISJ; 205(50)**People v LaPetina, No. 105, 7/2/2007**

The defendant was convicted of first-degree burglary, two counts of third-degree assault and endangering the welfare of a child. On appeal, the assault convictions were reversed and remanded for retrial because the trial court wrongly denied the defendant's request for a self-defense charge. The burglary count was reduced to second degree because the indictment was deficient. However, the appeals court rejected the defendant's claimed error that the trial court should have given a "choice of evils" instruction for the burglary count.

Holding: The request for a "choice of evils" instruction (Penal Law 35.05) was not preserved for review. The defendant did not raise this question before the trial court when he requested his self-defense charge on the assault counts under Penal Law 35.15. See *People v Craig*, 78 NY2d 616. The defendant's contention that the burglary conviction was contaminated by an error in the jury charge as to the assault counts is without merit. Order affirmed.

Appeals and Writs (Preservation of Error for Review) APP; 25(63)**Witnesses (Confrontation of Witnesses)** WIT; 390(7)**People v Liner, No. 107, 7/2/2007**

The defendant was convicted of third-degree burglary, petit larceny, and possession of a weapon for stealing merchandise from a Duane Reade store. At trial, the pros-

NYS Court of Appeals *continued*

ecution introduced two trespass notices revoking the defendant's privilege to enter Duane Reade stores. On appeal, the defendant challenged admission of the notices on the ground they violated his constitutional right to confront the witnesses against him.

Holding: Since the defendant did not raise the confrontation clause issue before the trial court, it was not preserved for review. *People v Gray*, 86 NY2d 10. Order affirmed.

Sex Offenses (Sentencing) SEX; 350(25)

In the Matter of North v Board of Examiners of Sex Offenders of State of New York, No. 99, 7/2/2007

The petitioner was arrested in 2002 and convicted in 2004 of a federal crime, possession of child pornography, under 18 USC 2252A(a)(5)(B). The state Board of Examiners of Sex Offenders (Board) required him to register under provision of the Sex Offender Registration Act (SORA). See Correction Law 168-k. The petitioner filed an article 78 challenge claiming that the 2002 SORA amendments (Correction Law 168-a[2][d]), covering his offense, did not apply because the crime occurred before the effective date. The Board argued that the federal offense had the "essential elements" of the analogous New York crime and the 2002 amendments applied to a 2004 conviction. The petition was denied on the "essential elements" ground. See Correction Law 168-a(2)(d)(i). While there was a difference between the federal law requirement that the material possessed portray children under 18 and the state age requirement of under 16, the plea showed that the state requirement was met. The decision was affirmed on appeal on the basis of the 2002 amendments, rejecting the "essential elements" test due to the differences in the age provisions. See Correction Law 168-a(2)(d)(iii).

Holding: The 2002 amendments to SORA specify particular federal offenses subject to registration. L 2002, ch. 11, § 1. The petitioner's federal offense was covered. Whether it had the essential elements of the comparable New York statute, possessing a sexual performance by a child (Penal Law 263.16) is the issue. Both laws criminalize possession of computer images of children engaged in sexually explicit activity but differ in their age provisions. SORA's "essential elements" test did not demand strict equivalency, like predicate felonies under Penal Law 70.04(1)(b)(i). See *People v Hernandez*, 98 NY2d 175. SORA is remedial, not penal, and registration is not a criminal sentence. See *Doe v Pataki*, 120 F3d 1263. When the foreign offense includes behavior not covered by the New York statute, the Board has to examine the underlying conduct to determine if it fit within the state scheme. Since the petitioner possessed pornographic images of children under 16, his actions qualified under both laws, and he was required to register. Order affirmed.

Third Department

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

People v Hunter, No. 100732, 3rd Dept, 6/7/2007

The defendant was convicted of sodomy in 2002. In 2006, he successfully moved to vacate the judgment on the ground that the prosecution knowingly failed to disclose that the complainant had accused another man of rape one month before the defendant's trial. The prosecution conceded knowledge of this other charge but argued that such information does not constitute *Brady* material because the other man eventually pled guilty to attempted rape.

Holding: For an unrelated complaint of sexual abuse to be admissible, the defendant must demonstrate both the falsity of the complaint and a pattern casting substantial doubt on the accuracy of the unrelated charge. See *People v Scott*, 88 NY2d 888, 890. The court erred in vacating the judgment because the other man charged with rape pled guilty. The defendant cannot demonstrate falsity. His argument that nondisclosure at trial prejudiced his ability to prove falsity was thus purely speculative and meritless. Order reversed, motion denied, and judgment of conviction reinstated. (County Ct, Rensselaer Co [McGrath, JJ])

Discovery (Preservation of Materials) DSC; 110(25)

Forensics (General) FRN; 173(10)

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

People v West, No. 100585, 3rd Dept, 6/7/2007

The defendant appealed denial of his motion for the performance of updated forensic DNA testing on semen taken from the complainant's person. He relied upon Criminal Procedure Law 440.30(1-a), which requires courts to allow DNA testing where a defendant shows the test results would have resulted in a more favorable verdict with reasonable probability. He also argued the court improperly concluded that the evidence to be tested no longer exists based solely upon a law enforcement officer's affirmation the evidence was destroyed.

Holding: The statute governing evidence retesting obligated the trial court to allow a DNA test, because the evidence of guilt was not overwhelming. Where the defendant recanted his admission of some sexual contact with the complainant, the jury was informed DNA had not excluded the defendant as the source of semen, and other evidence was circumstantial, a more favorable verdict was possible if DNA testing did exclude the defendant. When the continued existence of physical evidence is an issue, the prosecution must prove nonexistence and inability to test with sufficient specificity. See *People v Pitts*, 4 NY3d 303. Although the statute requires no more than a "representation" as to the evidence's destruction, a conclusory assertion by law enforcement is legally insufficient. The assertion here was not based upon personal

Third Department *continued*

knowledge of the evidence's destruction, does not state the source of the officer's knowledge, or reveal when or where the evidence was destroyed. No reference to police records of the evidence's storage or disposal was provided. A hearing to determine whether the DNA evidence in question exists is ordered. Judgment reversed, matter remanded. (County Ct, Schoharie Co [Bartlett III, JJ])

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

Motions (Suppression) MOT; 255(40)

People v Hall, No. 100313, 3rd Dept, 6/7/2007

Police responded to an attempted break-in where a person described as wearing a light-colored, hooded sweatshirt and dark pants had broken a glass window. The investigating officers were then notified of another nearby home that had been burglarized. At that scene, a resident told the officers he saw someone walking a bicycle in a backyard around the time of the break-in. The officers then saw a man, wearing clothing similar to the person described in the first incident, run from the side of a home towards a bicycle. This man, later identified as the defendant, became belligerent with the officers. When he was patted down for weapons, a piece of glass was discovered. He was taken to the station for questioning, where he signed a written statement after five hours of questioning and was indicted. While the defendant's suppression motion for the written statement was granted, his motion to suppress certain oral statements he made before he was Mirandized but after the written statement was produced was denied. His argument as to lack of probable cause was rejected.

Holding: The oral statements must be suppressed. Because they were given after the defendant had been in the same room with the same interrogating two officers for over five hours before he had knowledge of his charges, the oral statements essentially flowed from the written statement. The right of inquiry was reasonable based on the clothing description similarities and that the suspect ran into a nearby yard. There was probable cause for arrest where the defendant fled, attempted to mount a bicycle, acted belligerent when approached, and possessed a piece of broken glass. *See People v De Bour*, 40 NY2d 210. Judgment reversed and remanded for new trial. (Supreme Ct, Albany Co [Lamont, JJ])

Evidence (Hearsay) EVI; 155(75)

Identification (Eyewitnesses) IDE; 190(10)

People v McEaddy, No. 100035, 3rd Dept, 6/7/2007

The defendant was convicted of first-degree robbery. At trial, detectives testified to obtaining statements from an individual who identified the defendant at the crime

scene. This alleged eyewitness however did not testify. The prosecution also elicited hearsay testimony regarding phone calls from several others who recognized the defendant from a surveillance video aired on local newscasts.

Holding: The out-of-court statements were improperly admitted. The defendant's right of confrontation was violated because the defendant did not have the opportunity to cross-examine the alleged eyewitness about testimonial statements relevant to prove the truth of the matter. *See Crawford v Washington*, 541 US 36, 51-69 (2004). This error could not be deemed harmless beyond a reasonable doubt (*see People v Crimmins*, 36 NY2d 230, 237), since the only testifying eyewitness could not positively identify the defendant at trial (although he had from a photo array days after the robbery), the surveillance video was not conclusive, and the defendant's alleged admission was far from conclusive. No relevant nonhearsay purpose was demonstrated. The defendant was also unduly prejudiced by testimony that implied other people recognized him from a surveillance video. Judgment reversed, new trial ordered. (Supreme Ct, Albany Co [Teresi, JJ])

Family Court (General) FAM; 164(20)

Sex Offenses (Corroboration) SEX; 350(2)

Matter of Kayla N., No. 501371, 6/7/2007

The court found by a preponderance of the evidence that the respondent sexually abused his stepdaughter and derivatively neglected his stepson. This evidence came in the form of recanted testimony from the stepdaughter and her mother. At trial, the mother repeatedly invoked her 5th Amendment privilege in refusing to answer questions about her prior testimony.

Holding: Even though the child recanted her allegations of abuse, the court is not necessarily required to accept her recantations as true. It is accepted that such a reaction is common among abused children. *See Matter of Corey C. [Harold D.]*, 20 AD3d 736, 737. Her allegations, while admissible, would not be sufficient; there must be corroborating evidence that "[tends] to support its reliability." *Matter of Sasha R. [Nelson S.]*, 24 AD3d 902, 903; *see Family Court Act 1046(a)(vi)*. The mother's recanted statement that her daughter was sexually abused can be considered corroborating evidence. The mother previously pled guilty to neglect for failing to protect her daughter from the respondent. Due deference to the court's credibility determinations supports finding no error in the court's rejecting of the recantations as unreliable. Order affirmed. (Family Ct, Otsego Co [Burns, JJ])

Counsel (Anders Brief) COU; 95(7)

People v Harrison, No. 15461-100738, 6/14/2007

The defendant pled guilty to two counts of robbery, criminal possession of a weapon, and grand larceny. His motion pursuant to CPL 440.10 to vacate the judgment conviction on the ground that he was incapable of enter-

Third Department *continued*

ing a knowing, voluntary, and intelligent guilty plea because his mental status was impaired due to a head injury was denied without a hearing.

Holding: Appellate counsel sought to be relieved on the ground that no nonfrivolous issues exist. The record however reveals that there exists at least one issue of “arguable merit” relating to the voluntariness of the plea and waiver, as well as the propriety of the denial of defendant’s CPL 440.10 motion. Because the defendant suffered a serious head injury prior to the incident in question, which may have impaired his cognitive abilities, further review is warranted. *See People v Cruwys*, 113 AD2d 979, 980 *lv den* 67 NY2d 650. Counsel relieved, new counsel to be assigned. (County Ct, Schenectady Co [Hoye, JJ])

Fourth Department

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

Discovery (General) (Right to Discovery) DSC; 110(12) (33)

People v Owens, 39 AD3d 1260 (4th Dept 2007)

Holding: The defendant appealed his conviction of second-degree burglary, fourth-degree criminal mischief, and petit larceny. The court properly determined that the defendant failed to prove the systemic exclusion of African-Americans from the jury pool, there was reasonable suspicion to stop his vehicle, and probable cause existed for his arrest. While the court should have given a circumstantial evidence charge, since the burglary charge depended entirely upon circumstantial evidence (*see People v Rogers*, 16 AD3d 1101), this error was harmless. There was no significant probability the jury would have acquitted but for the failure to charge as to circumstantial evidence.

The court erred in failing to sanction the prosecution, at the persistent violent offender hearing, for a *Rosario* violation, the destruction of the fingerprint examiner’s notes. The notes were the only written record of the 10 points of similarity between the sets of prints and therefore the only means by which the defendant could effectively cross-examine the examiner. Their destruction prejudiced the defendant, warranting a sanction. *See People v Wallace*, 76 NY2d 953, 955. Judgment modified, second-degree burglary sentence vacated, matter remitted for resentencing on that court following a new persistent violent offender hearing. (Supreme Ct, Monroe Co [Affronti, JJ])

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

Juries and Jury Trial (Competence) JRY; 225(15)

People v Gilmore, No. KA 04-00290, 4th Dept, 6/8/2007

Holding: The evidence is legally insufficient to support the conviction of depraved indifference murder. While it may have been rational to find reckless the defendant’s conduct in shooting the decedent in the back during a robbery attempt, there was not the requisite “utter depravity, uncommon brutality and inhuman cruelty.” *See People v Suarez*, 6 NY3d 202, 216. The court erred by disqualifying a sworn juror, who said that his brother was imprisoned on “trumped-up charges,” over the defendant’s objection. This did not meet the CPL 270.35(1) requirement for disqualification, that a particular juror “possesses a state of mind which would prevent the rendering of an impartial verdict.” *See People v Buford*, 69 NY2d 290, 298. Judgment reversed, new trial ordered on count three, and depraved indifference murder count dismissed without prejudice. (County Ct, Monroe Co [Connell, JJ])

Dissent: [Scudder, JJ] The court placed sufficient information on the record to demonstrate a probing inquiry into the particular circumstances surrounding the disqualified juror. CPL 270.35 was satisfied where the juror claimed that police had “manufactured evidence” against his brother, and the juror became emotional and noncommittal when asked if he could be impartial. Case law does not support reversal for the use of an incorrect standard for discharging a sworn juror. After rejecting the intentional murder count and justification defense, the jury was left with evidence of the defendant running while firing his weapon behind him multiple times, sufficient to establish “disregard for the value of human life.”

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

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

People v Santiago, No. KA 99-01149, 4th Dept, 6/8/2007

The defendant was convicted of multiple counts of first-degree murder, second-degree murder, and first-degree attempted murder. The jury returned a death sentence.

Holding: The felony murder charges (Penal Law 125.25[3]) must be dismissed as included under intentional felony murder. *See People v Miller*, 6 NY3d 295, 303. The death penalty sentence must be set aside. The defendant sought a pretrial ruling that the deadlock instruction under CPL 400.27(10) was unconstitutional, though he did not object when it was given; it was ruled unconstitutional in *People v LaValle* (3 NY3d 88). Resentencing is required, at which the court may impose life without parole or life with a minimum of no less than 20 years but no more than 25 years. Penal Law 70.00(3)(a)(i); (5).

The defendant’s mother gave comprehensive consent to a search of their home; her stated exception as to the outdoor kennel based on the viciousness of the defendant’s dog was “insufficient to impose a limitation on or constitute a revocation of consent.” *People v Jakubowski*, 100 AD2d 112, 118. Police properly accessed the kennel

Fourth Department *continued*

after the dog was secured. The defendant's confinement in handcuffs prior to the showup identification at the hospital did not transform his detention to arrest. His pre-*Miranda* statement that he sold drugs was nonresponsive to a preceding question, the purpose of which was to determine if the defendant was under the influence. The court did not abuse its discretion in admitting autopsy and hospital photographs of the decedents; while gruesome, their relevance to material issues outweighed their prejudice. *See People v Poblner*, 32 NY2d 356, 370 rearg den 33 NY2d 657 cert den 416 US 905. Additional contentions are rejected. Judgment affirmed as modified. (County Ct, Monroe Co [Bristol, JJ])

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

Burglary (Evidence) **BUR; 65(20)**

People v Porter, No. KA 05-01526, 4th Dept, 6/8/2007

Immediately following a bank robbery, a man who fit the description of the perpetrator was spotted by a police officer a block from the incident. The man, later found to be the defendant, then entered and exited a residence and was chased on foot and apprehended. He was convicted of robbery, burglary, and resisting arrest.

Holding: The evidence upon which the defendant was convicted of burglary was sufficient. The prosecution had to show only that the defendant intended to resist arrest when he entered the residence, not that he actually committed the crime of resisting arrest. *See People v Williams*, 38 AD3d 327. It was reasonable to infer that the defendant saw the officer a block away and entered the residence seeking to avoid being arrested. *See Penal Law 205.30; see gen People v Bleakley*, 69 NY2d 490, 495. Judgment affirmed. (County Ct, Oneida Co [Dwyer, JJ]) ♪



Photo by David L. Austin

Jonathan Gradess congratulates Duane Johnson of The Legal Aid Society-Bronx on completing the Basic Trial Skills Program at the graduation ceremonies.

Defender News*(continued from page 3)*

- Q. Does your agency have written policies and procedures on live and photo lineups?
- Q. What are those policies and procedures? Can we get a copy?
- Q. Do your policies and procedures follow the recommendations that have been made by the U.S. Department of Justice and by eyewitness scientists?
- Q. How many fillers (non-suspects) are used in your lineups?
- Q. What are the procedures used for selecting the fillers to be used in your lineups?
- Q. What instructions are given to witnesses prior to viewing a lineup?
- Q. Do you use an independent lineup administrator (the double-blind lineup procedure) or do you permit the lineup to be conducted by someone who knows which persons are fillers and which is the suspect?
- Q. Do you secure a statement of certainty from the eyewitness at the time of the identification?

Class Action Settled with BAR/BRI

There has been a settlement in a class action antitrust suit against bar review course provider BAR/BRI. According to a notice, anyone who purchased a bar review course from BAR/BRI from Aug. 1, 1997 through July 31, 2006 is a class member entitled to part of the \$49 million settlement. The claim form must be postmarked by Sept. 17, 2007. More info is available at www.barbri-classaction.com, or call 1-888-285-7850.

2007 Defender Institute BTSP—Another Success

This year's Basic Trials Skills Program, which the Association's Defender Institute holds each summer at Rensselaer Polytechnic Institute in Troy, New York, took 55 public defense attorneys through an intense week of lectures, workshops, and exercises June 10 through 16. This nationally recognized training gives lawyers who about to embark on their felony trial careers an opportunity to explore their own styles, make mistakes, and build the experience and confidence they need to provide their clients with zealous, effective representation. A client-centered approach and a national faculty of coaches—attorneys and communications experts—have made BTSP a model trainer. ♪

NYSDA MEMBERSHIP APPLICATION

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

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

Name _____ Firm/Office _____

Office Address _____ City _____ State ____ Zip _____

Home Address _____ City _____ State ____ Zip _____

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

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

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

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

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

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

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

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

To pay by credit card: Visa MasterCard Discover American Express

Card Billing Address: _____

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

Cardholder's Signature: _____

NEW YORK STATE DEFENDERS ASSOCIATION

194 Washington Ave., Suite 500, Albany, NY 12210-2314

Non-Profit Organization

U.S. Postage

PAID

Albany, NY

Permit No. 590