



Public Defense Backup Center
REPORT

Volume XXIII Number 1

January-February 2008

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

2008-2009 Budget Released: Office of Indigent Defense Services Proposed

An article VII bill (S6806-A/A9806-A) offered as part of Governor Eliot Spitzer's 2008-2009 budget includes a proposal for an Office of Indigent Defense Services. (<http://www.assembly.state.ny.us/leg/?bn=S06806&sh=t>) Initial comments on the bill are provided in this issue's *My Vantage Point*, by NYSDA's Executive Director, Jonathan E. Gradess. NYSDA's comments on the bill will be released soon.

Recent Rulings on the Admissibility of Expert Testimony

In *People v Gonzalez*, No. 2005-07218 (2d Dept Jan. 22, 2008), the Second Department held that the lower court erred in denying the defendant's motion for leave to present expert testimony regarding the reliability of eyewitness identification. The motion court denied the defendant's motion for leave to present expert testimony without holding a *Frye* hearing (*Frye v United States*, 293 F 1013 [1923]), and the trial court denied the defendant's renewed motion. The Second Department concluded that although the evidence was legally sufficient to support the conviction and that the verdict was not against the weight of the evidence, the defendant is entitled to a new trial. (The *Gonzalez* decision will be summarized in a future issue.) However, the First Department, in *People v Austin*, 46 AD3d 195 (1st Dept 2007), held that the court did not abuse its discretion in denying the defendant's motion to present eyewitness identification expert testimony. The court noted that defense counsel failed to cross-examine the complainant about his increased confidence in his identification, and never asked the court to reconsider the relevance of the expert testimony on witness confidence after the complainant's testimony or include supplemental jury instructions on eyewitness identification. For a full summary, see page 19.

As with other types of expert testimony, when seeking to admit eyewitness identification expert testimony, counsel should offer clear evidence of the connection

between the facts of the case and the expert testimony to be provided, and show that the expert will provide specialized knowledge that jurors would not be expected to know. If the court denies the initial motion, counsel should consider renewing the motion at trial and be sure to preserve the issue for appeal. Even if the expert is not allowed to testify, defense counsel can use eyewitness identification experts to help prepare for trial.

Regarding a different area of expertise, the Second Circuit held that the defendant received ineffective assistance of counsel because defense counsel failed to consult an expert witness about the effect of unconsciousness and massive blood loss on a complainant's ability to make an identification. *See Bell v Miller*, 500 F3d 149 (2d Cir 2007). More information about this case is available at page 2.

DWI Updates

VTL 1194(4)(a): Prosecution Must Establish that an Authorized Person Drew the Defendant's Blood

In *People v Lem Mar*, No. 9361/06 (Dist Ct, Nassau Co, Nov. 26, 2007), the court granted the defendant's motion to suppress the results of his Vehicle and Traffic Law 1194 blood test. During a combined *Huntley*, *Mapp*, and *Dunaway* hearing, the arresting officer provided the only testimony about the blood test. The officer testified that an emergency room nurse drew a sample of the defendant's blood in response to another officer's request; however, he did not provide the nurse's name, title, or credentials, or details about the blood draw. "It was incumbent upon the People to present testimony and direct evidence during the hearing that the blood was properly drawn by a person who was authorized to draw the blood. This Court holds that naked hearsay testimony by a Police Officer that the

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Defendant's blood was drawn by a vague 'emergency room nurse' is insufficient to satisfy the People's burden of proof on this issue and does not establish that the person who drew the Defendant's blood was a person authorized to do so by the statute."

Physician-Patient Privilege Not Violated When Police Obtain Blood Samples Taken By the Defendant's Physician

The Second Department, in *People v Elysee*, 847 NYS2d 654 (2d Dept 2007), held that the physician patient privilege, codified in CPLR 4504, is not violated where the police, pursuant to a search warrant, obtain blood samples previously taken but not tested by the defendant's physician. The court concluded that a physical blood sample is not protected by the privilege because it does not communicate or render observable any information about a patient upon which treatment can be based or a diagnosis made. For a full summary of the decision, see page 31.

New Department of Health and Department of Motor Vehicles Regulations

Ignition Interlock Device Program

As reported in the January 16, 2008 State Register, the DMV has amended 15 NYCRR Part 140 to implement the 2007 amendments to VTL 1198. (<http://www.dos.state.ny.us/info/register/2008/jan16/pdfs/rules.pdf>.) As amended, Part 140 reflects the statewide implementation of the ignition interlock device program, adds section 1192(2-a) violations to the list of applicable convictions, and adopts the employer vehicle exception set forth in VTL 1198(8).

New List of Breath Measurement Devices

The January 23, 2008 State Register includes an emergency amendment to 10 NYCRR Part 59 that sets forth a new conforming products list of evidential breath measurement devices. (<http://www.dos.state.ny.us/info/register/2008/jan23/pdfs/rules.pdf>.) The new list includes the DataMaster DMT, which is replacing 475 breath test instruments being used throughout the state, and adds and deletes several other devices.

First Department Finds Prosecutorial Misconduct for Brady Violations

In *People v Garcia*, 46 AD3d 461 (1st Dept 2007), the First Department concluded that the prosecution violated its duty under *Brady v Maryland* (373 US 83) by failing to turn over information about statements made by three witnesses that contradicted its theory of the case. The court noted that the prosecution did not satisfy its obliga-

tion by disclosing the witnesses' names as there was no indication of the information they possessed or that it was *Brady* material and the names were buried in voluminous discovery provided to defense counsel shortly before trial. The court concluded that the prosecution's constitutional and statutory obligations are independent obligations and thus, it does not matter whether defense counsel knew or should have known about the witnesses. For a full summary of the decision, see page 23.

Recent Ineffective Assistance of Counsel Decisions

Bell v Miller, 500 F3d 149 (2d Cir 2007): The Second Circuit granted Derrick Bell's habeas corpus petition on ineffective assistance of counsel grounds where defense counsel failed to consult a medical expert regarding the complainant's identification of the defendant. (www.law.com, 1/9/2008.) The complainant identified the defendant by name after he regained consciousness 11 days after the incident, had lost 50 percent of his blood, underwent surgery, and was still suffering memory loss a month later. However, right after the incident, the complainant described the perpetrator in general terms, as if he did not know him. After the Second Department rejected his more general IAC claim on direct appeal, see *People v Bell*, 298 AD2d 398 (2d Dept 2004), the defendant brought a CPL 440.10 motion that included a specific medical expert IAC claim. The motion was denied without a hearing. The District Court for the Eastern District of New York denied the defendant's habeas petition. See *Bell v Miller*, No. 05-cv-0663 (EDNY Aug. 12, 2005). The Second Circuit held: "Our disposition of this appeal does not announce a *per se* rule requiring a defense counsel to con-

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sult with a medical expert in order to cast doubt on a key prosecution witness. But where the only evidence identifying a criminal defendant as the perpetrator is the testimony of a single witness, and where the memory of that witness is obviously impacted by medical trauma and prolonged impairment of consciousness, and where the all-important identification is unaccountably altered after the administration of medical drugs, the failure of defense counsel to consider consulting an expert to ascertain the possible effects of trauma and pharmaceuticals on the memory of the witness is constitutionally ineffective.”

People v Cyrus, 848 NYS2d 67 (1st Dept 2007): The First Department held that the defendant was denied his constitutional right to effective assistance of counsel at trial because defense counsel failed to investigate the law and facts relevant to the case, which “led to two crucial errors that effectively doomed his client’s defense to failure.” A full summary of this decision is available at page 21.

Vargas v United States, No. 06cv5533, 2008 U.S. Dist. LEXIS 7616 (SDNY 2/4/2008): The court concluded that the defendant is entitled to a hearing on whether defense counsel ignored his specific request that a notice of appeal be filed. “An attorney’s failure to follow specific instructions to file a notice of appeal is ‘professionally unreasonable,’ and prejudice to the defendant is presumed, *Roe v Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000), even if the appeal lacks merit, *Campusano v United States*, 442 F.3d 770, 771-72 (2d Cir. 2006).” The court rejected the defendant’s IAC claim regarding his counsel’s decision not to object to a sentencing enhancement, finding that the decision was reasonable and the result would not have been different because the enhancement was proper.

Spotlight on Ethics

Removal Recommended for Family Court Judge

On February 13, 2008, the New York State Commission on Judicial Conduct recommended that Fulton County Family Court Judge David F. Jung be removed for violating litigants’ fundamental due process rights, including the right to counsel and the right to be heard. (www.scjc.state.ny.us) In at least three cases, Judge Jung found parties to be in default, deprived them of their parental rights, and imposed jail time *in absentia*, even though he knew or should have known that the individuals were incarcerated or in police custody at the time of the court appearances. In at least two other cases, the Commission concluded that Judge Jung deprived litigants of their right to counsel. “The right to counsel cannot be forfeited by the imposition of restrictive and arbitrary policies, the sole purpose of which is to move cases. . . . It is a judge’s responsibility to determine whether a litigant is eligible for assigned counsel; that responsibility cannot be delegated.” Judge Jung is expected to appeal the rec-

ommendation to the Court of Appeals. (www.dailygazette.com, 2/21/08.)

New Ethics Opinion Regarding Complaints to Judges About Assigned Counsel

Defense counsel should be aware of the Advisory Committee on Judicial Ethics Opinion 07-82 regarding the responsibilities of judges who receive letters from parties complaining about their assigned counsel. The opinion, which is available on the Advisory Committee’s new website, www.nycourts.gov/ip/acje, is summarized as follows: “A judge who receives a letter from a party complaining about his/her assigned counsel (1) need not disclose the letter to all parties if it addresses only the lawyer’s conduct and/or relationship with the client; (2) should exercise his/her discretion concerning whether to disclose the letter to the assigned counsel; (3) must disclose the letter to all parties, after redacting privileged information, if it includes information about disputed evidentiary facts or other information addressing the merits of the pending case; and (4) need not investigate the complaint, but must take appropriate action if the judge concludes that there is a substantial likelihood that the lawyer has committed a substantial violation of the Code of Professional Responsibility.”

Coercing Defendants into Plea Bargains

In its 2007 Annual Report, the State Commission on Judicial Conduct noted that it has “received a number of complaints in recent years alleging that some judges have coerced or attempted to coerce defendants into accepting plea bargains.” (www.scjc.state.ny.us) The Commission reported that it has issued “confidential cautions where the Rules were violated in circumstances involving more than a good-faith error of law, such as where the judge attempted to elicit incriminating statements from the defendant; or declared as if speaking for the prosecutor that the plea offer would automatically increase every time the defendant rejected it, based on factors extrinsic to the case, such as the judge’s view that the defendant’s prior arrests should be held against him, without regard to whether acquittals or convictions had resulted from such arrests; or violated other rules in the process, such as the obligation to be patient, dignified and courteous toward litigants, lawyers and others. Where the coercion is extreme and repetitive, public discipline is warranted.” The Commission suggested that “OCA vigorously address [this issue] in judicial training and education programs”

NYSBA Completes Five-Year Study on Rules for Attorneys

In November 2007, the House of Delegates of the NYSBA formally approved proposed Rules of Professional Conduct that, if adopted by the Appellate

Division, would replace New York's existing Code of Professional Responsibility. (NYSBA Press Release, Nov 6, 2007, www.nysba.org.) The proposed Rules follow the format of the ABA Model Rules of Professional Conduct and adopt some of the Model Rules' language. NYSBA's Committee on the Standards of Attorney Conduct issued a comprehensive report discussing the proposed Rules and the differences between the Rules and the current Code. (www.nysba.org/cosareport.) According to the Committee Chair, "[t]he new rules, when adopted, will infuse an increased sense of clarity and consistency for New York lawyers." Some highlights of the proposed Rules include Rule 3.8, Special Responsibilities of Prosecutors; Rule 6.2, Accepting Appointments; Rule 7.6, Political Contributions to Obtain Government Legal Engagements or Appointments by Judges; and Rule 8.3, Reporting Professional Misconduct.

Fordham Law Review's Symposium on Ethics and Evidence

Ethics was the focus of Fordham Law Review's December 2007 issue, which is available at <http://law.fordham.edu/ihtml/page3.ihtml?imac=1162&issueID=343>.

The issue contains a number of timely articles on the interaction between ethics and evidence, including articles on false identifications, ethics and prosecutors' use of testimony of jailhouse informants and experts, and prosecutorial use and misuse of high-tech evidence. These articles recommend changes to criminal procedure laws and ethics rules, such as improved police identification procedures, prosecutorial screening of jailhouse informants, increased forensic science training for prosecutors and defense attorneys, which will help to ensure that defendants receive due process and wrongful convictions are prevented.

Challenges to the Administrative Imposition of Post-Release Supervision Continue

Since Elon Harpaz's article *Post-Release Supervision and Earley v Murray* appeared in Mar/May issue of the REPORT (www.nysda.org/07_Mar-May_REPORT.pdf), the appellate divisions have issued a number of decisions about the imposition of post-release supervision (PRS) by the NYS Department of Correctional Services (DOCS). On February 20, the Fourth Department issued two decisions that follow the Second Circuit's reasoning in *Earley v Murray: People ex rel Burch v Goord*, No. 257 KAH 07-01086 (Feb. 20, 2008) and *People ex rel Eaddy v Goord*, No. 263 KAH 07-00240 (Feb. 20, 2008). In both cases, DOCS imposed terms of post-release supervision while the petitioners were incarcerated and the petitioners were returned to prison after allegedly violating the terms of

their PRS. In *Burch*, the Fourth Department granted a writ of habeas corpus, and in *Eaddy*, the court converted the habeas corpus proceeding into an article 78 proceeding in the nature of prohibition (the petitioner had been released on parole) and granted the petition. The court concluded: "To the extent that our prior decisions in *Hollenbach* and *Crump* hold otherwise, they are no longer to be followed . . ." (The *Burch* and *Eaddy* decisions will be summarized in a future issue.)

The Third Department granted two article 78 petitions, finding that judges have the sole authority to impose and alter sentences. See *Matter of Quinones v New York State Dept of Correctional Servs*, 46 AD3d 1268 (3d Dept 2007); *Matter of Dreher v Goord*, 46 AD3d 1261 (3d Dept 2007). The court also noted that to the extent its decisions in *Matter of Deal v Goord*, 8 AD3d 769 (3d Dept) *app dismissed* 3 NY3d 737 (2004) and *Matter of Garner v New York State Dept of Correctional Servs*, 39 AD3d 1019 *lv granted* 9 NY3d 809 (2007), reached a different conclusion, those decisions should no longer be followed. For full summaries of these decisions, see page 39.

In December, the Second Department granted an article 78 petition and ordered the Division of Parole to immediately cease enforcement of the terms of post-supervision release that were improperly added to the petitioner's sentence. See *People ex rel McBride v Alexander*, 46 AD3d 849 (2d Dept 2007). For a full summary of this decision, see page 32.

The Court of Appeals will be reviewing six cases where PRS was administratively imposed: *People v Sparber*; *People v Thomas*; *People v Lingle*; *People v Rodriguez*; *People v Ware*; and *Matter of Garner v New York State Dept of Correctional Servs*. Oral argument in all six cases is scheduled for March 12, 2008.

New Law Aims to Provide Better Psychiatric Care to New York Inmates with Mental Illnesses

On January 28, 2008, Governor Spitzer signed a new law that provides inmates with serious mental illnesses better access to mental health treatment. (www.law.com, 1/30/2008.) The law creates residential mental health treatment units that will be operated by the Department of Correctional Services and the Office of Mental Health (A9342/S6422 [L 2008, ch 1]). Among other provisions, the law requires that inmates housed in the new units be offered at least four hours a day of structured out-of-cell therapeutic programming and/or mental health treatment, excluding weekends and holidays. The legislation limits the use of special housing unit confinement for inmates with mental illnesses to those who are deemed a physical threat to themselves or others.

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Conferences & Seminars

Sponsor: Eyewitness Identification Reform Litigation Network
Theme: A New Legal Architecture: Litigating Eyewitness Identification Cases in the 21st Century
Dates: March 14-15, 2008
Place: NYU Law School, New York City
Contact: Zeke Edwards (Innocence Project): tel (212) 364-5340; email zedwards@innocenceproject.org; or Viviana Sejas (NACDL): tel (202) 872-8600 x232; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association and the Kentucky Department of Public Advocacy
Theme: Train the Trainer and Nuts & Bolts of Leadership and Management
Dates: March 24-26 and March 26-28, 2008
Place: Lexington, KY
Contact: KDPA: tel (502) 564-8006 x236; email Lisa.Blevins@ky.gov; website www.nlada.org/Training

Sponsor: New York State Bar Association
Theme: Practical Skills—Family Court Practice
Date: April 8, 2008
Places: Albany, Buffalo, Melville, New York City, Rochester, Syracuse, and Tarrytown
Contact: NYSBA: tel (800) 582-2452; website www.nysba.org/cle

Sponsor: **New York State Defenders Association and Federal Public Defender Office for the Northern District of New York**
Theme: **Federal Criminal Defense Practice Update**
Date: **April 20, 2008**
Place: **Syracuse, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: **New York State Defenders Association**
Theme: **Criminal Defense Tactics and Techniques X**
Date: **April 26, 2008**
Place: **Rochester, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: New York State Association of Criminal Defense Lawyers (NYSACDL)
Theme: Annual Syracuse Trainer
Date: April 26, 2008
Place: Syracuse, NY
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Bar Association
Theme: DWI on Trial: The Big Apple VIII Seminar
Dates: May 1-2, 2008
Place: Radisson Martinique on Broadway, NYC
Contact: NYSBA: tel (800) 582-2452; website www.nysba.org/cle

Sponsor: National Association of Criminal Defense Lawyers
Theme: Warriors for the Defense: Trial Techniques from the Masters
Dates: May 1-4, 2008
Place: New York Marriot Financial Center Hotel, NYC
Contact: NACDL: tel (202) 872-8600 x 236; email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association of Criminal Defense Lawyers and Seattle University School of Law
Theme: Misdemeanor Public Defense
Date: May 9, 2008
Place: Open Society Institute, NYC
Contact: NACDL: tel (202) 872-8600; website www.nacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers (NYSACDL)
Theme: Cross to Kill
Date: May 16, 2008
Place: Brooklyn, NY
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Defender Training Project
Theme: 2008 Public Defender Trial Advocacy Program
Dates: May 30-June 4, 2008
Place: Dayton, OH
Contact: NDTP (Ira Mickenberg): tel (518) 583-6730; email imickenberg@nycap.rr.com

Sponsor: National Criminal Defense College
Theme: Trial Practice Institute
Dates: June 15-28, 2008
July 13-26, 2008
Place: Macon, GA
Contact: NCCDC: tel (478) 746-4151; fax (478) 743-0160; email Rosie@ncdc.net; website www.ncdc.net

Sponsor: **New York State Defenders Association**
Theme: **41st Annual Meeting & Conference**
Dates: **July 20-22, 2008**
Place: **Saratoga Springs, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: Separating Scientific Fact from Fiction
Dates: September 18-20, 2008
Place: Las Vegas, NV
Contact: NCADRC: tel (419) 865-0513; email ncadrc@aol.com; website www.falseallegation.org

Job Opportunities

The Jefferson County Public Defender's Office is accepting applications for an **Assistant Public Defender** position. Assistant public defenders are responsible for the representation of indigent defendants in criminal, family, and village and town night courts. Applicants must be attorneys in good standing in the State of New York and/or awaiting admission to the bar and must be able to work collaboratively with clients, other lawyers, social workers, and local law enforcement officials. Salary: \$47,822 - \$53,281 DOE, plus excellent fringe benefits including NYS retirement. EOE. To apply, send an application letter with résumé, Appellate Division certificate of good standing or a statement from the applicant indicating when, where, and the department in which the exam was taken, three letters of reference, and copy of valid driver's license to the Jefferson County Department of Human Resources, County Office Building, 175 Arsenal Street, Second Floor, Watertown, NY 13601.

Prisoners' Legal Services of New York (PLS) is accepting applications for an **Executive Director** (Albany office). PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. We have regional offices in Albany, Buffalo, Ithaca and Plattsburgh. PLS handles cases involving mental health and medical care, prison disciplinary matters, excessive use of force, conditions of confinement, sentence calculation and jail time credit. PLS attorneys engage in administrative advocacy and representation in individual lawsuits and impact litigation. We provide high quality legal services and have been successful in establishing important rights for our clients.

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

The **Executive Director** is responsible for the management of the program and for insuring that it provides high quality, effective and efficient legal services to clients. Applicants should have five (5) years of legal practice experience preferably in legal services, civil rights, poverty law and/or federal law. They should also have five (5) years of supervisory experience. Excellent leadership and communication skills, strong analytic and writing ability, and a history of working well with others are essential. Salary: DOE, minimum \$90,000. To apply, send a cover letter with a list of three (3) references, résumé, and writing sample by email to: John S. Kiernan, jskiernan@debevoise.com. Deadline: March 21, 2008.

PLS offers an outstanding benefit package including free health, dental, long term disability, and life insurance, as well as generous leave policies. We seek to be a well-balanced, diverse organization. PLS is an equal opportunity employer. We encourage people of color, women, and people with disabilities to apply. We have a serious need for staff who are fluent in Spanish.

The Center for Community Alternatives (CCA) is seeking a **Director of Court**

Advocacy Services to provide day to day leadership and oversight of NYC office(s) court services; defender based court advocacy for all level criminal offenses, death penalty mitigation, civil legal assistance to overcome barriers to reintegration, for both adults and youth and work with the justice strategies team to develop and advance reintegrative justice initiatives. Responsibilities include policy and program development, supervision of project staff, grant management, development of continued funding applications and ensuring the achievement of project goals and objectives consistent with agency mission and contract(s). CCA is a leader in the field of community-based alternatives to incarceration. Through innovative and pioneering services as well as the research, public advocacy and training of its Justice Strategies division, CCA fosters individual transformation, reduces reliance on incarceration and advocates for more responsive juvenile and criminal justice policies. Qualifications: J.D. degree plus experience in criminal justice related matters or Master's Degree in public administration, health, social work or criminal justice. Excellent management, supervisory and written/oral communication skills. Computer proficiency in word processing, spreadsheets, database management and internet required. Demonstrated cultural competency and commitment to working with disempowered, marginalized populations particularly persons involved with the criminal/juvenile justice system. To apply, send a résumé, cover letter, and salary history to: Center for Community Alternatives, 39 West 19th Street, 10th Floor, New York, NY 10011; fax (212) 675-0825; email jobs@communityalternatives.org ☺

Defender News *(continued from page 4)*

Court Certifies Class in Parole Denial Suit against NYS

In *Graziano v Pataki*, No. 7:06-cv-00480, 2007 U.S. Dist. LEXIS 89737 (SDNY Dec. 3, 2007), District Judge Charles L. Brieant granted the plaintiffs' motion for class certification and denied the defendant's motion to dismiss the amended complaint as moot. The class consists of all prisoners in the custody of the NYS Department of Correctional Services who were convicted of A-1 violent felony

offenses and have served the minimum terms of their indeterminate sentences and are eligible for parole release, and whose most recent parole release applications were denied solely because of the "seriousness of the offense," the "nature of the present offense," or similar reasons. The court also certified a subclass of prisoners who meet the requirements of the main class, but were sentenced to less than the statutory maximum for their offenses.

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From My Vantage Point

Measured Progress: Steps Toward Reform Must Include Independence

by Jonathan E. Gradess*

We Are Making Progress

Governor Eliot Spitzer's budget declares a direct role for the State in monitoring and improving public defense services. Issued in a very tight fiscal year, the budget includes \$3 million for an office to examine and make recommendations for solving the problems in New York's county-based public defense delivery system. Indigent Legal Services Fund (ILSF) money distributed by the Comptroller would be capped at \$72 million so that this new office could distribute the rest according to a plan it would develop.

Before evaluating limitations with the Governor's proposal, let us stop and celebrate the progress this bill represents.

In 2001, we published a paper addressing the ongoing public defense crisis—manifested most clearly then in the fallout from stagnant assigned counsel fees. Soon thereafter, I wrote in this column that there had been “widespread acceptance of our first four recommendations” regarding the need to raise fees. We didn't get everything we wanted, of course, but under 2003 legislation fees did go up, in-and out-of-court differentials were dropped, and State money has been flowing to localities based on overall public defense spending, not solely assigned counsel fees.

In pressing for our fifth recommendation—creation of a statewide Independent Public Defense Commission to create standards and distribute state money to localities—I wrote that the moment for reform occasioned by the fee crisis would not easily return. In that belief, I was fortunately wrong.

Chief Judge Judith S. Kaye made good on a promise not to let public defense reform die once fees were raised. In 2006 the Kaye Commission issued recommendations *exceeding* our own. It called not only for a statewide Independent Public Defense Commission controlling state funding for public defense, but for such a commission to head a statewide, fully state-funded public defense system.

In 2007 a bill to implement the Kaye Commission recommendations was introduced and is pending in both houses of the Legislature. Thus, two of the three branches of government had as of last year engaged not only on the need for the State to accept its responsibility to ensure quality public defense representation but on the core issue of independence.

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

We welcome the current Executive's recognition that the State must step up with regard to “widespread problems” in public defense. We understand that members of the administration, new to this issue, want to study the problems—and the cost and possible designs of any solutions—from an executive branch viewpoint. We believe that any thorough study will lead them to conclude, as did the Kaye Commission, that “[t]he delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, [and] is entirely and adequately state-funded”

Independence Remains Key

As I wrote in 2001, “creating an independent Commission will protect constitutionally and statutorily required legal services from control by those with conflicting interests and provide a single, accountable entity to whom any and all concerned groups can turn when quality representation is not being met.”

Independence of the defense function is recognized as a key principle by more than just NYSDA and other defense agencies and advocates. The American Bar Association, with a broad general membership including prosecutors, judges, and civil practitioners, has made independence a leading standard for provision of public defense services. The New York State Bar Association, which received the ABA's Harrison Tweed Award for creating and adopting “Standards for Providing Mandated Representation,” places independence at the top of its list of requirements.

This is not news to those of us working in public defense, or those who follow public defense issues. But it bears repeating as we look at the Governor's proposal. For while we are delighted that all three branches of our State government are now engaged on the issue of needed public defense reform, we are troubled that the Executive—the branch that prosecutes criminal cases and administers programs that act to deprive clients in Family Court of parental rights—has yet to recognize independence as a core principle for providing public defense. The Article 7 bill to create an Office of Indigent Defense Services (OIDS) gives the Governor unfettered power to appoint an Executive Director for whom no qualifications are established.

Around the state, we continue to see manifestations of a lack of independence of the public defense function at the local level. One Public Defender was not reappointed by the county legislature late last year after refusing to move the office into the courthouse. National standards that say courthouse locations raise issues of client trust and confidentiality were ignored. That Public Defender was replaced by a young lawyer from the District Attorney's office. (A prosecutorial background does not mean a lawyer will not function well as a defender, of

course. The NAACP in Schenectady County, which had opposed the appointment of Mark Caruso some years ago based in part on his prosecutorial background, later gave him an award.) But selection processes that reflect issues of political control rather than client concerns and quality representation do much to damage the vital attorney-client relationship.

An example of this exploded in Monroe County this year. Community outrage over the County Legislature's refusal to honor the merit selection process used to select former Public Defender Ed Nowak thirty years ago made headlines. Bitterness about the manner of the new Public Defender's appointment (press accounts detailed suspicions that the selection was a foregone conclusion) will no doubt make the transition more difficult for him, for his office, and for clients.

These two illustrations stand in for many other examples of the current lack of independence of the defense function across New York.

Embracing the Paradox

I talked about independence and the Governor's bill when I testified recently at the Legislative Budget hearing. I noted that "protecting against executive, legislative and judicial interference paradoxically requires executive, legislative and judicial approval of the concept of independence and insulation for the defense function."

At one level, the paradox is easily addressed. Each branch of government routinely accepts limitations on its power necessitated by the checks and balances built into our constitutional system. But to accept that none of the branches can overly influence public defense requires recognition of its unique nature as a governmental function.

Public defense lawyers represent individuals against the very government that pays for public defense services. Our job is to protect the interests of people who cannot afford protection. We must be held accountable to do that job right. Conflicts of interest are created if the judiciary has any more control over public defense lawyers than over retained counsel, if the executive has control of the resources available to its adversaries, and if the legislature is in a position to punish public defense providers—individually or collectively—for challenging the propriety of laws operating to the detriment of their clients.

When each branch recognizes that limitations on its power with regard to public defense should be embraced as an embodiment of our constitutional system, justice happens. We want to work with the Executive, and continue working with the Legislature and Judiciary, toward that goal.

Dealing with Other OIDS Details

As this issue of the Backup Center *REPORT* goes to press we are putting the finishing touches on our comments regarding the Governor's Article 7 bill. The bill sets out and constrains in sometimes confusing ways a series of duties and powers for fulfilling the office's responsibilities to monitor and improve public defense services. Our concerns include: the limitation to issues regarding representation in *criminal* cases (ignoring the huge impact that Family Court representation has on public defense budgets and functions); a lack of authority to mandate uniform data (such as the definition of a case) and apply standards; ambiguity as to certain powers and duties; and of course the overarching lack of independence. We will be sharing our analysis with the Governor, the Legislature and others, keeping the defense community apprised as well.

Continuing the Call for Independence

In both its Backup Center capacity and as a member of the Campaign for an Independent Public Defense Commission, NYSDA will, with others, continue to advocate for public defense reform that includes the core principle of independence. Comments decrying the lack of public defense independence in the new bill have already been made by the New York State Bar Association and its Committee on Mandated Representation, NYSACDL, and the Committee for Modern Courts. We hope and assume that the Governor and his staff are listening with open minds. ☺

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Immigration Practice Tips

by Manuel D. Vargas*

Board of Immigration Appeals Issues Two Decisions That Leave Unclear Whether A New York Immigrant Convicted of More Than One Simple Possession Drug Offense Will Be Deemed Subject To Mandatory Deportation As A “Drug Trafficking” Aggravated Felon

On December 13, 2007, the Board of Immigration Appeals (BIA) issued two precedential decisions that together mean that, in cases arising outside the jurisdiction of the Second, Fifth, and Seventh United States Circuit Courts of Appeals, a non-citizen with more than one state drug possession conviction may not be deemed convicted of a “drug trafficking” aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. See *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (hereinafter *Carachuri*) and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007) (hereinafter *Thomas*). These decisions—in which the NYSDA Immigrant Defense Project submitted briefs and participated in oral argument as *amicus curiae*—follow upon the December 2006 decision of the United States Supreme Court in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), in which the Court found that the federal government was wrong to apply the “drug trafficking” aggravated felony label to state simple possession drug offenses that were not felonies under federal law, such as most first-time possession offenses. See *Criminal Defense of Immigrants in State Drug Cases—The Impact of Lopez v. Gonzalez*, *REPORT*, Vol. XXI, No. 5, Nov-Dec 2006, pp. 7-10 (available at www.nysda.org/06_NovDEC_2006REPORT.pdf).

In cases arising in the Second, Fifth, and Seventh Circuits, however, the BIA indicated that it was constrained by federal circuit precedent to find that a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. See *Carachuri*, 24 I&N Dec. at 385-88, 392-93.

Unfortunately, many (although not all) removal proceedings for New York immigrants take place in the Second or Fifth Circuits. This is because the Second Circuit covers removal proceedings that take place within New York State, and because the Fifth Circuit covers

removal proceedings that take place in Louisiana or Texas, where many New York immigrants are moved and detained for removal proceedings after completion of their New York criminal sentences. Therefore, whether a New York second possession offense will be deemed an aggravated felony and make your lawfully admitted immigrant client subject to mandatory deportation remains uncertain. See *REPORT*, Vol. XXI, No. 5, Nov-Dec 2006, pp. 7-10.

For a still-correct practice advisory on criminal defense of immigrants in state drug cases post-*Lopez*, see *REPORT*, Vol. XXI, No. 5, Nov-Dec 2006, pp. 7-10. For relevant excerpts from a practice advisory on defense of immigrants with more than one possession conviction who are already in removal proceedings, see below; the complete advisory is available at www.nysda.org/idp/docs/07_PRACTICEADVISORYCARACHURI.pdf.

PRACTICE ADVISORY:

The Impact of the BIA Decisions in *Matter of Carachuri* and *Matter of Thomas* On Removal Defense of Immigrants with More Than One Drug Possession Conviction

This advisory is divided into the following sections:

- What the BIA decided in *Carachuri* and *Thomas*
- What *Carachuri* means for noncitizens whose cases arise in Circuits other than the 2nd, 5th, and 7th Circuits
- What *Carachuri* means for noncitizens whose cases arise in the 5th Circuit
- What *Carachuri* means for noncitizens whose cases arise in the 2nd Circuit
- Resources

What the BIA decided in *Carachuri* and *Thomas*

One year ago, in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), the Supreme Court decided that a state simple possession drug conviction is generally not a “drug trafficking” aggravated felony if the offense would not be a felony under *federal* law. Therefore, since a conviction for a first-time drug possession offense is generally not a felony under federal law, most noncitizens convicted of a single state drug possession offense—although removable—may be eligible to avoid removal by seeking cancellation of removal, asylum, withholding of removal, and/or naturalization because they are not subject to the aggravated felony bars applicable to these waivers or benefits. See *Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales* (April 12, 2007), available at www.nysda.org/idp/docs/07_PostLopezAdvisoryforRemovalDefense41207.pdf.

Nevertheless, after *Lopez*, the Department of Homeland Security (DHS) has argued that noncitizens with

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more than one possession conviction could be deemed aggravated felons based on dicta in *Lopez* indicating that state drug possession offenses could “counterintuitively” be deemed “drug trafficking” aggravated felonies if the state offense “corresponds” to the federal “recidivism possession” felony offense at 21 U.S.C. § 844(a) (possession of a controlled substance after a prior drug conviction has become final). See *Lopez*, 127 S. Ct. at 630 n.6. Under federal law, a second or subsequent possession offense may be penalized as a recidivist possession felony if notice of the prior conviction has been given and an opportunity to challenge the fact, finality, and validity of the prior conviction has been provided in the criminal case. See 21 U.S.C. § 851. Up until recently, however, the DHS argued that any second state simple possession drug conviction could be transformed into a “drug trafficking” aggravated felony based on a prior conviction for simple possession. In the DHS’ view, it did not matter that the state criminal proceeding did not prove the prior conviction or offer an opportunity equivalent to that under federal law to challenge the fact, finality, and validity of the alleged prior conviction, or even where the prior conviction never came up during the state criminal proceeding.¹

In *Carachuri*, the BIA rejected the DHS’ broad argument and decided that, in the absence of controlling federal court authority finding otherwise, a noncitizen’s state conviction for simple possession of a controlled substance “will not be considered an aggravated felony based on recidivism unless the individual’s status as a recidivist drug offender was either admitted or determined by a judge or jury *in connection with a prosecution for that simple possession offense.*” *Carachuri*, 24 I&N Dec. at 394 (emphasis added). The BIA did not apply this rule in the *Carachuri* case itself—a case that arose under Fifth Circuit law—because it found that it was bound by the contrary Fifth Circuit criminal sentencing decision in *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006) (finding alternative basis for applying sentence enhancement based on prior conviction of an aggravated felony because drug possession conviction at issue was preceded by another conviction and thus “could have been punished” under 21 U.S.C. § 844(a) as a felony). See *Carachuri*, 24 I&N Dec. at 386-88. The BIA did apply this rule in *Thomas*—a decision issued the same day as *Carachuri* but in a case that arose under Eleventh Circuit law—because it found that the Eleventh Circuit has not ruled on this issue. See *Thomas*, 24 I&N Dec. at 421-22.

What *Carachuri* means for noncitizens whose cases arise in circuits other than the 2nd, 5th, and 7th Circuits

A. Conviction not obtained under state recidivist provision

Under *Carachuri* and *Thomas*, Immigration Judges are now bound—at least in cases arising in jurisdictions out-

side the Second, Fifth, and Seventh Circuits (see following sections addressing case law in these circuits)—to find that a noncitizen’s state conviction for **simple possession of a controlled substance is not an aggravated felony based on evidence of a prior drug conviction where the individual’s status as a recidivist drug offender was not admitted or determined by a judge or jury in the state criminal proceedings relating to the second or subsequent conviction at issue.** The BIA majority in *Carachuri* stated:

[T]he purely “hypothetical” approach embraced by the Second, Fifth, and Seventh Circuits (as well as the concurring Board Members) discounts the importance of the respondent’s actual offense . . . in favor of an expansive, and apparently noncategorical, inquiry into his larger criminal history. In essence, the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent’s criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be “an offense” that could have been prosecuted as a Federal felony. . . . Without a showing of recidivism within the confines of the State prosecution, we conclude that the State offense cannot be said to proscribe conduct punishable as a felony under Federal law.

Carachuri, 24 I&N Dec. at 393.

Essentially, this means that, in most jurisdictions, a noncitizen’s second or subsequent state possession conviction should not be deemed an aggravated felony if the state did not charge and prosecute the individual as a recidivist.

B. Conviction obtained under state recidivist provision

If an individual was charged and convicted as a recidivist under state law, then, in the majority of jurisdictions, the question is to what extent do the state’s recidivist provisions correspond to those under federal law. See 21 U.S.C. §§ 844(a) and 851. Under federal law, a second or subsequent possession offense may not be penalized as a “recidivism possession” felony unless the offense was committed after the alleged prior conviction has become final, see 21 U.S.C. § 844(a), and the U.S. Attorney before trial, or before entry of a guilty plea, has filed an information with the court stating in writing the previous conviction(s) to be relied upon, and the defendant has had an opportunity to challenge the fact, finality, and validity of the prior conviction(s) in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. See 21 U.S.C. § 851. The BIA indicates that, at a minimum, the state must have provided the defendant with notice and an opportunity to be

heard on whether recidivist punishment is proper in order for a particular crime to be considered a “recidivist” offense. See *Carachuri*, 24 I&N Dec. at 391. The BIA, however, goes on to state the following:

We do not now decide whether State criminal procedures must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with 21 U.S.C. § 851(c). Nor are we now concerned with the timing of notice, or with the burdens and standards of proof applicable to a defendant’s challenge to his status as a recidivist. We also reserve the question whether facts about the nature, timing, or finality of prior convictions must be established categorically or otherwise.

Carachuri, 24 I&N Dec. at 394 n.10 (citation omitted).

For cases arising in the First, Third, and Ninth Circuits, one should also consider the relevant favorable precedents in those circuits. The First and Third Circuits found, prior to *Carachuri*, that second or subsequent state drug possession convictions should not be deemed to correspond to a federal felony under § 844(a) in the absence of some notice and proof in the state criminal proceedings of the prior drug conviction. See *Berhe v. Gonzales*, 464 F.3d 74, 85–86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137–38 (3d Cir. 2001). The Ninth Circuit has gone further—at least in the immigration context—and ruled that no second or subsequent state drug possession conviction should be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement. See *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004).²

What *Carachuri* means for noncitizens whose cases arise in the 5th Circuit

In *Carachuri*, the BIA held that it is bound in cases arising in the Fifth Circuit to find that an individual’s second or subsequent state possession offense may be deemed an aggravated felony even where the individual was not charged and convicted as a recidivist. See *Carachuri*, 24 I&N Dec. at 386-88 (citing *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005)). Nevertheless, noncitizens and their lawyers in the Fifth Circuit should raise any available arguments that second or subsequent possession offenses are not aggravated felonies. (For arguments to raise, see practice materials referenced in Resources section at the end of this advisory). Even if Immigration Judges and the BIA reject these arguments based on *Sanchez-Villalobos*, they should be raised to preserve them for Fifth Circuit review or to benefit from any future Fifth Circuit decision in another case making clear that *Sanchez-Villalobos* is not binding precedent on this issue. In fact, the multiple possession issue is raised in at

least three cases currently pending before the Fifth Circuit in the criminal sentencing context,³ and *Carachuri* itself may be appealed to the Fifth Circuit.

Noncitizens and their lawyers who have cases pending at the Fifth Circuit should argue that *Sanchez-Villalobos* is no longer binding, if it ever was, on resolution of multiple possession issues in the Circuit. First, *Sanchez-Villalobos* was decided pre-*Lopez*, under a standard rejected by the Supreme Court in *Lopez*.⁴ Furthermore, to the extent *Sanchez-Villalobos* applied the correct federal felony standard, it applied it in a manner inconsistent with *Lopez*. See *supra* Practice Advisory: *Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales*. As the BIA stated, “[i]t is certainly reasonable to believe that the Fifth Circuit may want to reexamine its law in the wake of *Lopez v. Gonzales*. Indeed, . . . we believe *Lopez* points strongly toward a different construction of the statute in ‘recidivist possession’ cases.” *Carachuri*, 24 I&N Dec. at 387. In addition, *Sanchez-Villalobos* was a sentencing decision that reached its determination on the two possession issue in a cursory and conclusory way, unlike the more thorough and complete analysis undertaken by the First and Third Circuits in *Berhe* and *Steele* in the immigration context. See *Carachuri*, 24 I&N Dec. at 392 (noting that the *Sanchez-Villalobos* court did not “address[] or resolve[] the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal ‘offense’ of recidivist possession when the Federal offense itself is compounded out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards within the CSA”).

Finally, and significantly, it should be pointed out that the Fifth Circuit itself has not treated *Sanchez-Villalobos* as binding precedent on the multiple possession issue. Even before *Lopez*, the Fifth Circuit questioned the significance of its alternative holding in *Sanchez-Villalobos* that a second state possession offense could be an aggravated felony under the federal standard. See *Smith v. Gonzales*, 468 F.3d 272, 276 n.3 (5th Cir. 2006) (“The effect of Part B [the alternative basis for affirmance] in *Sanchez-Villalobos* is uncertain”). In addition, after *Lopez* was decided, the Fifth Circuit rejected a government motion to dismiss that argued that *Lopez* requires that all subsequent possession convictions be treated as aggravated felonies. See *Semedo v. Gonzales*, No. 06-61102 (5th Cir. 2007). In fact, despite *Sanchez-Villalobos*, the Fifth Circuit not only rejected this request but it granted the petitioner a stay of removal. Moreover, after the government switched tactics and moved for remand in another Fifth Circuit case involving an unpublished Board decision that had relied on *Sanchez-Villalobos*, the Fifth Circuit ordered remand to the Board for reconsideration in light of *Lopez*. See *Bharti v. Gonzales*, No. 06-60383 (5th Cir. 2007). In this case, the government itself had taken the position that the Fifth Circuit has not

addressed the issue at hand in this case. The government's papers to the Fifth Circuit stated:

[T]he Board should be permitted, in the first instance, to apply its expertise to this case in light of the Supreme Court's analysis. In particular, remand is appropriate for the Board to determine whether in order for Petitioner's second possession offense to qualify as an aggravated felony, he needed to have been charged under a recidivist statute, or the first conviction needed to have been charged or proven during the criminal proceedings for the subsequent offense. *See* 21 U.S.C. § 851; *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006). That question has been raised by Petitioner here in his opening brief (as well as in the brief of amici curiae), but does not appear to have been addressed by either the Board or this Court in the context of immigration proceedings.

Respondents' Opposition To Motion of Amici Curiae For Leave to Submit Amicus Brief, *Bharti v. Gonzales*, attached to Brief of Amicus Curiae New York State Defenders Association for Respondent before the BIA, available at www.nysda.org/idp/docs/07_MatterofC-A-BIAAmicusBriefFinalRedacted.pdf. In fact, despite *Sanchez-Villalobos*, the Fifth Circuit has also recently remanded a criminal sentencing case involving two prior possession convictions for reconsideration of an aggravated felony sentence enhancement in light of *Lopez*, *see United States v. Arevalo-Sanchez*, 2006 WL 870362 (5th Cir. Mar. 21, 2007) (unpublished) ("In light of *Lopez*, *Arevalo-Sanchez's* argument has merit"), and flatly rejected the government's arguments in another criminal sentencing case, *see United States v. Galvan-Lozano*, No. 06-41297, 2007 U.S. App. LEXIS 21849, at *3-4 (5th Cir. 2007) (unpublished) ("The government provides no authority . . . to support its assertion that a court of appeals may affirm [an aggravated felony sentencing enhancement] based on drug convictions, which were not individually aggravated felonies, on the ground that the convictions together are the equivalent of a recidivist possession conviction . . .").

Thus, noncitizens and their lawyers should argue that, given *Lopez*, *Sanchez-Villalobos* is no longer good law in the Fifth Circuit. If an individual was not charged and convicted as a recidivist under state law, he or she should argue for application, in the interest of uniformity, of the rule of *Carachuri* to find that the conviction is not an aggravated felony. If an individual was charged and convicted as a recidivist under state law, then the individual should make any available arguments that the state recidivist provisions do not correspond to those under federal law. *See* 21 U.S.C. §§ 844(a) and 851.

What *Carachuri* means for noncitizens whose cases arise in the 2nd Circuit

In *Carachuri*, the BIA appears to imply in dicta that it

would be bound also in cases arising in the Second Circuit to find that an individual's second or subsequent state possession offense may be deemed an aggravated felony even where the individual was not charged and convicted as a recidivist. *See Carachuri*, 24 I&N Dec. at 392-393 (citing *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002)). The decision does not note that the Second Circuit expressly stated in *Simpson* that its holding was not binding beyond the criminal sentencing context in which the issue arose in that case. *See Simpson*, 319 F.3d at 86 n.7 ("We offer no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than the Guidelines"). In any event, even if *Simpson* were binding in the immigration context, noncitizens and their lawyers in cases arising in the Second Circuit should point out that this conclusion in *Carachuri* was dicta and then raise any available arguments that second or subsequent possession offenses are not aggravated felonies. (For arguments to raise, see practice materials listed in the Resources section at the end of this advisory). Even if Immigration Judges and the BIA reject these arguments based on *Simpson*, they should be raised to preserve them for Second Circuit review or to benefit from any future Second Circuit decision in another case making clear that *Simpson* is not binding precedent on this issue. In fact, the multiple possession issue is raised in at least one case currently being briefed before the Second Circuit. *See Martinez v. Gonzales*, No. 07-3031.

Noncitizens and their lawyers who have cases pending at the Second Circuit (or even those with cases still pending before the agency given that any finding in *Carachuri* with respect to Second Circuit law was dicta) should also argue that *Simpson* was decided pre-*Lopez*, under a standard rejected by the Supreme Court in *Lopez*.⁵ Furthermore, to the extent *Simpson* applied the correct federal felony standard, it applied it in a manner inconsistent with *Lopez*. *See supra Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales*. In addition, *Simpson* was a sentencing decision that reached its determination on the two possession issue in a cursory and conclusory way, unlike the more thorough and complete analysis undertaken by the First and Third Circuits in *Berhe* and *Steele* in the immigration context. *See Carachuri*, 24 I&N Dec. at 392 (noting that the *Simpson* court did not "address[] or resolve[] the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal 'offense' of recidivist possession when the Federal offense itself is compounded out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards within the CSA").

Finally, and significantly, the Second Circuit itself has not treated *Simpson* as binding precedent on the multiple possession issue in the immigration context. In fact, in a subsequent immigration case, the Second Circuit explicitly

chose not to resolve “this complex issue” in a pro se case lacking full briefing. See *Durant v. INS*, 393 F.3d 113, 115 (2d Cir. 2004), amended by *Durant v. INS*, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. Dec. 16, 2004) (“We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . Accordingly, we do not address [the issue]”). And, in post-*Lopez* cases raising the multiple possession issue, the government itself has sought remand in at least one case in which the Board in an unpublished opinion had relied on *Simpson*. The Second Circuit’s remand order, stipulated to by the government, remands the case to the Board for consideration “in light of *Lopez*,” and states that the Board should consider the fact that the immigrant “was not charged under a recidivist statute.” *Powell v. Gonzales*, No. 06-5315 (2d Cir. Feb. 7, 2007); see also *Martinez v. Ridge*, No. 05-3189 (2d Cir. May 8, 2007); *Sorbo v. Ashcroft*, No. 04-1215 (2d Cir. Sept. 10, 2007) (remand orders in other multiple conviction cases at the government’s request to provide the agency with an opportunity to reconsider decisions in light of *Lopez*).

Thus, noncitizens and their lawyers should argue that *Simpson* is not the law of the Second Circuit in the immigration context and, even if it were, that it is no longer good law after *Lopez*. If an individual was not charged and convicted as a recidivist under state law, he or she should argue for application, in the interest of uniformity, of the rule of *Carachuri* to find that the conviction is not an aggravated felony. If an individual was charged and convicted as a recidivist under state law, then the individual should make any available arguments that the state recidivist provisions do not correspond to those under federal law. See 21 U.S.C. §§ 844(a) and 851.

Resources

Those whose cases are not fully resolved by the BIA decisions in *Carachuri* and *Thomas*—e.g., those whose cases arise in the Second, Fifth, and Seventh Circuits, or those whose cases involve convictions under state recidivist provisions that may or may not correspond to those under federal law—may refer to prior Immigrant Defense Project resource materials for additional arguments to challenge continuing or future DHS charges that an individual with more than one simple possession drug conviction has been convicted of an aggravated felony. Please note, however, that these resource materials have not yet been updated to include the impact of the BIA decisions in *Carachuri* and *Thomas*. These resources include:

- *Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales* (April 12, 2007), available at www.nysda.org/idp/docs/07_PostLopezAdvisoryforRemovalDefense41207.pdf (see section entitled “What if my client has more than one state drug possession conviction?” on pages 6-9).

- *Pro Se Advisory: Immigrants With Multiple Drug Possession Convictions: Instructions for Challenging Whether You Have Been Convicted of an Aggravated Felony* (Oct. 12, 2007), available at www.nysda.org/idp/docs/07_PracticeAdvisoryMultipleDrugPossession_NotanAF_Advisory_Final1017.pdf. ↻

Endnotes

1. As the BIA noted, the DHS modified its position after oral argument in *Carachuri* to state that “a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to ‘recidivist possession’ unless the State actually used those laws to prosecute the respondent.” *Carachuri*, 24 I&N Dec. at 391 (emphasis added).

2. As the BIA points out, the rationale for the Ninth Circuit interpretation in *Oliveira-Ferreira* may be affected by the decision in a criminal sentencing case currently pending before the Supreme Court and scheduled to be argued on January 15, 2008. See *Carachuri*, 24 I&N Dec. at 386 n.3 (citing *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), cert. granted, 128 S. Ct. 33 (2007) (No. 06-1646)).

3. *United States v. Rodriguez de Leon*, No. 07-50347 (briefing completed on 9/10/07); *United States v. Gutierrez-Quintanilla*, No. 07-40494 (briefing completed on 11/2/07); and *United States v. Arevalo-Sanchez*, No. 07-40684 (briefing completed on 12/12/07).

4. *Sanchez-Villalobos* applied a state or federal felony approach to drug aggravated felony determinations, see *Sanchez-Villalobos*, 412 F.3d at 576 (offense must “be a felony under either state or federal law”), that *Lopez* rejected when it adopted a federal felony only standard. See *Lopez*, 127 S. Ct. at 629-633.

5. *Simpson* applied a state or federal felony approach to drug aggravated felony determinations, see *Simpson*, 319 F.3d at 85 (offense is an “aggravated felony” when it “can be classified as a felony under either state or federal law”), that *Lopez* rejected when it adopted a federal felony only standard. See *Lopez*, 127 S. Ct. at 629-633.

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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

Prior Convictions (Sentencing) PRC; 295(25)

Sentencing (Enhancement) SEN; 345(32)

Logan v United States, 552 US ___, 128 Sct 475 (2007)

The petitioner pleaded guilty to being a felon in possession of a firearm (18 USC 922(g)(1)), and received an enhanced sentence of 15 years under Armed Career Criminal Act of 1984 (18 USC 924(e)(1)) (ACCA) based on three state misdemeanor battery convictions. For ACCA sentence-enhancement purposes, a prior conviction may be disregarded if the conviction "has been expunged, or set aside," or the offender "has been pardoned or has had civil rights restored." 18 USC 921(a)(20). The petitioner argued that the convictions should have been disregarded because although he did not lose his civil rights, rights retained are functionally equivalent to rights revoked but later restored. The district court rejected the argument and the circuit court affirmed on appeal.

Holding: The ordinary meaning of the phrase "civil rights restored" shows that the ACCA exception does not apply where the defendant's civil rights had not been taken away and later given back. Reading the phrase along with the other ACCA exceptions supports this conclusion as the other exceptions all describe governmental actions that relieve the defendant of all or some of the consequences of his conviction. This conclusion is further supported by a reading of a related provision that prohibits persons convicted of domestic violence misdemeanors from possessing firearms. See 18 USC 922(g)(9), 921(a)(33)(B)(ii). The provision, which Congress passed 10 years after 921(a)(20), includes the same list of exceptions as 921(a)(20) and specifies that the phrase "civil rights restored" only applies "if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense." 18 USC 921(a)(33)(B)(ii). The statutory language in 921(a)(20) and 921(a)(33) make clear that Congress did not intend to include a retention-of-rights exemption. Judgment affirmed.

Sentencing (Enhancement) SEN; 345(32)

Weapons (General) WEA; 385(22)

Watson v United States, 552 US ___, 128 Sct 579 (2007)

The petitioner told a government informant he wanted to buy a gun and the informant suggested payment in narcotics. Later, the petitioner purchased a pistol from an undercover agent and paid with narcotics. The petitioner pleaded guilty to distribution of a controlled substance and use of a firearm during a drug trafficking offense, 18 USC 924(c)(1)(A), but reserved the right to challenge the factual basis for the firearm offense and its enhanced sentence. The circuit court affirmed the convictions on appeal.

Holding: By trading his drugs for a gun, the petitioner did not "use" a firearm during a drug trafficking crime within the meaning of 18 USC 924(c)(1)(A). The term "use" is not defined by statute. The Court in *Smith v United States* (508 US 223 [1993]) held that in the reverse situation, i.e. exchanging firearms for drugs, the ordinary meaning of "use" would apply to the seller. However, mere possession of a firearm near the scene of drug trafficking does not qualify as "use" as that term is commonly understood. See *Bailey v United States*, 516 US 137 (1995). The flow of commerce originated from the petitioner, so he "used" the drugs to acquire a gun, but no definition of "use" (aside from the government's argument) would equate receipt of the gun with using the gun. See *United States v Stewart*, 246 F3d 728, 731; *United States v Westmoreland*, 122 F3d 431, 436. Judgment reversed.

Concurrence: [Ginsburg, J] For purposes of the 18 USC 924(c)(1) enhancement, there is no distinction between trading a gun for drugs and trading drugs for a gun. The Court wrongly decided *Smith*; "use" does not apply to a bartering transaction, but to use of a firearm as a weapon. *Smith* should be overruled.

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

Sentencing (Guidelines) SEN; 345(39)

Gall v United States, 552 US ___, 128 Sct 586 (2007)

The petitioner was involved in a conspiracy to sell ecstasy while in college. Several months later he withdrew from the conspiracy and stopped using drugs. He graduated, started his own business, and remained drug-free. Nearly four years later, he was indicted for federal drug trafficking. The petitioner voluntarily returned, surrendered, and pleaded guilty. The presentence report recommended a sentence of 30 to 37 months in prison, but the court sentenced the petitioner to three years' probation. In support of its decision, the court cited the petitioner's explicit withdrawal from the conspiracy, post-offense conduct, including starting a successful business, family support, lack of criminal history, and age at the time of the offense. The Court of Appeals reversed.

US Supreme Court *continued*

Holding: Appellate courts must apply an abuse-of-discretion standard of review when reviewing sentencing decisions. Although the Sentencing Guidelines are advisory, *see United States v Booker* (543 US 220 [2005]), the district court should use the Guidelines as a starting point. Then the court should weigh all the factors under 18 USC 3553(a) and not presume the Guideline range is reasonable. When choosing a sentence outside the range, the court must ensure that the justification is sufficiently compelling to support the degree of the variance and provide an explanation for the chosen sentence. The appellate court must determine whether the district court committed a significant procedural error, such as failing to calculate or properly calculate the Guidelines range, considering the Guidelines as mandatory, not considering the factors in 18 USC 3553(a), basing a decision on erroneous facts, or not providing an adequate explanation for the sentence. If a sentence falls within the Guidelines range, the appellate court may presume that the sentence is reasonable, but if the sentence falls outside the range, the court cannot presume that it is unreasonable. *See Rita v United States*, 551 US __ (2007). No procedural errors occurred in this case. The trial judge gave appropriate weight to the seriousness of the offense and appropriately considered the need to avoid unwarranted sentencing disparities. The court of appeals failed to give the requisite deference to the sentencing judge's discretion. Judgment reversed.

Concurrence: [Scalia, J] Despite the flaws in the substantive reasonableness review, the statutory holding in *Rita* is binding. The highly deferential standard announced in this case will mean fewer unconstitutional sentences than the proportionality standard employed by the appellate court.

Concurrence: [Souter, J] Congress should enact new sentencing guidelines to end the tension between the need for consistency and the right to have a jury determine facts needed to support upper range sentencing.

Dissent: [Thomas, J] The sentencing court committed statutory error when it departed below the applicable Guidelines range. *See Kimbrough v United States*, 552 US __ (2007) (Thomas, J., dissenting).

Dissent: [Alito, J] The meaning of "advisory" guidelines or "reasonableness" review has not been elucidated since *Booker*. *Booker* should be read as requiring sentencing courts to give some significant weight to the policy decisions embodied in the Guidelines.

Kimbrough v United States, 552 US __, 128 Sct 558 (2007)

The petitioner pleaded guilty to conspiracy to distribute crack and powder cocaine, possession with intent to distribute more than 50 grams of crack cocaine, possession with intent to distribute powder cocaine, and weapons possession. The Guidelines range was 19 to 22.5 years. The court found the range was "greater than necessary" to accomplish the purposes of sentencing, *see* 18 USC 3553(a), and noted the "disproportionate and unjust effect that crack cocaine guidelines have in sentencing." Finding the statutory minimum sentence sufficient to accomplish the goals of sentencing, the court sentenced him to 15 years in prison and five years of supervised release. The court of appeals reversed, holding that a sentence "outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses."

Holding: The district court's sentencing determination was reasonable and it did not abuse its discretion by finding the crack/cocaine sentencing disparity excessive. Under the Guidelines, the crack and powder cocaine 100-to-1 ratio yielded sentences for crack offenses three to six times longer than those for powder offenses involving equal amounts of drugs. *See United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy*, at iv (May 2002). Unlike its usual approach, the Sentencing Commission did not take into account empirical data and national experience when setting the Guidelines for powder and crack cocaine offenses. A recent Guidelines amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder. Because of the sentencing court's unique access to facts and witnesses, it was in the best position to evaluate all the sentencing factors and departures. It was not an abuse of discretion for the district court to conclude that the crack/powder disparity resulted in a sentence "greater than necessary" to achieve the purposes of 18 USC 3553(a). Here, the 180-month sentence was reasonable, since this was an ordinary drug trafficking matter, the petitioner had no prior felony convictions, received an honorable discharge from the Marine Corps, and was steadily employed. Judgment reversed.

Concurrence: [Scalia, J] The sentencing judge had the freedom to reasonably apply 18 USC 3553(a) factors and to reject the recommendations in the Guidelines after giving them due consideration.

Dissent: [Thomas, J] The Court in *United States v Booker* (543 US 220 [2005]) provided too broad a remedy for the constitutional error presented and now the Court must answer questions on administering a sentencing scheme based on policy decisions rather than law. Section 3553(b), which made the Guidelines mandatory, ought to be applied as written. Thus, the district court erred in

Constitutional Law (United States Generally)	CON; 82(55)
Sentencing (Guidelines)	SEN; 345(39)

US Supreme Court *continued*

reducing the petitioner’s sentence below the Guidelines range.

Dissent: [Alito, J] Under *Booker*, a sentencing judge still must give significant weight to policy decisions embodied in the Guidelines. However, *Booker* prohibited the appellate courts from treating the policy decisions as binding. The case should be remanded for further consideration of those policy decisions.

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

Death Penalty (General) (Penalty Phase) DEP; 100(80) (120)

Arave v Hoffman, 552 US ___, 128 Sct 749 (2008)

The respondent, who was convicted of murder and sentenced to death, sought federal habeas corpus relief claiming ineffective assistance of counsel during plea bargaining and sentencing. The district court granted habeas relief as to the sentencing claim, but denied the plea bargaining claim, and ordered the state to resentence the respondent. The court of appeals affirmed the sentencing decision, but reversed the decision regarding the plea bargaining claim, and ordered the state to release the respondent or offer him a plea agreement with the same material terms as the original plea offer.

Holding: The respondent moved to withdraw his ineffectiveness claim related to the plea negotiations and asked that his appeal be dismissed so that he can be resentenced. The state agreed that the motion should be granted. The respondent’s motion is granted and because the plea bargaining claim is moot, the circuit court’s judgment regarding that claim is vacated. *See Deakins v Monaghan*, 484 US 193, 200-201 (1988). Judgment vacated as to the plea bargaining claim and matter remanded for dismissal of the claim with prejudice.

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

Wright v Van Patten, 552 US ___, 128 Sct 743 (2008)

When the respondent entered a no-contest plea to first-degree reckless homicide, his attorney was not physically present, but participated by speaker phone. The court imposed the maximum sentence of 25 years in prison. The state court of appeals denied the respondent’s motion to withdraw his plea based on his attorney’s absence, concluding that the attorney’s performance satisfied *Strickland v Washington* (466 US 668 [1984]). The federal district court denied habeas relief, but the court of appeals reversed, applying the standard set forth in

United States v Cronin (466 US 648 [1984]). The Supreme Court remanded for consideration in light of *Carey v Musladin* (549 US ___ [2006]), and the court of appeals reaffirmed.

Holding: The respondent is not entitled to relief under 28 USC 2254. Section 2254(d)(1) bars relief on a claim that was adjudicated on the merits in state court unless the decision is contrary to or involves an unreasonable application of clearly established federal law as determined by this Court. The appearance of defense counsel by speaker phone at a plea proceeding presents a novel question. Even if the standard in *Cronin*, not *Strickland*, applies in this case, “[t]he question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance by counsel that an inquiry into its effects would not be worth the time.” *United States v Gonzalez-Lopez*, 548 US __ (2006) (slip op at 7). This Court’s decisions do not provide a clear answer to that question. Therefore, it cannot be said that the state court unreasonably applied clearly established federal law. “Our own consideration of the merits of telephone practice, however, is for another day” Judgment reversed.

Concurrence: [Stevens, J] *Cronin* applies when the defendant is denied the presence of counsel at a critical stage in the proceedings; however, *Cronin* did not specify that counsel must be present in open court. Therefore, the presence of counsel in open court is not clearly established. Because the state court did not unreasonably apply clearly established federal law, the judgment must be reversed. The result may have been different if the Court were presented with this issue on direct review.

New York State Court of Appeals

Jurisdiction (General) JSD; 227(3)

Venue (General) VEN; 380(20)

People v Zimmerman, 9 NY3d 421 (2007)

While the state Attorney General’s office (AG) was conducting an antitrust investigation into activities by several companies, including Federated Department Stores, the AG and Federated signed a confidentiality agreement stating that disputes regarding document discovery would be brought in New York County Supreme Court. During the investigation, the AG questioned the defendant, former Chairman and CEO of Federated, in Ohio. The AG later notified Federated and the other companies that it was filing suit against them, but the parties settled before the suit was filed. The AG also started a grand jury investigation in New York County regarding the defendant’s alleged perjury during his examination. The defendant was indicted for first-degree perjury. The

NY Court of Appeals *continued*

trial court granted the defendant's motion to dismiss, concluding that New York County did not have jurisdiction under the particular effect venue provision set forth in CPL 20.40(2)(c) and dismissed the indictment. The appellate division affirmed.

Holding: Since New York County did not suffer a particular effect as the result of the defendant's perjury through a "concrete and identifiable injury" to its governmental processes or the welfare of its community, venue in that county is not authorized. *See Matter of Taub v Altman*, 3 NY3d 30. The prosecution failed to present to the grand jury evidence that the defendant allegedly testified falsely in Ohio with the intent or knowledge that it "would have a material and harmful effect on New York County's judicial processes." *See Matter of Steingut v Gold*, 42 NY2d 311, 317. Order affirmed.

Dissent: [Read, J] The legislative intent of CPL 20.40(2) was to "'prevent a miscarriage of justice' owing to county jurisdictional 'limits prescribed by the common law' (*People v Licenziata*, 199 AD [106] at 111)" Recognizing jurisdiction within the state but not an individual county thwarts the purpose of the statute. The evidence supports the grand jury's finding of particular effect jurisdiction.

Appeals and Writs (Scope and Extent of Review)	APP; 25(90)
Evidence (Sufficiency) (Weight)	EVI; 155(130) (135)
Homicide (Murder [Definition] [Intent])	HMC; 185(40[d] [p])

People v Danielson, 9 NY3d 342 (2007)

In one case, the defendant Danielson and two others were accused of shooting the decedent. At trial there was conflicting testimony about the shooting. The jury acquitted him of intentional murder, but convicted him of depraved indifference murder. The appellate division affirmed on appeal. In another case, the defendant Pasley was accused of taking the decedent's chain and slashing his throat, leaving him to bleed to death. Pasley asserted that he acted in self-defense. The jury acquitted him of first-degree and second-degree intentional murder, but convicted him of depraved indifference murder. The appellate division affirmed the trial court's denial of Pasley's CPL 330.30 motion, in which he argued that the evidence supported only an intentional murder theory, and denied his appellate argument that the evidence only supported a theory of intentional or reckless murder. Neither defendant preserved a challenge to the legal sufficiency of his conviction.

Holding: The appellate division must conduct a weight of the evidence review if the defendant requests it. *See* CPL 470.15[5]; *People v Romero*, 7 NY3d 633, 636. In conducting that review, if the court concludes that acquittal would not have been unreasonable, it must "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions." This review necessarily includes consideration of whether the credible testimony proves the elements of the crime beyond a reasonable doubt. In Danielson's case, while the appellate division mistakenly concluded that an element-based review was unnecessary, it did conduct a weight of the evidence review that included considering the credible evidence, conflicting testimony and inferences that could be drawn from the evidence in light of the elements charged at trial. However, in Pasley's case, the appellate division considered witness credibility, but did not consider conflicting testimony and conflicting inferences in light of the elements charged at trial. Judgment affirmed in *Danielson*; judgment reversed and matter remanded in *Pasley* for a weight of the evidence review.

Jurisdiction (General) JSD; 227(3)

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

People v Cuadrado, 9 NY3d 362 (2007)

The defendant was indicted for murder, attempted robbery, and criminal possession of a weapon. Later he agreed to plead guilty to a superior court information alleging first-degree assault, among other crimes, and he signed a waiver of indictment to implement the agreement. The prosecution now concedes that the waiver of indictment and plea were invalid. *See* NY Const, art I, § 6; *People v Boston*, 75 NY2d 585. In his direct appeal, the defendant did not challenge the validity of the plea or waiver of indictment. Twelve years later, he filed a CPL 440.10 motion to vacate his conviction arguing that his waiver of indictment was invalid. The trial court granted the motion, but the appellate division reversed on appeal.

Holding: Because the defendant unjustifiably failed to raise this issue on appeal, he is prohibited from raising it in a CPL 440.10 motion. Although defendants are allowed to raise jurisdictional defects in CPL 440.10 motions, courts must deny such motions when the defendant could have raised the issue on direct appeal. *See* CPL 440.10(2)(c). The Legislature had the authority to reasonably limit this avenue of post-conviction review, so long as the defendant had a fair opportunity to vindicate his rights. Allowing a defendant to challenge defects that could have been raised on direct appeal would be an invitation to abuse. Judgment affirmed.

NY Court of Appeals *continued*

Constitutional Law (New York State Generally) CON; 82(25)

Juries and Jury Trials (Constitution—Right to) (General) JRY; 225(20) (37)

People v Gajadhar, 9 NY3d 438 (2007)

The defendant was charged with intentional and felony murder and other offenses. The case was tried before a 12-member jury and several alternate jurors. At the close of evidence, defense counsel advised the court that the defendant would not consent to juror substitutions once deliberations began, so the court dismissed the alternate jurors. On the third day of deliberations a juror was hospitalized. The defendant signed a written waiver agreeing to deliberations by the remaining 11 jurors, which the court approved. The defendant was convicted of second-degree felony murder and first-degree attempted robbery. The appellate division affirmed the conviction.

Holding: Article I, § 2 of the New York State constitution permits a defendant to consent to a deliberating jury of less than 12 people if the explicit procedures set forth in that section are followed. In 1846, the state constitution was amended to allow parties in civil cases to waive a jury trial or modify the number of jurors, but that amendment did not permit defendants in criminal cases to waive the 12-person jury. *See Cancemi v People*, 18 NY 128. In 1938, the state constitution was amended to allow (non-capital) criminal defendants to waive the right to a jury trial “by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.” 1938 NY Const, art I, § 2. Because a criminal defendant has the right to waive a jury entirely and seek a bench trial, if a juror becomes unavailable after deliberations have started and there are no alternate jurors that can be substituted, the defendant should be permitted to request that the case be decided by an 11-member jury. A knowing, voluntary, and intelligent waiver of this right cannot be challenged on appeal. *See People v Henriquez*, 3 NY3d 210, 216-217. Judgment affirmed.

Dissent: [Ciparick, J] The language in Article I, § 2 does not refer to the waiver of a single juror and the constitutional (NY Const, art VI, § 18) and statutory (CPL 270.05 [1]) requirements that a jury in a felony case consist of 12 persons are not waivable.

Double Jeopardy (Res Judicata) DBJ; 125(32)

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

Matter of Josey v Goord, 9 NY3d 386 (2007)

After a Tier III disciplinary hearing, the petitioner was found guilty of violating inmate rules prohibiting assault, fighting, and possession of a weapon, and received a penalty of 24 months in the Special Housing Unit (SHU) and a loss of privileges. A year later, the petitioner pleaded guilty to second-degree manslaughter in connection with the same incident. The respondent New York State Department of Correctional Services (DOCS) then issued another misbehavior report, charging the petitioner with violating Disciplinary Rule 1.00 based on his criminal conviction. The petitioner was found guilty and received additional penalties. The petitioner filed an article 78 petition claiming that res judicata barred the later Tier III hearing. The trial court denied the petition and the appellate division affirmed on appeal.

Holding: Res judicata does not bar DOCS from disciplining an inmate for a Penal Law conviction even if it already disciplined the inmate for violating disciplinary rules stemming from the same conduct. In deciding whether to apply res judicata to administrative decisions, courts must determine whether doing so is consistent with the function of the administrative agency involved, the necessities of the case, and the nature of the power being exercised. *See Matter of Venes v Community School Bd of Dist 26*, 43 NY2d 520, 524. In this situation, it would be inconsistent with the necessities of the case and the nature of DOCS’s functions to apply res judicata to the later disciplinary action. Disciplinary Rule 1.00 specifically authorizes DOCS to sanction an inmate for a Penal Law conviction and other disciplinary rule violations that arise from the same incident. *See 7 NYCRR 270.2[A]*. Disciplinary hearings must be conducted within a short time frame (*see 7 NYCRR 251-5.1*), and are needed to help maintain order, which is a legitimate penological objective. The interests of prison security justified an additional administrative proceeding after a criminal conviction. *See People v Vasquez*, 89 NY2d 521, 529 *cert den sub nom Cordero v Lalor*, 522 US 846 (1997). Order affirmed.

Appeals and Writs (Question of Law and Fact) (Scope and Extent of Review) APP; 25(75) (90)

People v Allen, No. 45, 1/10/2008

Holding: The record supported the lower courts’ determinations that the police had both reasonable suspicion and a common law right to inquire. Since these were mixed questions of law and fact and the record supports the determinations, they are beyond review by this court. *See People v DeBour*, 40 NY2d 210. Order affirmed.

First Department

Juveniles (Disposition) JUV; 230(40) (60) (90) (130)
 (Hearings) (Parental
 Rights) (Right to
 Counsel)

Alix A. v Erika H., 45 AD3d 394, 845 NYS2d 306
 (1st Dept 2007)

Holding: The court erred in transferring custody to the petitioner father without proper notice to the respondent mother (*see Matter of Fisk v Fisk*, 274 AD2d 691), without a hearing with the opportunity to present evidence and call and cross-examine witnesses (*see Matter of Edwin G. v Patricia E.*, 209 AD2d 351), and while the respondent was not represented by counsel. *See Matter of Williams v Bentley*, 26 AD3d 441. The court's actions deprived the respondent of her fundamental rights. The respondent was not served with the petition, which alleged that she violated an order of protection, until she was brought to the courtroom on the day the petition was filed. While the legislature has given family court judges flexibility in dealing with complicated and urgent issues, judges must honor procedural requirements and litigants' due process rights. The court erred in finding a violation of the order of protection, extending the order for five years, and enlarging it to encompass the subject child. The court lacked jurisdiction to act permanently on the petition on the day it was filed, before the respondent was properly served. *See Family Court Act 826*. Order reversed and matter remanded for the proper filings and an expedited hearing with all parties and their chosen or assigned counsel present. (Family Ct, Bronx Co [Martinez-Perez, JJ])

Juveniles (Abuse) JUV; 230(3)

Matter of Sephaniah A., 45 AD3d 386, 845 NYS2d 301
 (1st Dept 2007)

Holding: The fact-finding determination that the respondent mother derivatively abused her son is supported by a preponderance of the evidence. The respondent did not provide a reasonable explanation for injuries to her other children, including burns found on one child and numerous unexplained injuries to that child and another child, which provided the basis for prior abuse and neglect findings. *See Family Court Act 1046(a)(i)*. The respondent's general acceptance of responsibility is not dispositive and her prior failure to bring the child in for medical treatment after allegedly discovering the injuries and her affirmative lies about the circumstances of the injury are noteworthy. Given the seriousness of the injuries from the prior abuse, it does not matter that it occurred more than two years earlier. "Under these circumstances, the court properly concluded that respon-

dent continued to have defective judgment regarding her duties as a parent, and thereby posed a risk to the subject child (*see Matter of Umer K.*, 257 AD2d 195, 199 [1999])." The appeal with regard to the dispositional order is moot because the terms of the order have expired and the child has been discharged to his father. *See Matter of Clifford J.*, 238 AD2d 244. Order affirmed with regard to the fact-finding determination and appeal otherwise dismissed as moot. (Family Ct, New York Co [Schechter, JJ])

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

People v Austin, 46 AD3d 195, 845 NYS2d 315
 (1st Dept 2007)

The defendant, an African-American male, was accused of punching the complainant, an Asian-American male, and taking his cell phone. He was arrested five days later, after the complainant saw him in public. He was convicted of second-degree robbery based solely on the complainant's uncorroborated eyewitness testimony.

Holding: The court properly exercised its discretion in denying the defendant's pretrial motion to admit expert testimony on eyewitness identification because it does not appear that the expert could tell the jury something significant that jurors would not ordinarily be expected to know. The testimony would have addressed the issues of witness confidence, cross-racial identification, and the effect of stress on identifications. The court concluded that the defendant failed to demonstrate the relevance of the testimony. When the complainant saw the defendant before the arrest, he told his wife "I'm pretty sure this is the guy," but when he testified at trial, he said that he had no doubt that it was the defendant who took his phone. At trial, defense counsel did not cross-examine the complainant about the increase in his confidence about the identification, ask the court to reconsider the relevance of expert testimony on the issue of witness confidence (*see People v Lee*, 96 NY2d 157, 163), or ask the court to supplement the charge on eyewitness identification or object to the court's charge. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J (motion); Wetzel, J (trial and sentence)])

Evidence (Uncharged Crimes) EVI; 155(132)

People v Giles, 47 AD3d 88, 845 NYS2d 331
 (1st Dept 2007)

When the police arrested the defendant for trying to open a doctor's office door with a knife, he had a folding knife, a stolen credit card, and a MetroCard that was purchased using a stolen credit card. Both credit cards were stolen during recent home burglaries, but the defendant was not charged with those burglaries.

First Department *continued*

Holding: The court correctly admitted the testimony regarding the burglaries as it was relevant to show that the cards were stolen, that the defendant knew they were stolen (see *People v Thompson*, 202 AD2d 337 *lv den* 83 NY2d 915), and that he intended to burglarize the doctor’s office. Although the defendant offered to stipulate that the cards were stolen, he would not stipulate that he knew that they were stolen. Since the prosecution had to prove that he knew the cards were stolen, they did not have to accept the stipulation. See *People v Bligen*, 35 AD3d 171 *lv den* 8 NY3d 919. His knowledge that the cards were stolen was relevant to his intent to steal once inside the office because his efforts had not advanced to the point where his intent to enter the office to steal was so clear as to render past conduct irrelevant. Since the court repeatedly instructed that the jury was not to assume that the defendant committed the burglaries, the rule in *People v Molineux* (168 NY 264) does not apply, and the defendant’s rights were fully protected. Judgment affirmed. (Supreme Ct, New York Co [Solomon, JJ])

Dissent: [Kavanagh, JJ] The defendant is entitled to a new trial because the prejudicial impact of the testimony, particularly with regard to the extensive details of how the burglaries were carried out, outweighed its probative value.

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Merejildo, 45 AD3d 429, 846 NYS2d 52 (1st Dept 2007)

Holding: The court correctly denied the defendant’s motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643) because he did not meet the merit time eligibility requirements of Correction Law 803(1)(d). The defendant was convicted of third-degree criminal possession of a weapon, a violent felony offense, and second-degree criminal possession of a controlled substance, and was sentenced to consecutive terms of two to four years and eight years to life. Merit time is not available to persons who are serving an indeterminate sentence for a violent felony. See Correction Law 803(1)(d)(ii). The defendant failed to preserve the argument that he was eligible because his sentence on the weapons conviction expired prior to his resentencing motion. Even if it were preserved, the argument is incorrect because the defendant’s consecutive sentences were merged into a single aggregate sentence of ten years to life. See Penal Law 70.30(1)(b). Order affirmed. (Supreme Ct, New York Co [Stone, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Woods, 45 AD3d 408, 846 NYS2d 112 (1st Dept 2007)

Holding: The court properly adjudicated the defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C). The prosecution provided clear and convincing evidence of risk factors that had a total point score that supported a level three adjudication. The record also supports the court’s alternative conclusion that the defendant should be a level three offender based on the override for a recent threat to reoffend by committing a sexual or violent crime. At the time of the adjudication, the new criminal proceeding against the defendant was still pending. However, the court relied on reliable evidence that established the facts of the crime, not the defendant’s arrest, to support the override factor. The defendant’s argument that the override factor only applies to verbal threats is without merit. Order affirmed. (Supreme Ct, New York Co [Sussman, JJ])

Attempt (General) ATT; 50(7)

Homicide (Murder [Degrees and Lesser Offenses] [Intent]) HMC; 185(40[g] [p])

People v Lopez, 45 AD3d 493, 846 NYS2d 164 (1st Dept 2007)

Holding: The defendant pleaded guilty to attempted depraved indifference murder, which is a nonexistent, legally impossible crime because a person cannot attempt to commit a crime in which the result does not require intent. See *People v Campbell*, 72 NY2d 602, 605. The defendant’s plea to a nonexistent crime is a jurisdictional defect that renders the plea a nullity. See *People v Castillo*, 30 AD2d 1118 *affd* 8 NY3d 959. It would be unlawful to “deem” the defendant’s plea to be a plea to first-degree reckless endangerment, as the defendant requests, because the conviction was on a jurisdictionally defective count. Judgment reversed, plea vacated, second-degree attempted murder count of the indictment dismissed, and matter remanded for proceedings on the remaining counts of the indictment. (Supreme Ct, Bronx Co [Bernstein, JJ])

Discrimination (Race) DCM; 110.5(50)

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

People v Rosado, 45 AD3d 508, 846 NYS2d 165 (1st Dept 2007)

Holding: The defendant satisfied the first step in the *Batson v Kentucky* (476 US 79 [1986]) analysis by demonstrating that the prosecution exercised a peremptory chal-

First Department *continued*

lenge against every Hispanic panelist in the venire that remained available after the excusal of other potential jurors for cause or by consent. *See eg Johnson v California*, 545 US 162, 173 (2005). The prosecution exercised eight peremptory challenges, four of which were used to eliminate the Hispanic panelists, while the percentage of Hispanics in the voir dire was just over 10 percent. Under the circumstances, this numerical argument is sufficient to raise an inference of discrimination, even though the defendant did not provide any other evidence in support of his argument. On remand, the prosecution should be given an opportunity to offer ethnicity-neutral reasons for these challenges. Appeal held in abeyance and matter remanded for further proceedings pursuant to *Batson*. (Supreme Ct, New York Co [Straus, J])

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

New York State Legislation (General) NYL; 268(10)

People v Colon, 46 AD3d 260, 847 NYS2d 44 (1st Dept 2007)

The defendant was convicted of second-degree failing to disclose the origin of a recording for selling music compact discs that did not bear the names and addresses of the manufacturers.

Holding: The court correctly concluded that the term “address” as used in Penal Law 275.35 does not include internet or web site addresses. The term address is ordinarily defined as a physical location and nothing in the statute indicates that the term should be given a different meaning. *See We’re Assoc Co v Cohen, Stracher & Bloom*, 65 NY2d 148, 151. The defendant failed to preserve her argument that the statute requires the actor to know that the recordings lacked the actual names and addresses of the manufacturers; she did not object during a charging conference when the court agreed with the prosecutor’s interpretation of the statute or when the court instructed the jury on this issue. Although the court issued a written decision on the issue, it made the decision in response to a question from the jury and not in response to a protest by a party. *See CPL 470.05(2)*. The protest by a party requirement cannot be read out of the statute; the requirement furthers compelling public purposes, including the finality, fairness, and efficiency of criminal matters. *See Wainwright v Sykes*, 433 US 72, 88 (1977); *People v Dekle*, 56 NY2d 835, 837. The sentence was excessive. Judgment modified by reducing the sentence to 90 days and three years probation and judgment affirmed as amended. (Supreme Ct, New York Co [Stone, J])

Juveniles (Neglect)

JUV; 230(80)

Matter of Allison B., 46 AD3d 313, 847 NYS2d 187 (1st Dept 2007)

Holding: The uncontradicted testimony of the case-worker and the respondent mother showed that the respondent’s apartment was “messy,” the respondent’s 16-month-old daughter suffered a minor burn on her bottom after she touched an uncovered steam pipe while bouncing and playing on a bed with her father and sister, and the burn was promptly treated. The court’s conclusion that the respondent neglected her children under Family Court Act 1012(f)(i)(A) and 1046(b)(i) was not supported by a preponderance of the evidence. Order reversed and petition dismissed. (Family Ct, New York Co [Schechter, J])

Sex Offenses (Sentencing)

SEX; 350(25)

People v Cintron, 46 AD3d 353, 848 NYS2d 616 (1st Dept 2007)

Holding: The court properly adjudicated the defendant a level three sex offender under the Sex Offender Registration Act (Correction Law art 6-C) (SORA). The provision that requires individuals convicted of certain nonsexual abduction-related crimes to register as sex offenders is constitutional and is constitutional as applied to the defendant. *See People v Cassano*, 34 AD3d 239 *lv den* 8 NY3d 804. The defendant was incarcerated for an offense covered by SORA on the effective date of the statute because his sentence for unlawful imprisonment merged with his longer concurrent sentence for first-degree drug possession. *See People v Ramirez*, 89 NY2d 444, 450. Order affirmed. (Supreme Ct, Bronx Co [Tallmer, J])

Counsel (Competence/Effective Assistance/Adequacy)

COU; 95(15)

People v Cyrus, __ AD3d __, 848 NYS2d 67 (1st Dept 2007)

Holding: The defendant was denied his constitutional right to effective assistance of counsel at trial because defense counsel failed to investigate the law and facts relevant to the case, which “led to two crucial errors that effectively doomed his client’s defense to failure.” At issue was whether the defendant committed petit larceny by stealing property from a drug store or felony robbery for brandishing a box cutter during the theft. A store security camera taped the incident and the two police officers who viewed the tape said that the video was too unclear to definitively identify the defendant or the box cutter, but that they saw a metallic object in the individual’s hand as he left the store. The copy of the tape that the police received from the store turned out to be blank and the

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original was erased. Defense counsel failed in his duty to investigate the contents of the videotape disclosed by the prosecution and then opened the door to damaging testimony during cross-examination of a police officer about its contents. *See People v Droz*, 39 NY2d 457, 461-462. Defense counsel also failed to adequately introduce the circumstances of the defendant's interrogation and confession before the suppression court as those facts may have supported viable arguments for suppression of his confession. The defendant did not need to show that but for counsel's errors he would have been acquitted; the focus is on the fairness of the proceedings overall. *See People v Stultz*, 2 NY3d 277, 284. Order reversed, motion granted, and matter remanded for a new trial, preceded by a new suppression hearing. (Supreme Ct, New York Co [Allen, JJ])

Juveniles (Parental Rights) JUV; 230(90) (105)
(Permanent Neglect)

Matter of Albert Milton K., Jr., __ AD3d __,
848 NYS2d 97 (1st Dept 2007)

The subject child was placed into foster care when he was one year old after his mother had died and his father entered a residential drug treatment program. The father successfully completed the program, and he also completed parenting skills and vocational training programs and had bi-weekly visits with his son. When overnight visits began, the child said that he was scared during the visits, but could not explain why. A family therapist initially reported positive results, but later the child became increasingly aggressive and oppositional in the sessions.

Holding: The court correctly found that the agency failed to prove by clear and convincing evidence that the father failed to plan for his son as required by Social Services Law. The evidence did not show that the father failed to have substantial contact with his son; the evidence showed that despite his affection and concern, his son rejected him, which is not grounds for the termination of parental rights under Social Services Law 384-b(7)(b). "[T]he requirement that the parent support the child's emotional needs does not justify a termination of parental rights solely on a showing that the parent failed to win over a child whose strong preference is to remain with the foster mother to whom he is tightly bound." As the court noted, the agency plan could have better addressed the problems of reuniting the father and son given the length of time he was with his foster mother and his bond with her. Order affirmed. (Family Ct, New York Co [Knipps, JJ])

Counsel (Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel) COU; 95(15) (39)

People v Rodriguez, 46 AD3d 396, 848 NYS2d 94
(1st Dept 2007)

Holding: The court improperly denied the defendant's request for substitution of counsel by failing to conduct an inquiry or allowing the defendant to explain why he wanted different counsel. During an in-court discussion of discovery matters, the defendant told the court that he did not want his current lawyer. The court admonished the defendant for interrupting and told him that he could not have a different attorney because he already had two such substitutions and the case was ready for trial. Although the timing of the request and the prior substitutions of counsel were important considerations, the court may not completely cut off the discussion without hearing the defendant's explanation. *See People v Sides*, 75 NY2d 822. At a minimum, the court has an obligation to determine whether the defendant had a valid reason for requesting new counsel. The defendant did not have an obligation to pursue his request after the court understood that the defendant was requesting new counsel and unequivocally denied the request. *See People v Mezon*, 80 NY2d 155, 161. The defendant is not entitled to a *Mapp/Dunaway* hearing [*Mapp v Ohio*, 367 US 643 (1961); *Dunaway v New York*, 422 US 200 (1979)] because he did not raise a factual issue regarding the legality of his arrest. No opinion is expressed as to the merits of any pretrial CPL 710.40(4) application that might be made. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Scherer, J (*Mapp/Dunaway* motion); Wetzel, J (trial and sentence)])

Double Jeopardy (Lesser Included and Related Offenses) DBJ; 125(15)

Forgery (Elements) (Evidence) FOR; 175(10) (15)

People v Dallas, 46 AD3d 489, 848 NYS2d 132
(1st Dept 2007)

Holding: The defendant's constitutional due process rights were not violated by his prosecution in New York County for possession of counterfeit documents because his earlier prosecution in Kings County was for possession and sale of a different set of counterfeit documents. *See Blockburger v United States*, 284 US 299 (1932). His statutory due process rights were not violated because his conduct in each county was not so closely related as to constitute a single criminal transaction, even though he was in the business of selling counterfeit documents and his conduct in both counties may have been admissible in both prosecutions under *People v Molineux* (168 NY 264). *See* CPL 40.10(2). That did not create one single criminal

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transaction. See *People v Vesprey*, 183 AD2d 212, 216 *lv den* 81 NY2d 894. The second prosecution was not barred as the crimes were not joinable in a single accusatory instrument. See CPL 40.40. The conviction was supported by legally sufficient evidence and was not against the weight of the evidence. The defendant's possession with the intent to defraud, deceive or injure another could be inferred from his intent to sell false documents, which purchasers would use to deceive or defraud others. Judgment affirmed. (Supreme Ct, New York Co [Stone, JJ])

Concurrence: [McGuire, J] The evidence showed that the defendant was in the business of selling forged documents, but a rational jury could not determine that the defendant had the conscious objective to defraud, deceive or injure another. However, the defendant failed to preserve this issue for review.

Evidence (Hearsay) EVI; 155(75)

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

People v Gantt, __ AD3d __, 848 NYS2d 156
(1st Dept 2007)

Holding: The court correctly denied the defendant's motion to preclude statements made by the decedent to three witnesses identifying the defendant as the shooter. The statements are admissible under the excited utterance exception to the hearsay rule because he made them almost immediately after the shooting while he lay seriously wounded and bleeding on the sidewalk, when he was under the stress of excitement caused by the event. See *People v Edwards*, 47 NY2d 493, 497. The decedent's recantation nine days later does not affect the admissibility of the earlier statements as the court could have concluded that the earlier statements were more trustworthy than the later statement, which was made after he had time to contrive and misrepresent. See *People v Fratello*, 92 NY2d 565, 570, 574 *cert den* 526 US 1068 (1999). The admission of the statements did not violate the Sixth Amendment's confrontation clause as the statements were not testimonial hearsay. See *Davis v Washington*, 547 US 813 (2006). The decedent's statements to his two friends are not similar to the kind of formal interrogation by authorities that the Supreme Court found to be part of the Sixth Amendment's core concerns. See *Crawford v Washington*, 541 US 36, 51 (2004). The decedent's statement to a police officer who arrived at the crime scene was not testimonial as it was elicited as part of an effort to determine what happened to cause his injuries and whether there was any continuing danger to others in the area. See *People v Nieves-Andino*, 9 NY3d 12, 16. Judgment affirmed. (Supreme Ct, New York Co [Obus, JJ])

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

Misconduct (Prosecution) MIS; 250(15)

People v Garcia, 46 AD3d 461, 848 NYS2d 137
(1st Dept 2007)

Holding: The court correctly held that the prosecution violated their duty under *Brady v Maryland* (373 US 83 [1963]) to turn over material favorable to the defense and that the defendants were thereby prejudiced. The prosecution willfully withheld evidence from flight attendants that contradicted the complainant's statement that she told the attendants that she was being taken on the flight against her will. Three flight attendants told the prosecutor that no such incident happened because if it had, they would have remembered it. The evidence was clearly favorable to the defense as it contradicted the prosecution's theory of the case. With regard to prejudice, the withheld "meaningful impeachment evidence may well have proven determinative to the evaluation of a case in which serious doubts coexisted with the chilling accusations and in which the key witness' credibility was under attack." The prosecution did not satisfy its obligation by disclosing the flight attendants' names with no indication of what information they possessed, and when the names were buried in voluminous discovery provided shortly before trial and they were not identified as *Brady* material. See *Banks v Dretke*, 540 US 668, 695 (2004). It does not matter whether defense counsel could have discovered or should have known that the attendants would have contradicted the complainant's testimony because the prosecutor's constitutional and ethical obligations are independent obligations. Order affirmed. (Supreme Ct, Bronx Co [Barrett, JJ])

Due Process (Fair Trial) DUP; 135(5)

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

People v Contreras, __ AD3d __, 848 NYS2d 650
(1st Dept 2008)

Holding: The court did not err in conducting proceedings outside the defendant's presence regarding the admissibility and relevance of a note found in the complainant's apartment, which involved graphic sexual matters, and prohibiting defense counsel from disclosing the contents of the note to the defendant. During the court's ex parte interview of the complainant, she stated that the note was written a month before the incident and that it referred to her boyfriend, not the defendant, who is her ex-husband. Defense counsel was allowed to question the complainant about the note outside the presence of the defendant and the jury. Because there was no indication

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that the defendant knew of the note's existence, he could not have contributed in a meaningful way to the proceedings and thus was not deprived of his right to be present at a material stage of the trial. *See* CPL 260.20; compare *People v Morales*, 80 NY2d 450 with *People v Turaine*, 78 NY2d 871. The defendant was not deprived of his right to a fair trial or to effective assistance of counsel because if he knew of or had seen the note and he could have told his attorney. *See eg Matter of Fischetti v Scherer*, 44 AD3d 89, 93-94. While the Rape Shield Law did not apply, the court had a legitimate interest in protecting the complainant from an unnecessary invasion of her privacy. *See People v Williams*, 81 NY2d 303, 313. The court correctly exercised its discretion in precluding admission of the note as it was irrelevant. *See People v Williams*, 188 AD2d 382 *lv den* 81 NY2d 849. Judgment affirmed. (Supreme Ct, New York Co [Stone, J])

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

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

People v Thomas, __ AD3d __, 848 NYS2d 647
(1st Dept 2008)

Holding: The court correctly relieved the defendant's retained attorney over the defendant's objection after making detailed findings on the record regarding the attorney's prolonged unavailability for trial due to other engagements and illness. *See People v Bracy*, 261 AD2d 180 *lv den* 93 NY2d 966. However, the court deprived the defendant of his right to retain counsel of his choice by immediately replacing his retained counsel with assigned counsel that it selected. The defendant told the court that if he had to change attorneys, he wanted to hire an attorney of his choice and he did not want a court-selected attorney. The defendant should have been given a reasonable opportunity to retain new counsel as he made a timely and unequivocal request and there is no indication that it would have caused unreasonable delay. *See People v Arroyave*, 49 NY2d 264, 270-271. The court improvidently exercised its discretion in denying defense counsel's request for a new CPL article 730 competency examination as there were indications that the defendant's condition has changed since the last examination. *See People v Lewis*, 302 AD2d 322 *lv den* 100 NY2d 540. Although he was found competent a year earlier, the defendant had initially been found incompetent, defense counsel told the court that he was showing signs of incompetency, and the court's colloquy with the defendant revealed strong signs that a new examination was needed. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [Wetzel, J])

Juveniles (Delinquency) JUV; 230(15) (40) (110)
(Disposition) (Persons in
Need of Supervision)

Matter of Jeffrey C., __ AD3d __, 849 NYS2d 517
(1st Dept 2008)

Holding: The court erred in adjudicating the appellant a juvenile delinquent and imposing 12 months' probation as this was not the least restrictive alternative consistent with the needs and best interests of the appellant and the need for protection of the community. *See* Family Court Act 352.2(2)(a). The proceeding was commenced after the appellant and his brother had an altercation. Although the appellant may have overreacted, his actions appear to have been in the heat of the moment and in response to provocation by his older brother. The appellant had never been adjudicated a juvenile delinquent or person in need of supervision and has no reported history of drug or alcohol abuse. "While the Probation Department report indicates that appellant did not follow curfew and had several school absences, the court could have required the department to monitor appellant 'to assure that he attends school regularly and obeys curfew,' without adding the stigma of a juvenile delinquent adjudication (*Matter of Justin Charles H.*, 9 AD3d 316, 317 . . .)." Order modified by vacating the portion that reflects two counts of attempted assault and substituting therefor one count of third-degree attempted assault and substituting for the juvenile delinquency adjudication a finding that the appellant is a person in need of supervision, and order affirmed as modified. (Family Ct, Bronx Co [Malave, JJ])

Adjournment in Contemplation of Dismissal (General) ACD; 12(10)

Juveniles (Delinquency) (Disposition) JUV; 230(15) (40)

Matter of Anthony M., __ AD3d __, 849 NYS2d 519
(1st Dept 2008)

Holding: The court erred in adjudicating the appellant a juvenile delinquent for committing an act which, if committed by an adult, would constitute the crime of attempted petit larceny. *See Matter of Justin Charles H.*, 9 AD3d 316, 317. The record shows that the appellant comes from a stable home, has no prior history of criminality or record of getting into trouble at home, school, or in the community, and this was his first contact with the juvenile justice system. During the six months between the incident and the dispositional hearing, there were no other incidents and there was no indication that he used drugs or alcohol or was involved with a gang. The appellant accepted responsibility for his actions and told the court he would never do anything like it again. An adjournment in contemplation of dismissal (ACD) would avoid the stigma of a juvenile delinquency adjudication and would

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focus on the appellant's need for direction and supervision. The court should have, as part of the ACD, required the Probation Department to monitor the appellant to make sure that he attends school regularly and obeys his curfew. Order reversed, juvenile delinquency adjudication and conditional discharge vacated, and matter remanded with the direction to order an ACD. (Family Ct, Bronx Co [Gribetz, JJ])

Juveniles (Parental Rights) JUV; 230(90)

Prisoners (Family Relationships) PRS I; 300(16)

Matter of Medina Amor S., Nos. 1769, 1769A,
1st Dept, 1/10/2008

Holding: The court erred in terminating the respondent father's parental rights as the agency failed to prove abandonment by clear and convincing evidence. The respondent was incarcerated when his children were placed in foster care and will remain incarcerated until after the children reach age 18. Incarceration is not a basis for terminating parental rights and Social Services Law (SSL) recognizes the continuing parental obligations of incarcerated parents to their children. *See* SSL 384-b(7)(d). The court had no basis for concluding that the respondent's pre-filing visit was an insignificant contact under the permanent neglect standard or that the respondent evinced an intent to forgo his parental rights and obligations under the abandonment standard. *See* SSL 384-b(5)(a). The best interests of the children is not the proper standard for determining whether to terminate parental rights on the ground of abandonment. *See In re Female W.*, 47 NY2d 861. "Simply put, a parent cannot be displaced 'because someone else could do a better job of raising the child,' absent extraordinary circumstance such as abandonment, unfitness or persistent neglect (*Matter of Bennett v Jeffreys*, 40 NY2d 543, 548). . . . By improperly applying the permanent neglect standard, the court in effect bootstrapped its finding of abandonment to draw an inescapable conclusion that freeing these children or adoption was in their 'best interests.'" Orders reversed and vacated and petitions dismissed. (Family Ct, Bronx Co [Roberts, JJ])

Double Jeopardy (Jury Trials) DBJ; 125(10) (20)
(Mistrial)

Matter of Capellan v Stone, __ AD3d __, 849 NYS2d 530
(1st Dept 2008)

On the second and third days of deliberations, juror 10 did not report due to a claimed illness. After the court tried to contact him on day three, juror 10 called to report

that he most likely would not be in court the next day, a Friday, but that he should be available on Tuesday; Monday was a state holiday. Although the defendants waived their right to continuous deliberations and their right to appeal, the court stated that it would declare a mistrial if all the jurors were not able to return on Tuesday. Given that a few jurors indicated that they had problems returning the next week, including on Tuesday and juror 10 could not guarantee that he would return on Tuesday, the court declared a mistrial over the defendants' objections. The defendants sought prohibition of retrial in this Article 78 proceeding.

Holding: The defendants cannot be retried as the record does not show that the court's declaration of a mistrial was required by a manifest necessity or the ends of public justice. *See Illinois v Somerville*, 410 US 458, 467 (1973). The court incorrectly concluded that the defendants could not waive the continuous deliberations mandate in CPL 310.10(2). *See People v Bello*, 82 NY2d 862. The court improvidently exercised its discretion by ordering a mistrial based on juror 10's uncertain health since the record does not show that juror 10's health prevented him from acting as a juror or that the court explored alternatives to a mistrial. *See Matter of Colcloughley v Johnson*, 115 AD2d 58, 62 *lv den* 68 NY2d 604. Petitions granted and respondents prohibited from retrying Cappellan and Santos.

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Shemesh, Nos. 1776/06, 2257, 1st Dept,
1/15/2008

Holding: The court properly dismissed the indictment with leave to re-present on the ground that the defendant was wrongfully denied his right to testify before the grand jury. *See* CPL 190.50(5)(a). The defendant promptly informed the prosecutor that he intended to testify before the grand jury. Because he is an observant Jew, he could not testify during the eight days of Passover, which ended one day before the grand jury term ended. He was available prior to the holiday, but the prosecutor was unable to present his case during that time. Under the unique circumstances, the prosecutor did not give him a reasonable or meaningful opportunity to testify before the grand jury. Reasonableness is a flexible term and is determined based on all of the known facts. *See People v Sawyer*, 96 NY2d 815, 816. The record does not show that the defendant was not diligent in getting new counsel or that his counsel was not diligent in communicating with the prosecutor about scheduling his testimony. The prosecutor did not provide an adequate reason why the defendant could not have testified on the last day of the grand jury term. The court correctly declined to ask the defendant about his religious obligations as there was no evi-

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dence that his claim was insincere. *See Thomas v Review Bd, Indiana Empl Sec Div*, 450 US 707, 715-716 (1981). Order affirmed. (Supreme Ct, New York Co [Obus, J])

Dissent: [Kavanagh, J] The prosecution gave the defendant three suitable dates on which to appear and the defendant was solely responsible for failing to appear.

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

Subpoenas and Subpoenas Duces Tecum (General) SUB; 365(7)

People v Hurley, __ AD3d __, 848 NYS2d 879 (1st Dept 2008)

Holding: The defendant cannot appeal the court's order denying his motion for a subpoena duces tecum. The defendant's motion related to his completed criminal case and thus the order arose out of that criminal proceeding. A party cannot appeal an order arising out of a criminal proceeding absent specific statutory authorization. *See People v Santos*, 64 NY2d 702, 704. CPL article 450 does not authorize an appeal from an order denying a motion for a subpoena duces tecum. Appeal dismissed. (Supreme Ct, New York Co [Tejada, J])

Arrest (Identification) (Probable Cause) ARR; 35(15) (35)

Sentencing (General) (Pronouncement) SEN; 345(37) (70)

People v Collado, No. 2629, 1st Dept, 1/29/2008

Holding: The court correctly denied the defendant's motion to suppress. The police had probable cause to arrest the defendant based on an unidentified complainant's statements that the defendant and his companions tried to rob him and that one of the men had a handgun. When a marked police car approached the men, they took evasive action and one of them pulled out an air pistol that resembled a firearm. The police could not locate the complainant, but while the defendant was at the police station, another complainant identified him during a lineup as the person who robbed him, which led to the defendant's conviction. The unidentified complainant's disappearance did not affect his reliability as the police corroborated the information by observing the men's suspicious behavior and the display of an apparent firearm. *See People v Simpson*, 244 AD2d 87, 91 *app withdrawn* 92 NY2d 947. The police had probable cause to believe that he and his companions were involved in a joint criminal enterprise. *See People v Davis*, 308 AD2d 343 *lv den* 1 NY3d 570. The post-release supervision portion of the defendant's sentence was constitutionally imposed because although the court did not mention it during the sentencing

proceedings, it was included in the court's worksheet and commitment sheet. The term was mandatory and thus can be imposed by way of court documents. *See People v Sparber*, 34 AD3d 265, 266 *lv granted* 9 NY3d 882. Judgment affirmed. (Supreme Ct, New York Co [Silverman, J (suppression hearing); Wetzell, J (trial and sentence)])

Forensics (General) FRN; 173(10)

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

People v Allen, No. 2623, 1st Dept, 1/29/2008

Holding: The court correctly denied the defendant's motion for post-conviction DNA testing because the judgment against the defendant resulted solely from his guilty plea. *See CPL 440.30(1-a); People v Lebron*, 44 AD3d 310. The defendant was originally convicted after trial, but after that conviction was reversed, he pleaded guilty. The defendant's argument that the original trial resulted in the judgment is without merit. Order affirmed. (Supreme Ct, Bronx Co [Seewald, J])

Juveniles (Delinquency) (Hearings) JUV; 230(15) (60)

Search and Seizure (Examination of Personal Effects) (Motion to Suppress [CPL Article 710]) (Warrantless Searches [Plain-View Objects]) SEA; 335(40) (45) (80[k])

Matter of Elvin G., No. 1730, 1st Dept, 1/29/2008

Holding: The court correctly denied the appellant's suppression motion without a hearing because the facts he presented, even if true, were insufficient to warrant suppression and he did not present a legal basis for challenging the school official's conduct. *See People v Mendoza*, 82 NY2d 415, 432; *New Jersey v T.L.O.*, 469 US 325, 341-342 (1985). The appellant alleged that the school dean responded to a teacher's call that a student was using a device to make disruptive noises and had the students stand up so that he could check their pockets for the device; once the appellant knew that all the students were subject to the search, he took a hunting knife out of his pocket. Because the dean had a reasonable basis for believing that a student in the room was violating school rules, it was not necessary for the dean to have had a reasonable suspicion that the appellant was the offending student. *See Matter of Gregory M.*, 82 NY2d 588, 593. The dean's actions were the least intrusive and most practical means of finding the device and restoring order to the disrupted classroom. Order affirmed. (Family Ct, Bronx Co [Drinane, J])

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Dissent: [Catterson, J] The court should have held a suppression hearing as there were factual disputes regarding whether the knife was in plain view prior to the search and whether the search was the least intrusive and most practical method for finding the device.

Speedy Trial (Cause for Delay) SPX; 355(12) (32)
(Prosecutor's Readiness for Trial)

People v Nunez, No. 2627, 1st Dept, 1/29/2008

Holding: The court correctly granted the defendant's speedy trial motion to dismiss the indictment. The court properly charged the prosecution with 25 days because their 10-day adjournment request was rendered equivocal by their statement that their readiness depended on whether the assigned prosecutor would be available and their suggestion that an adjournment of 25 days may be necessary. *See People v Collins*, 82 NY2d 177, 181-182. The court properly charged the prosecution with a 42-day delay because their request for an earlier adjournment date was an illusory expectation of future readiness. *See People v Kendzia*, 64 NY2d 331, 337-338. The prosecution had already made four requests for adjournments and they did not file a certificate of readiness, even after the motion court appropriately insisted that it be filed to stop the speedy trial clock. *See People v Stirrup*, 91 NY2d 434, 440. The 22-day delay was properly attributed to the prosecution as their request for another adjournment showed that they were still not ready for trial. Although the defendant's assigned attorney was not at that court appearance, another attorney from the office appeared on his behalf; thus, the attorney's absence did not contribute to the delay. Defense counsel did not impliedly consent to the adjournment by indicating that the suggested adjourn date was fine; counsel merely indicated that the date was not inconvenient. *See People v Smith*, 82 NY2d 676. Order affirmed. (Supreme Ct, Bronx Co [Mogulescu, J])

Search and Seizure (Consent SEA; 335(20[f])
[Coercion and Other
Illegal Conduct])

People v Packer, No. 1657, 1st Dept, 1/29/2008

The defendant was a passenger in a car that was stopped by the police so that the police could arrest the driver. The defendant tried to leave the car, but was told to stay where he was. Then, when he was asked to get out of the car, an officer frisked him and found a small knife. The officer asked the defendant for identification, which was in his backpack in the car. The officer insisted on getting the bag himself and the defendant agreed to let the

officer look in the bag. The officer found a knife in the bag, which was the basis for the conviction.

Holding: The court incorrectly denied the defendant's motion to suppress. The frisk was illegal because it was not based on a reasonable suspicion of criminal activity. *See People v De Bour*, 40 NY2d 210, 223. The prosecution failed to show that the defendant's consent was voluntary because it was not the unequivocal product of an essentially free and unconstrained choice. *See People v Gonzalez*, 39 NY2d 122, 128. "[O]nce improperly initiated police conduct is established, a directly ensuing consent to search will be deemed invalid as a matter of law." *See People v Hollman*, 79 NY2d 181. Judgment reversed, suppression motion granted, and indictment dismissed. (Supreme Ct, New York Co [Straus, J (suppression hearing); Pickholz, J (plea and sentence)])

Dissent: [Malone, J] Because the defendant was no longer seized by the police after his brief frisk, he can and did voluntarily consent to the search. *See People v Bora*, 83 NY2d 531, 534-535.

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Family Court (General) FAM; 164(20)

Juveniles (Disposition) (Neglect) JUV; 230(40) (80)

Matter of Andrew Y., 44 AD3d 1063, 844 NYS2d 408
(2nd Dept 2007)

Holding: The court correctly concluded that the appellant neglected his son and step-daughter by committing an act of domestic violence against his son's mother while the children were present, which placed them at substantial risk of harm. *See Family Court Act 1012(f)(i)(B)*; *Matter of Richard T.*, 12 AD3d 986. The court erred in extending the orders of protection to the children's 18th birthdays. Family Court Act 1056(1) and (4) authorize the court to extend an order of protection beyond the duration of the order of fact-finding and disposition if the person is not a relative by blood or marriage and is not a member of the child's household at the time of the disposition. *See Matter of Collin H.*, 28 AD3d 806, 809-810. Because the appellant is Andrew Y.'s biological father and is related to Tori P. by marriage, the court could not extend the orders of protection beyond the order of disposition. Order of fact-finding and disposition affirmed and order of protection modified. (Family Ct, Dutchess Co [Forman, J])

Search and Seizure (General) SEA; 335(42) (80)
(Warrantless Searches)

People v Dillon, 44 AD3d 1068, 844 NYS2d 402
(2nd Dept 2007)

The local fire department responded to a call about a

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fuel odor coming from a locked factory that the defendant was leasing. When the defendant arrived to unlock the factory door, he entered the building and shut the door behind him. The defendant refused to allow the fire chief in and said that he would clean up the fuel spill. The fire chief entered the building and he and the defendant had a physical confrontation. Police officers at the scene removed the defendant from the building and the fire chief ordered firefighters to search the building to find the fuel leak. One team of firefighters found a small fuel spill and another team entered a locked room and discovered a hydroponics grow room containing marijuana. The police obtained a search warrant and seized the marijuana.

Holding: As the entry and search by the firefighters fell within the emergency exception to the warrant requirement, the court properly applied the three-part test in *People v Mitchell* (39 NY2d 173 *cert den* 426 US 953). Based on the objective facts observed by the firefighters, they had reasonable grounds for believing that there was an emergency and they had a reasonable basis for associating the emergency with the place that was searched. See *Brigham City v Stuart*, 126 S Ct 1943, 1946 (2006). Their entry and search was motivated by the need to protect lives and the property and not to make an arrest or seize evidence. The scope of the search was properly limited by the exigencies of the situation. See *People v Rielly*, 190 AD2d 695. Judgment affirmed. (County Ct, Suffolk Co [Doyle, JJ])

Family Court (General) FAM; 164(20)
 Juveniles (Permanent Neglect) JUV; 230(105)

Matter of Shaquill Dywon M., 44 AD3d 1047,
 844 NYS2d 419 (2nd Dept 2007)

Holding: The court erred in granting the petition to terminate the appellant mother’s parental rights. The court incorrectly concluded that the appellant mother did not take advantage of the presentment agency’s attempts to build a meaningful relationship between her and her children and failed to plan for her children’s future. “[T]he threshold consideration is whether the presentment agency discharged its statutory obligation to exercise diligent efforts to encourage and strengthen the parental relationship (see Social Services Law § 384-b[7]; *Matter of Jamie M.*, 63 NY2d 388, 390 . . .).” Testimony at the fact-finding hearing shows that the mother did make significant progress in strengthening her relationship with her children. Although the mother late for visits and missed some visits, the caseworker concluded that the mother was in compliance with the agency’s service plan. The mother visited with the children, earned an income, got public assistance, successfully completed a parenting

skills program, cooperated with the agency, and had obtained suitable housing for her and her children. Because the dispositional hearing occurred 18 months ago, a new dispositional hearing is necessary to determine whether a suspended judgment is appropriate. See Family Court Act 633. Orders of fact-finding and disposition reversed and matter remitted for a new dispositional hearing. (Family Ct, Kings Co [Lim, JJ])

Arrest (Probable Cause) (Warrantless) ARR; 35(35) (54)
 People v Hampton, 44 AD3d 1071, 844 NYS2d 399
 (2nd Dept 2007)

The defendant was convicted of second-degree attempted murder, two counts of first-degree attempted arson, and third-degree criminal possession of a weapon.

Holding: The court properly denied the defendant’s motion to suppress physical evidence and statements he made to the police. The police had probable cause to arrest the defendant after they found an apparently illegal handgun in a car that the defendant’s aunt had just gotten out of and the defendant stated that he recently gave the gun to his aunt. See *People v Berzups*, 49 NY2d 417, 427. That the police were more interested in investigating the defendant’s involvement in his aunt’s recent attempt to murder a third party than prosecuting him for the weapons offense does not diminish the legality of his arrest. See *People v Cypriano*, 73 AD2d 902. The legality of his arrest is not affected by the defendant’s belief that he was being arrested on suspicion of arson, not criminal possession of a weapon. See *Devenpeck v Alford*, 543 US 146, 155 (2004). Judgment affirmed. (County Ct, Nassau Co [La Pera, JJ])

Juveniles (Support Proceedings) JUV; 230(135)
 Matter of Ambrose v Felice, 45 AD3d 581,
 845 NYS2d 411 (2nd Dept 2007)

Holding: The court erred in denying the appellant father’s objections to the support magistrate’s child support order. The support magistrate’s decision to impute income to the father is not supported by the record, including the father’s testimony and documentary evidence. See *Matter of Bianchi v Breakell*, 23 AD3d 947. The support magistrate also improperly attributed income to the father’s personal cellular phone by treating it as personal use of a business asset. See Family Court Act 413[1][b][5][iv][B]. The court improvidently exercised its discretion in failing to impute income to the mother for significant expenses that her father paid on her behalf. See Family Court Act 413[1][b][5][iv][D]. Order modified and matter remitted for a de novo determination of the amount, if any, of the father’s child support obligation. (Family Ct, Suffolk Co [Luft, JJ])

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Sentencing (Hearing) SEN; 345(42)

Sex Offenses (Sentencing) SEX; 350(25)

People v Best, 45 AD3d 657, 846 NYS2d 240
(2nd Dept 2007)

Pursuant to the settlement in *Doe v Pataki* (3 F Supp 2d 456), the defendant sought a redetermination of his sex offender risk level. The court designated the defendant a level three offender.

Holding: The district attorney failed to comply with the terms of the *Pataki* stipulation of settlement by providing the pro se defendant and the court with the new risk assessment instrument on the day of the hearing. Paragraph 10 of the stipulation required that the instrument be provided at least 30 days prior to the hearing. The court erred in assessing 40 points for the defendant's criminal history based on the commission of a violent felony less than three years before the New York sex offense. See Sex Offender Registration Act, Risk Assessment Guidelines and Commentary, at 14 (2006). The record is unclear regarding whether the crime underlying the defendant's New Jersey conviction occurred prior to the commission of the sex offense. See *People v Best*, 73 AD2d 651. Because the district attorney did not provide the instrument in advance of the hearing, the defendant did not have an opportunity to respond to it or gather documentation regarding the New Jersey conviction. Order reversed and matter remitted for a new hearing and determination. (Supreme Ct, Queens Co [Kohm, J])

Sentencing (Guidelines) SEN; 345(39)

Sex Offenses (Sentencing) SEX; 350(25)

People v Coffey, 45 AD3d 658, 846 NYS2d 239
(2nd Dept 2007)

The court adjudicated the defendant a level three sex offender, pursuant to the Sex Offender Registration Act (Correction Law art 6-C) (SORA). The defendant had a presumptive risk level of two.

Holding: The court erred in considering a charge that was ultimately dismissed in the underlying criminal action as a basis for justifying an upward departure from the defendant's presumptive risk level. The court's upward departure was not supported by clear and convincing evidence of an aggravating factor not adequately taken into account by the risk assessment instrument. See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 (1997 ed); *People v Burgos*, 39 AD3d 520. Order reversed and the defendant is reclassified as a level two offender. (County Ct, Suffolk Co [Braslow, J])

Appeals and Writs (Briefs) (Counsel) APP; 25(15) (30)

Counsel (*Anders* Brief) COU; 95(7)*People v Gonzalez*, 45 AD3d 778, 844 NYS2d 899
(2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and requested to be relieved as counsel. An independent review of the record reveals a potentially nonfrivolous issue regarding whether the term of the proposed sentence that the court would impose upon resentencing pursuant to the Drug Law Reform Act of 2005 is excessive. See L 2005, ch 643, § 1. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a copy of the stenographic minutes, and briefing schedule set. (County Ct, Westchester Co [Zambelli, J])

Sentencing (Addiction, Effect on
Sentencing) (Alternatives to
Incarceration) SEN; 345(2) (7)*People v Green*, 45 AD3d 780, 847 NYS2d 200
(2nd Dept 2007)

The defendant entered into a plea agreement that was conditioned on her successful completion of a drug treatment program. After she was discharged from the program, the court concluded that she breached the plea agreement and sentenced her to a term of imprisonment.

Holding: The court failed to conduct a sufficient inquiry to assure that the defendant was legitimately discharged from the program and that the information used to support the sentence was reliable and accurate. See *People v Outley*, 80 NY2d 702. Judgment reversed and matter remitted for a new inquiry and determination regarding the defendant's discharge from the program and resentencing. (Supreme Ct, Kings Co [Gubbay, J])

Sex Offenses (Sentencing) SEX; 350(25)

People v Kraus, 45 AD3d 826, 847 NYS2d 142
(2nd Dept 2007)

Holding: The court incorrectly assessed 20 points for risk factor seven of the Sex Offender Registration Act Guidelines, which is imposed where "the offense 'arose in the context of a professional relationship between the offender and the victim and was an abuse of that relationship' (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 12 [1997 ed.])." Risk factor seven "is concerned with the abuse of trust attending professional relationships and contemplates the situation where the professional is the offender . . ." The defendant was convicted of sexually assaulting his former job coun-

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selor. The complainant, not the defendant, was the professional; therefore the risk factor does not apply. Because there was no proof that the defendant’s history of mental illness decreased his ability to control impulsive sexual behavior, the fourth Guidelines override factor does not apply. *See People v Orengo*, 40 AD3d 609. The court did not articulate any reasons for an upward departure, which must be based on clear and convincing evidence of a special circumstance that warrants a departure from the presumptive risk level. Order reversed and matter remitted for a new risk level determination. (Supreme Ct, Kings Co [Hall, J])

Counsel (Right to Counsel) COU; 95(30)
 Ethics (Defense) ETH; 150(5)
 Matter of Marvin Q., 45 AD3d 852, 846 NYS2d 356
 (2nd Dept 2007)

Holding: The court properly exercised its discretion in granting the law guardian’s motion to disqualify the respondent’s attorney from representing him in the child abuse and neglect proceedings. Parties have a right to be represented by counsel of their own choosing unless there is a clear showing that disqualification is warranted. The respondent’s attorney “violated Code of Responsibility DR 7-104(A)(1) (*see* 22 NYCRR 1200.35[a][1]) by, without the Law Guardian’s knowledge and consent, allowing members of his law firm to interview the subject child and by procuring an affidavit from the child regarding the pending Family Court proceedings.” The Law Guardian and the child have an attorney-client relationship and the Law Guardian’s absence from the interview is a violation of the child’s due process rights. *See Campolongo v Campolongo*, 2 AD3d 476. The court correctly precluded the use of the affidavit in the Family Court proceedings. Order affirmed. (Family Ct, Nassau Co [Schwartz Zimmerman, J])

Admissions (Interrogation) ADM; 15(22) (25)
 (*Miranda* Advice)
 People v Mattis, 45 AD3d 869, 847 NYS2d 117
 (2nd Dept 2007)

Holding: The court correctly denied the defendant’s motion to suppress his videotaped statement to an assistant district attorney, concluding that it was sufficiently attenuated from the taint of his prior statements to law enforcement officials. There was a 10-hour break between the first interrogation and the videotaped interrogation, an hour and a half of which the defendant participated in lineups, and the second interrogation was conducted by a

prosecutor and took place in a different room. “Under these circumstances, there was a definite, pronounced break giving the defendant ample time for reflection, which was sufficient to remove any taint of his prior statements (*see People v Vachet*, 5 AD3d 700, 702 . . .).” The defendant failed to preserve for appellate review his claim that the second statement should have been suppressed because it was the product of a policy to interrogate first and obtain an unwarned statement, and then to get a waiver and confession (*see Missouri v Seibert*, 542 US 600 [2004]), which would make it easier for the prosecution to meet its burden of proof. Based on the facts presented, the claim is without merit. *See People v Paulman*, 5 NY3d 122, 134. Judgment affirmed. (Supreme Ct, Kings Co [Feldman, J])

Sentencing (Enhancement) (Hearing) SEN; 345(32) (42)
 People v Warde, 45 AD3d 879, 847 NYS2d 144
 (2nd Dept 2007)

The defendant pleaded guilty to third-degree criminal possession of a weapon. Prior to sentencing, the defendant was arrested for another offense.

Holding: Because the form waiver of the right to appeal that the defendant signed was insufficient to show that he knowingly, intelligently, and voluntarily waived his right to appeal his sentence on the ground of excessiveness, the issue will be considered. The court erred in denying the defendant an opportunity to speak and present information about his post-plea arrest. In determining whether to impose an enhanced sentence for a post-plea arrest, the court must conduct a sufficient inquiry to be satisfied that there was a legitimate basis for the arrest. *See People v Outley*, 80 NY2d 702, 713. Although the defendant was indicted for a charge underlying that arrest, which is prima facie evidence that there was a legitimate basis for his arrest (*see People v Ricketts*, 27 AD3d 488, 489), the defendant must be given the opportunity to speak about the arrest. *See Coleman v Rick*, 281 F Supp 2d 549, 558-559. Judgment modified by vacating sentence, judgment otherwise affirmed, and matter remitted for resentencing. (Supreme Ct, Kings Co [Holdman, J])

Search and Seizure (Arrest/Scene SEA; 335(10[g]) (55)
 of the Crime Searches
 [Probable Cause])
 (“Poisoned Fruit” Doctrine)

People v Clark, 46 AD3d 566, 846 NYS2d 378
 (2nd Dept 2007)

Holding: The court erred in denying the defendant’s motion to suppress pawn tickets and the jewelry found using the pawn tickets. Because the police did not have probable cause to arrest the defendant, the seizure of the

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tickets at that time was improper. The record does not show that there is a very high degree of probability that the jewelry represented by one of the tickets would have inevitably been discovered irrespective of the improper seizure; therefore the jewelry should not have been admitted at trial. *See People v Stith*, 69 NY2d 313, 318. With regard to his conviction for a separate burglary, the proof of the defendant's guilt, without reference to the improperly-admitted evidence, was overwhelming and there is no reasonable possibility that the improperly-admitted evidence might have contributed to his conviction. *See People v Crimmins*, 36 NY2d 230, 237, 241. Judgment modified, second-degree burglary conviction vacated, judgment affirmed as modified, motion to suppress granted, and remitted for a new trial on the burglary charge. (Supreme Ct, Suffolk Co [Mullen, J])

Appeals and Writs (Briefs) (Counsel) APP; 25(15) (30)
Counsel (*Anders* Brief) COU; 95(7)

People v Puntervold, 46 AD3d 581, 845 NYS2d 915
(2nd Dept 2007)

Holding: The defendant's appellate counsel filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]) and requested to be relieved as counsel. An independent review of the record reveals potentially nonfrivolous issues including, but not limited to, the voluntariness of the defendant's guilty pleas. *See People v Hill*, 9 NY3d 189. Counsel relieved and directed to turn over all papers to new counsel, prosecution to provide counsel with a copy of the stenographic minutes, and briefing schedule set. (County Ct, Suffolk Co [Gazzillo, J])

Due Process (Fair Trial) DUP; 135(5)
Identification (In-court) IDE; 190(24) (50)
(Suggestive Procedures)

People v Trott, 46 AD3d 713, 848 NYS2d 235
(2nd Dept 2007)

The defendant was arrested for third-degree criminal sale of a controlled substance based on his alleged sale of crack cocaine to an undercover police officer a week earlier. Prior to trial, the hearing court suppressed evidence of the undercover officer's identification of the defendant on the day of the arrest because an unduly suggestive identification procedure was used. The court, finding an independent source based on the officer's observation of the defendant during the drug transaction, permitted the prosecution to elicit an in-court identification. At trial, the court prohibited the prosecution from eliciting testimony that the officer was present for the arrest and that he saw

the defendant leave the location of the previous drug buy. However, over the defendant's objection, the court allowed the officer to testify that he was working on the date of the arrest.

Holding: The court erred in admitting the officer's testimony as the testimony allowed the jury to infer that the officer identified the defendant on the day he was arrested. *See People v Milligan*, 309 AD2d 950. Allowing this testimony was a violation of the suppression ruling and constituted improper bolstering. *See People v Calabria*, 94 NY2d 519; *People v Howard*, 87 NY2d 940. The error was not harmless because the in-court identification was the only evidence against the defendant. *See People v Eyre*, 138 AD2d 397. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Latella, J])

Evidence (Privileges) EVI; 155(115)
Search and Seizure (Search Warrants [Suppression]) SEA; 335(65[p])

People v Elysee, __ AD3d __, 847 NYS2d 654
(2nd Dept 2007)

The defendant was convicted of second-degree manslaughter, second-degree assault, two counts of third-degree assault, and driving while intoxicated.

Holding: The court properly denied the defendant's motion to controvert the search warrant and suppress the results of the blood alcohol test performed on blood samples taken from him by a physician immediately after he arrived at the hospital after the accident. The case presents a matter of first impression in this court. "[A] physical blood specimen taken from a patient by a medical professional is not 'information' protected by the physician-patient privilege as defined in CPLR 4504(a)" Therefore, such a sample is subject to seizure pursuant to a warrant under CPL 690.10. The privilege prohibits disclosure of information conveyed or learned through a communication or observation, including diagnoses and actual test results. *See Edington v Mutual Life Ins Co of NY*, 67 NY2d 185, 194; *Hughson v St. Francis Hosp of Port Jervis*, 93 AD2d 491; *People v Petro*, 122 AD2d 309, 310. But a physical blood sample before testing does not communicate or render observable any information about a patient upon which treatment can be based or a diagnosis made. *See gen Matter of Grand Jury Investigation of Onondaga County*, 59 NY2d 130, 134. Changes in statutory and case law show an intention to facilitate the State's ability to seize such evidence. The samples were seized pursuant to a valid search warrant. *See Schmerber v California*, 384 US 757, 772 (1966). No compelling public policy interests justify expanding the privilege to physical blood samples. Judgment affirmed. (Supreme Ct, Kings Co [Del Giudice, J])

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

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

People v LaFontant, 46 AD3d 840, 847 NYS2d 650 (2nd Dept 2007)

The defendant was convicted of third-degree criminal possession of a weapon.

Holding: The court erred in denying the defendant’s motion to suppress a photograph of the defendant holding what he claimed to be a toy gun, which a parole officer found on his cell phone after his arrest for possession of a weapon. “The search of the defendant’s cell phone, for the purpose stated by the parole officer, was not reasonably designed to lead to evidence of a parole violation and accordingly, was not reasonably related to the parole officer’s duty to prevent parole violations (*see People v Candelaria*, 63 AD2d 85, 90 . . .).” However, the evidence was properly admitted to impeach the defendant’s testimony that he had not possessed a gun prior to the date of the incident. *See United States v Havens*, 446 US 620, 627-628 (1980). The court properly denied the defendant’s motion to suppress the gun. The police had reasonable cause to forcibly stop and detain him based on a report of a park employee who saw him display the gun in a public park and they had probable cause to arrest him based on that report and the discovery of the gun in his vicinity. *See People v Corr*, 28 AD3d 574, 575; *People v Strickland*, 291 AD2d 420, 421. Judgment affirmed. (County Ct, Rockland Co [Resnik, J])

Evidence (Sufficiency) EVI; 155(130)

Juveniles (Delinquency) JUV; 230(15)

Matter of Marcus C., 46 AD3d 816, 848 NYS2d 317 (2nd Dept 2007)

Holding: Upon viewing the evidence in a light most favorable to the presentment agency, the evidence is legally insufficient to establish beyond a reasonable doubt that the appellant committed acts which, if committed by an adult would have constituted first-degree assault and first-degree reckless endangerment. The appellant did not act with depraved indifference (*see People v Feingold*, 7 NY3d 288, 296), but did consciously disregard the substantial and unjustifiable risk that he would not know that the handgun in his possession might fire a live round because of his inexperience with firearms. *Compare Matter of Koron B.*, 303 AD2d 314 with *Matter of Victor V.*, 30 AD3d 430. Order of disposition modified, findings of first-

degree assault and first-degree reckless endangerment vacated and replaced with findings of second-degree assault and second-degree reckless endangerment, and order affirmed as modified. (Family Ct, Kings Co [Weinstein, J])

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

Sentencing (Pronouncement) SEN; 345(70)

People ex rel McBride v Alexander, 46 AD3d 849, 848 NYS2d 284 (2nd Dept 2007)

Holding: The petitioner petitioned for a writ of habeas corpus seeking to be released from a sentence of post-release supervision imposed on him by the New York State Division of Parole. The petition is converted into a CPLR article 78 proceeding in the nature of prohibition to prohibit enforcement of the sentence of post-release supervision. *See CPLR 103(c)*. The court did not include a term of post-release supervision when sentencing the petitioner, but the Division of Parole notified him that he was subject to post-release supervision pursuant to Penal Law 70.45. Because the sentencing minutes and the orders of commitment do not mention a period of post-release supervision, “the sentences actually imposed by the courts never included, and do not now include, any period of post-release supervision (*see People ex rel. Gerard v Kralik*, 44 AD3d 804 . . .).” Therefore, the respondent had no basis for subjecting the petitioner to supervision. Petition granted and respondent is prohibited from enforcing the post-release supervision.

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Newton, __ AD3d __, 847 NYS2d 645 (2nd Dept 2007)

The defendant applied for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643). He had been convicted of second-degree criminal possession of a controlled substance and was sentenced as a second felony offender to an indeterminate term of imprisonment of six years to life. The court concluded that the defendant was eligible for resentencing and proposed a resentence of a determinate term of 11 years with five years of post-release supervision. The defendant then withdrew his application.

Holding: The court failed to adequately inform the defendant that he had the right to appeal from the order setting forth the proposed resentence. The defendant is not barred from appealing the order because he withdrew his application since he did not knowingly and intelligently waive his right to appeal from the order. *Cf People v Lopez*, 6 NY3d 248, 256-257. The court properly exercised

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its discretion in determining the resentence and the proposed resentence was neither harsh nor excessive. See *People v Suitte*, 90 AD2d 80. An appeal of a resentencing order is limited to whether the proposed resentence is harsh or excessive; therefore, the prosecution's argument that the defendant was not eligible for resentencing is not properly before the court. Order affirmed and matter remitted to afford the defendant an opportunity to withdraw his resentencing application before any resentence is imposed. (County Ct, Rockland Co [Bartlett, J])

Evidence (Newly Discovered) EVI; 155(88)

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

People v Tankleff, __ AD3d __, 848 NYS2d 286 (2nd Dept 2007)

In 1990 the defendant was convicted of two counts of second-degree murder for his parents' deaths. After an unsuccessful direct appeal and petition for a writ of habeas corpus, the defendant filed a CPL 440.10 motion to vacate the conviction based on newly-discovered evidence, actual innocence, and other grounds.

Holding: The court erred in denying the defendant's CPL 440.10(1)(g) motion to vacate based on newly-discovered evidence. The defendant's motion was made with due diligence after the new evidence was discovered as it required time to find the multiple new witnesses and the defendant should not be penalized for waiting until all the evidence was gathered before presenting it to the court. See *People v Hildenbrandt*, 125 AD2d 819, 821. The court failed to consider that the cumulative effect of the new evidence created a probability that, if received at trial, the verdict would have been more favorable to the defendant. See *Amrine v Bowersox*, 128 F3d 1222, 1230 *cert den* 523 US 1123. The court completely disregarded that the witnesses who testified at the motion hearing were not connected to each other and their genesis as witnesses was separated by space and time, and that each of the witnesses implicated one or two individuals other than the defendant in the murders. The court properly denied the defendant's motion to vacate on the ground of actual innocence as he did not establish entitlement to such relief. Order modified, motion to vacate based on newly-discovered evidence granted, order otherwise affirmed, judgments and sentences vacated, and matter remitted for a new trial. (County Ct, Suffolk Co [Braslow, J (CPL 440.10 motion); Tisch, J (original judgment)])

Juveniles (Abuse) JUV; 230(3)

Matter of Christopher Anthony M., 46 AD3d 896, 848 NYS2d 711 (2nd Dept 2007)

After denying his motion for summary judgment, the court concluded that the appellant father had abused one of his children and derivatively neglected another child. The child's face had been burned when he was in the kitchen with an adult resident of the apartment and his father was in an adjoining bedroom.

Holding: The court erred in denying the father's summary judgment motion. The physician's testimony was sufficient to permit the court to draw an inference so as to establish a prima facie case of abuse when a child suffers an injury that would not ordinarily occur in the absence or omission of the child's caregivers. See Family Court Act 1046(a)(ii). However, the findings of fact and the credible evidence presented at the hearing were sufficient to rebut that inference and to establish that the child's injury could reasonably have occurred accidentally, and that there was a sufficient factual basis for the father's inability to explain how his son was injured. See *Matter of Phillip M.*, 82 NY2d 238, 244. The burden shifted back to the presentment agency to establish a triable issue of fact, which it failed to do. See *Matter of Suffolk County Dept of Social Servs.*, 83 NY2d 178, 182. Order of disposition denying the father's motion for summary judgment reversed, motion granted, petitions as against the father dismissed, fact-finding and dispositional orders pertaining to the father vacated, and appeal otherwise dismissed. (Family Ct, Queens Co [Richroath, J])

Dissent in part: [Covello, J] The evidence presented in support of the motion for summary judgment was insufficient to establish the absence of any triable issue of fact. See *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324. "[T]he majority has effectively required the ACS to come forward with direct evidence of the father's culpability." This "undermines the purpose of Family Court Act 1046(a)(ii)"

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Love, 46 AD3d 919, __ NYS2d __ (2nd Dept 2007)

The defendant applied for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643) (DLRA 2005). After the court informed him of its proposed resentence, the defendant stated that he would "take" the resentence and appeal it. Defense counsel stated that the defendant would accept the resentence, to which the court replied: "All right, done." The court then issued an order setting forth its findings of fact and reasons for the resentence. The order also purported to impose the proposed resentence.

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Holding: The court erred in failing to notify the defendant of his right to withdraw the application or appeal from the initial order and by immediately resentencing the defendant. *Cf People v Newton*, __ AD3d __, 847 NYS2d 645. DLRA 2005 provides that before the defendant must decide whether to accept the proposed sentence, the court must allow him an opportunity to appeal the initial order. The defendant’s statements during the hearing indicate that he was not withdrawing his application and they do not support the conclusion that he cannot assert on appeal that the proposed sentence is excessive. “To the extent that the decisions in *People v Guzman* (37 AD3d 615) and *People v Rosario* (42 AD3d 472) may be read as supporting a contrary view, they should no longer be followed.” The sentencing court properly exercised its discretion in determining the proposed sentence. *See People v Suitte*, 90 AD2d 80. Order modified, modified order affirmed, sentence vacated, and matter is remitted for further proceedings. (County Ct, Suffolk Co [Gazzillo, JJ])

Juveniles (Adoption) (Paternity) JUV; 230(5) (100)

Matter of Seasia D., 46 AD3d 878, 848 NYS2d 361 (2nd Dept 2007)

Holding: To determine whether a biological father’s consent is required for an adoption, the court must look at the father’s willingness to assume full custody in the six months before, evidenced by payment of pregnancy and birth expenses, and a public acknowledgement of paternity within that period. *See Matter of Robert O. v Russell K.*, 80 NY2d 254. The evidence at the hearing established that the father publicly acknowledged paternity and showed a willingness to assume full responsibility for the child. His offers of support and efforts to witness the child’s birth were rebuffed. Less than one month after the child was born, although it was after the child was placed for adoption, the father commenced a paternity and custody proceeding. He previously attempted to commence a paternity proceeding, but was incorrectly told to wait until he knew the child was born. Because the birth mother’s family kept the father from learning of the mother’s plans or the birth until after the child was surrendered, his failure to take immediate custody cannot be considered a waiver. *See Matter of Chandini S. v Joseph D.*, 166 AD2d 599. Order affirmed, matter remitted to set a date for the production of the child by the prospective adoptive parents, a determination of where the child shall reside pending resolution of the biological father’s custody proceeding, and a determination of the custody proceeding. The surrender of the child by its minor mother, acting without counsel and under the duress of the maternal grandmother, was invalid. The legislature’s failure to amend the law found

unconstitutional 17 year ago makes determination of such cases even harder. (Family Ct, Queens Co [DePhillips, JJ])

Dissent: [Dillon, JJ] The biological father’s consent was not required for the adoption.

Juveniles (Custody) (Parental Rights) JUV; 230(10) (90)

People ex rel Secor v Acosta, 46 AD3d 927, 848 NYS2d 352 (2nd Dept 2007)

Holding: The court erred in denying the paternal grandparents’ amended petition for custody. In deciding a custody petition by a nonparent when the child has a living parent, the court must determine whether the parent relinquished her superior right to custody due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances. *See Matter of Bennett v Jeffreys*, 40 NY2d 543, 548. In their custody petition, the grandparents allege that prior to their son’s death, they raised the children with him and fulfilled all of the children’s needs. They also allege that for most of that time, the children’s mother chose not to be a part of the children’s lives and she abused drugs and faced criminal charges arising from her drug abuse. If the allegations are true, they may support a finding of extraordinary circumstances. *See Domestic Relations Law 72(2)(a), (b); Matter of Campo v Chapman*, 24 AD3d 439. Order and judgment reversed, branch of the amended petition for custody reinstated, and matter remitted for a new hearing and determination. (Supreme Ct, Dutchess Co [Pagones, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Beasley, No. 2005-09396, 2nd Dept, 1/8/2008

Holding: The court incorrectly denied the defendant’s motion for resentencing under the Drug Law Reform Act of 2004 (L 2004, ch 738) (DLRA 2004). The court erred in requiring the defendant to establish that his motion should be granted as a matter of substantial justice. DLRA 2004 provides that the court shall determine an appropriate determinate sentence “unless substantial justice dictates that the application should be denied.” L 2004, ch 738, § 23; *see People v Salcedo*, 40 AD3d 356, 357. Under the circumstances and as a matter of discretion in the interest of justice, substantial justice did not require the court to deny the defendant’s motion. The facts underlying his conviction were not unusually serious, his prison record does not include any serious infractions, he has had many positive accomplishments, he has shown remorse for his actions, and his sentence for a second drug felony took into account that the offense was committed while he was on a work furlough. Order reversed, motion granted, and matter remitted for further proceedings in

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accordance with the DLRA 2004. (Supreme Ct, Queens Co [Grosso, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Bispo, __ AD3d __, 849 NYS2d 292
(2nd Dept 2008)

Holding: The court erred in denying the defendant's motion for resentencing under the Drug Law Reform Act of 2005 (L 2005, ch 643) (DLRA 2005). The defendant is not precluded from applying for resentencing, even if his merit time allowance has been withheld under Correction Law 803(1)(d)(iv), because he was eligible to earn a merit time allowance under Correction Law 803(1)(d)(i) and (ii). *See People v Sanders*, 36 AD3d 944, 946. It is undisputed that the defendant has met the other requirements of DLRA 2005. Order reversed and matter remitted for further proceedings. (Supreme Ct, Queens Co [Hollie, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Mingo, No. 2006-01964, 2nd Dept, 1/8/2008

Holding: The court correctly designated the defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C) (SORA). The prosecution provided clear and convincing evidence that the defendant was armed with a dangerous instrument during the sex offense. The prosecution's evidence included three documents that were generated by their office during the criminal proceeding and recite the facts underlying the offense. SORA and the SORA Guidelines provide that the court can consider hearsay that is well beyond that generally admissible into evidence. *See gen Nucci v Proper*, 95 NY2d 597. These documents are reliable hearsay within the meaning of SORA. "The documents, by their nature, are not ones that would be signed or sworn, and the defendant should not benefit from the lack of a more developed record of the criminal proceeding when the proceeding was terminated by acceptance of his guilty plea." Order affirmed. (Supreme Ct, Kings Co [Marrero, JJ])

Dissent: [Spolzino, JP] The prosecution presented no evidence to demonstrate that the documents containing references to a dangerous instrument (Grand Jury Synopsis Sheet, Data Analysis Form, and Early Case Assessment Bureau Data Sheet) were as trustworthy as the types of documents recognized as reliable hearsay, such as SORA case summaries, presentence reports, grand jury minutes, and witness statements. In other contexts, hearsay is only admissible when there is indicia of reli-

bility. *See People v Ketcham*, 93 NY2d 416, 421. Here, the document's authors are not identified, the sources of the information in the documents are not provided, and they are internally inconsistent.

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

Sex Offenses (General) SEX; 350(4)

People v Dashevsky, No. 2007-03174, 2nd Dept,
1/15/2008

Holding: The court incorrectly granted the defendant's motion to dismiss the superior court information and in effect withdraw his guilty plea. The defendant pleaded guilty to first-degree attempted dissemination of indecent material to minors based on his Internet communications with an undercover officer whom he believed to be a minor. Prior to sentencing, the defendant moved to dismiss arguing that, pursuant to *People v Kozlow* (31 AD3d 788), his allocution was factually insufficient to show that the communications depicted sexual conduct within the meaning of Penal Law 235.22 since they did not contain visual sexual images. However, the Court of Appeals reversed the *Kozlow* decision and held that the term "depict" covers a wide range of indecent materials, not just visual or pictorial representations. *See People v Kozlow*, 8 NY3d 554, 560. Therefore, the superior court information should be reinstated. The court lacks the authority to reinstate the defendant's plea. *See People v Thompson*, 202 AD2d 456. Appeal of the order granting the defendant's motion to withdraw his guilty plea dismissed, order dismissing the superior court information reversed, information reinstated, and matter remitted for further proceedings. (Supreme Ct, Suffolk Co [Doyle, JJ])

Juveniles (Custody) (Neglect) JUV; 230(10) (80) (90)
(Parental Rights)

Matter of Courtney B., __ AD3d __, 849 NYS2d 179
(2nd Dept 2008)

Holding: The court correctly modified its prior order by returning custody of the child to her mother. The child's parents had signed admissions of neglect of the child due to their substance abuse and the child was placed with her paternal grandparents. Thereafter, the mother successfully completed an inpatient substance abuse program and parenting programs. With the support of the child's law guardian and the county Department of Social Services, the mother reobtained custody of her child. Even though the paternal grandmother had temporary custody of the child with the mother's consent, the mother's custody claim preempts that of the grandmother. *See Matter of Ellen K. v John K.*, 186 AD2d 656. Since the

Second Department *continued*

mother successfully addressed the issues leading to the child's removal, the court properly returned custody to her. *See* Family Court Act 1054. Order affirmed. (Family Ct, Suffolk Co [Genchi, JJ])

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

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

Matter of Moller v Dennison, __ AD3d __,
849 NYS2d 645 (2nd Dept 2008)

Holding: The court incorrectly concluded that the article 78 petition was barred by the statute of limitations. Because the petitioner commenced the proceeding within four months of the respondent's denial of his request, the petition is not time-barred. *See Matter of Chmielewsky v New York State Div of Parole*, 246 AD2d 778, 779. However, upon review of the merits of the petition and the record, the court properly dismissed the petition. *Cf United States v Rodriguez*, 178 F Appx 152, 157-158 *cert den* 127 S Ct 1124. The petitioner was convicted of first-degree attempted assault, second-degree assault, and first-degree reckless endangerment after he shot his wife while she was backing their car out of the driveway. The respondent imposed a special condition on the petitioner's post-release supervision that prohibited him from associating or communicating by any means with his wife without approval from the Division of Parole. The petitioner requested that the respondent lift the special condition or in the alternative allow him to live with his wife. The respondent denied that request based on its policy of strictly forbidding the approval of a parolee's proposed residence with a victim of domestic violence committed by the parolee, even if the victim indicates that the couple has reconciled. Order and judgment affirmed. (Supreme Ct, Nassau Co [Phelan, JJ])

Juveniles (Custody) (Visitation) JUV; 230(10) (145)

Matter of Nikolic v Ingrassia, No. 2007-00199,
2nd Dept, 1/22/2008

Holding: The court properly awarded physical custody of the child to his father, but erred in awarded visitation to the mother for all weekends, holidays, and summer vacations. In making a custody determination, the court's paramount concern is the best interests of the child. *See Eschbach v Eschbach*, 56 NY2d 167, 171. When a parent willfully interferes with a noncustodial parent's visitation rights, as the court found the mother had done, it raises a strong probability that that parent is unfit to act as the custodial parent. *See Matter of Joosten v Joosten*, 282 AD2d 748. The court properly declined to follow the forensic evaluator's recommendation that the mother was

the preferred custodial parent, particularly since the recommendation was made before the mother's intentional interference with the father's visitation was discovered. The court did not fail to consider the child's relationship with her brother in making the determination. In some cases, the best interests of siblings differ and the record did not show that the siblings had a close relationship and the schedule gave the siblings ample opportunity to see each other. However, the schedule was not in the child's best interests as it did not "take into account the importance of the child's relationship with the father and his extended family by depriving the child of contact during times that are usually reserved for family gatherings and recreation." Order modified by deleting the visitation provision, order affirmed as modified, matter remitted for a new visitation schedule determination, and pending a new determination, the visitation schedule in the order shall remain in effect. (Family Ct, Nassau Co [Pessala, JJ])

Juveniles (Custody) (Neglect) JUV; 230(10) (80)

Matter of Xavier J., __ AD3d __, 849 NYS2d 648
(2nd Dept 2008)

Holding: The court improvidently exercised its discretion by authorizing the respondent mother to have custody of the child pending determination of the neglect petition. The agency's petition alleges that the respondent derivatively neglected her child based on prior abuse and neglect cases involving her older children, one of whom died after being shaken by her, and the continuing risk posed by the father's substance abuse and violent behavior towards the mother. In determining whether a child should be removed pending a final determination on a neglect petition, the court must balance the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal of the child. *See* Family Court Act 1027; *Nicholson v Scopetta*, 3 NY3d 357, 380. Although the mother pleaded guilty to manslaughter after an infant died in her care, she later failed to acknowledge that her actions caused the child's death. *See Matter of Umer K.*, 257 AD2d 195, 199. The mother's statements at the hearing indicate that she does not appreciate the seriousness of the father's behavior or the risk that it poses to the child. Under the circumstances, it is safer to leave the child in the agency's custody pending a fact-finding hearing and a final determination of the petition. *See Matter of Nyasia J.*, 41 AD3d 478, 479. Order reversed and the child shall remain in the custody of the agency pending final determination of the neglect petition. (Family Ct, Kings Co [Elkins, JJ])

Third Department

Evidence (Prejudicial) (Uncharged Crimes) EVI; 155(106) (132)

People v Billups, 45 AD3d 1176, 845 NYS2d 873
(3rd Dept 2007)

The defendant was convicted of six counts of second-degree burglary.

Holding: The court erred in allowing the prosecution to present evidence at trial, pursuant to the state of mind or intent exception to the rule in *People v Molineux* (168 NY2d 264, 293), that while he was being interrogated, the defendant stated that he previously pleaded guilty to an unrelated burglary charge. In deciding whether to admit the evidence, the court incorrectly focused on the defendant's state of mind during the interrogation, not when he allegedly committed the crimes charged. As intent was not at issue, "the evidence of the prior conviction would only tend to establish defendant's propensity to commit burglary and not 'to negate the existence of an innocent state of mind' (*Matter of Brandon*, 55 NY2d 206, 211 . . .)." Although the court attempted to ameliorate the prejudice to the defendant by giving limiting instructions to the jury, the error was not harmless beyond a reasonable doubt. See *People v Wallace*, 31 AD3d 1041, 1044. Judgment reversed and matter remitted for a new trial. (County Ct, Albany Co [Breslin, J])

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

Sentencing (Enhancement) (Pronouncement) SEN; 345(32) (70)

People v Bruning, 45 AD3d 1179, 846 NYS2d 467
(3rd Dept 2007)

The defendant entered into an *Alford* plea agreement with a promised sentence of 10 to 13 years in prison. The agreement included a waiver of the right to appeal. Prior to sentencing, the defendant moved to withdraw his plea, claiming that the plea was coerced, but the court denied the motion. At sentencing, the defendant stated that he intended to appeal. The court concluded that the defendant's planned appeal negated the plea agreement and it imposed a sentence above the agreed-upon sentence.

Holding: The court erred in increasing the defendant's sentence after he stated that he planned to appeal. In order for the court to impose a sentence that differs from the one established in the plea agreement, the court must advise the defendant during the plea that it can either impose a different sentence if he fails to meet specified conditions or permit the defendant to withdraw his plea, which the court failed to do. See *People v Emerson*, 42

AD3d 751, 752-753. Judgment reversed and matter remitted for further proceedings. (County Ct, Chenango Co [Daley, J])

Evidence (Common Plan or Scheme) (Prejudicial) (Uncharged Crimes) EVI; 155(30) (106) (132)

People v Buskey, 45 AD3d 1170, 846 NYS2d 701
(3rd Dept 2007)

The defendant was convicted of first-degree sexual abuse and three counts of endangering the welfare of a child. The charges were based on the defendant's alleged sexual contact with the 13-year-old complainant.

Holding: The court erred in allowing the prosecution in its direct case to introduce evidence that the defendant had made sexual advances toward three other teenage girls as evidence of a common scheme or plan and to demonstrate lack of mistake and motive. For evidence of uncharged crimes to be admissible under the common scheme or plan exception, the uncharged crimes must support the inference that there exists a single inseparable plan encompassing both the charged and uncharged crimes. See *People v Fiore*, 34 NY2d 81, 85. The uncharged crimes established only a repetitive pattern and not a common scheme or plan. The evidence was not necessary to demonstrate lack of mistake or intent as it was not introduced in response to a defense theory and the defendant's motive and purpose can be gleaned from his alleged acts. The probative value of the evidence is substantially outweighed by the prejudice to the defendant and there is a risk that the jury would use the evidence to draw an impermissible inference. See *People v Jackson*, 136 AD2d 866. Judgment reversed and matter remitted for a new trial. (County Ct, Clinton Co [McGill, J])

Juries and Jury Trials (Challenges) (Qualifications) (Selection) JRY; 225(10) (50) (55)

People v Jones, 45 AD3d 1178, 845 NYS2d 875
(3rd Dept 2007)

Holding: The court erred in denying the defendant's for cause challenge of a potential juror who indicated a potential bias as to the police officers' credibility and testimony. Credibility of those officers was an important issue in the case. The juror admitted that he knew the officers involved in the defendant's arrest and he did not give unequivocal assurance that he would be impartial after indicating his potential bias. The court gave a general instruction about not treating the officers' testimony differently than other witnesses, but the record does not show that the juror agreed to abide by the instruction. The defendant exercised a preemptory challenge as to that juror and used the rest of his preemptory challenges.

Third Department *continued*

Reversal is required under these circumstances. *See People v Nicholas*, 98 NY2d 749, 750-752. Judgment reversed and matter remitted for a new trial. (County Ct, Schenectady Co [Cortese, J])

Identification (Show-ups) IDE; 190(40)

Sentencing (Pronouncement) SEN; 345(70) (90)
(Youthful Offenders)

People v Mattis, 46 AD3d 929, 846 NYS2d 757
(3rd Dept 2007)

The defendant was convicted of two counts of second-degree robbery and one count of second-degree assault.

Holding: The court properly denied the defendant’s motion to suppress the showup identification. Shortly after the incident, the complainant was brought to a nearby location where she identified the defendant and the co-defendant. Showup identifications are permissible if the procedures used are reasonable under the circumstances, including that the showup occurred in close proximity to the location and the time of the incident and the procedures used were not unduly suggestive. *See People v Brisco*, 99 NY2d 596, 597. Under the circumstances, the showup identification was admissible. *See People v August*, 33 AD3d 1046, 1048-1049 *lv den* 8 NY3d 878. The court erred in failing to determine the defendant’s youthful offender status. Statements in the presentence report and by defense counsel indicated that the defendant was eligible, but the court failed to determine his status and did not provide reasons for denying such status. *See People v Rivera*, 27 AD3d 491 *lv den* 6 NY3d 897. Judgment modified, sentence vacated, and matter remitted for resentencing. (County Ct, Ulster Co [Pulver Jr., J])

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

People v Thomson, 46 AD3d 939, 847 NYS2d 682
(3rd Dept 2007)

Holding: The court correctly concluded that while defense counsel’s inaction constituted inadequate legal assistance, the defendant failed to show that there is a reasonable probability that but for counsel’s error, the result would have been different. *See Mask v McGinnis*, 233 F3d 132, 140. By failing to verify that the defendant’s prior New Jersey conviction was not a predicate felony prior to plea negotiations, defense counsel provided inadequate legal assistance. In order to establish prejudice, the defendant must show that the prosecution would have offered him a more favorable plea deal if they knew about his

actual status and that he would have accepted such a deal. *See People v Garcia*, 19 AD3d 17, 18, 20-21. The defendant failed to present evidence that the prosecution based their plea offer on his predicate felony status and there is no support for the conclusion that a change in his status would have resulted in a better offer. The defendant also failed to present objective evidence that he would have accepted a more favorable plea offer. *See United States v Gordon*, 156 F3d 376, 381. The defendant had rejected an offer of 8 to 16 years in prison and chose to go to trial, despite the potential maximum term of life imprisonment, and in his appeal, he did not provide a definite statement as to what sentence he would have accepted. The only evidence the defendant presented in support of that conclusion is his affidavit stating that he would have considered a more favorable offer. Order affirmed. (Supreme Ct, Albany Co [Teresi, J])

Juveniles (Neglect) JUV; 230(80)

Matter of Krista LL., 46 AD3d 1209, 848 NYS2d 398
(3rd Dept 2007)

Holding: The court correctly concluded that the respondent mother neglected her two children. The neglect determination was based upon the respondent’s actions after her older daughter revealed that the respondent’s husband had been sexually abusing her. Although the respondent immediately took her daughter to counseling, the evidence showed that the respondent refused to believe the abuse had occurred, despite her husband’s confession, she repeatedly accused her older daughter of lying and trying to break up the family and inflicted corporal punishment on her, she allowed her daughters to be exposed to her husband after he was released from jail, and she convinced her younger daughter that the abuse allegations were lies. “[T]his conduct constitutes a severe derivation from the course which would be adopted by a reasonably prudent parent, creates the potential of harm to the mental and emotional condition of both children, and demonstrates a sound and substantial basis for the neglect findings (*see Matter of Mary S.*, 279 AD2d 896, 897 [2001]).” With regard to her younger daughter, based on the facts and circumstances in this case, the court properly concluded that the respondent placed her daughter at imminent risk of harm by allowing her to be exposed to the husband (*see Matter of Vivian OO.*, 34 AD3d 1111, 1113), even though that conclusion was based on uncorroborated evidence from the petitioner’s caseworker. Order affirmed. (Family Ct, Columbia Co [Czajka, J])

Accusatory Instruments (Amendment) (General) ACI; 11(5) (10)

Evidence (Sufficiency) EVI; 155(130)

Third Department *continued*

People v Bray, 46 AD3d 1232, 848 NYS2d 738
(3rd Dept 2007)

Holding: The defendant was convicted of three counts of endangering the welfare of a child. The charges stemmed from allegations that the defendant hit his estranged wife while the couple's three young children were present. The defendant was acquitted of additional charges of attempted assault. Contrary to the defendant's argument, the court did not allow the prosecutor to in effect amend the misdemeanor complaints during oral argument by referring to conduct that was not alleged in therein because the complaints were deemed converted into informations. While the complaints referred to the alleged assault, the supporting depositions contained additional allegations, including that the defendant refused to leave the premises or allow the children's aunt to leave with the children. The prosecutor's reference to that conduct did not amount to an amendment of the accusatory instruments and the informations were sufficient. *See People v Miles*, 64 NY2d 731, 732. The verdicts were not repugnant because "no element of attempted assault is a necessary element of endangering the welfare of a child." *See People v Tucker*, 55 NY2d 1, 7. The evidence was sufficient to support the verdicts as it showed that the defendant acted in a way that he knew was likely to result in potential harm to the children. *See People v Johnson*, 95 NY2d 368, 371-372. Judgment affirmed. (Supreme Ct, Clinton Co [Lawliss, JJ])

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

Sentencing (Pronouncement) SEN; 345(70)

Matter of Dreher v Goord, 46 AD3d 1261,
848 NYS2d 758 (3rd Dept 2007)

Holding: The court erred in denying the petitioner's article 78 petition seeking to prohibit the respondent Commissioner of the Department of Correctional Services (DOCS) from imposing a period of post-release supervision on him. The sentencing court did not impose a period of post-release supervision, but when the petitioner entered DOCS custody, DOCS added a five year term of post-release supervision to his sentence. Although Penal Law 70.45(1) provides for a mandatory term of post-release supervision, it does not authorize DOCS to impose such a term; "sentencing remains the province of the courts." The Legislature has made clear that DOCS has some responsibility for correcting an unlawful sentence, *see* Correction Law 601-a, but it does not have the authority to change an incorrect sentence. Courts have the sole authority to sentence defendants and a sentence can only be altered by a judge in a subsequent proceeding. *See*

Earley v Murray, 451 F3d 71, 75 *cert den* 127 S Ct 3014 (2007). "To the extent that our prior decisions have held otherwise (*see Matter of Garner v New York State Dept. of Correctional Servs.*, 39 AD3d 1019, 1019 [2007], *lv granted* 9 NY3d 809 [2007]; *Matter of Deal v Goord*, 8 AD3d 769, 769-770 [2004], *appeal dismissed* 3 NY3d 737 [2004]), they should no longer be followed (*see Matter of Quinones v New York State Dept. of Correctional Servs.*, __ AD3d __ [decided herewith])." Judgment reversed and petition granted. (Supreme Ct, Albany Co [McCarthy, JJ])

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

Sentencing (Pronouncement) SEN; 345(70)

Matter of Quinones v NYS Department of Correctional Services, 46 AD3d 1326, __ NYS2d __ (3rd Dept 2007)

Holding: The court erred in denying the petitioner's article 78 petition seeking to prohibit the respondent Department of Correctional Services (DOCS) from imposing a period of post-release supervision on him. DOCS imposed a five-year term of post-release supervision on the petitioner in the absence of any action by the sentencing court on the issue. As the amendments to Penal Law 70.45 make clear, because the petitioner was a first-time violent felony offender, the court had the discretion to impose a term of post-release supervision between the minimum and maximum set by Penal Law 70.45(2). *See* L 2004, ch 738, § 35. Because the court could have imposed less than a five-year term of post-release supervision, the imposition of a term was not just a ministerial act. Courts have the sole authority to sentence defendants and a sentence can only be altered by a judge in a subsequent proceeding. *See People v Duncan*, 42 AD3d 470, 471; *Earley v Murray*, 451 F3d 71, 75 *cert den* 127 S Ct 3014 (2007). "To the extent that our prior decisions in *Matter of Deal v Goord* (8 AD3d 769 [2004], *appeal dismissed* 3 NY3d 737 [2004]) and *Matter of Garner v New York State Dept. of Correctional Servs.* (39 AD3d 1019, 1019 [2007], *lv granted* 9 NY3d 809 [2007]) reached a different conclusion, they should no longer be followed." Judgment reversed and petition granted. (Supreme Ct, Albany Co [Ceresia, Jr., JJ])

Search and Seizure (Arrest/
Scene of the Crime
Searches [Probable Cause
(Observations and
State of Mind)]) SEA; 335(10[g(iv)])

People v Solano, 46 AD3d 1223, 848 NYS2d 431
(3rd Dept 2007)

A police officer had been speaking to David Messmore, who he knew to be a substance abuser; Messmore told him about the drug trade in a nearby area.

Third Department *continued*

While they were talking, a car with North Carolina plates drove by, slowed down, and honked its horn. Messmore waived the car off, got in his own car, and followed the North Carolina car. After the officer found both cars stopped on a nearby street, both cars left. He then found both cars pulled over on another street with the North Carolina car in front. He stopped with the front of his car close to the front of the North Carolina car. The officer did not see Messmore in the North Carolina car until he got out. The officer frisked the defendant who was in the front seat and found crack cocaine and a later search revealed more cocaine.

Holding: The court erred in denying the defendant’s motion to suppress the physical evidence seized during the search because the police did not have reasonable cause to believe that he was involved in criminal activity. The officer seized the defendant when he pulled his car in front of the North Carolina car and approached it. At that point, the officer had not observed any illegal conduct. *Compare People v Nichols*, 227 AD2d 715, 716-717. While the officer testified that the parties’ actions led him to conclude that they may have been engaging in criminal activity, the actions were “susceptible of innocent interpretation (see *People v Bailey*, 204 AD2d 751, 752-753 [1994]).” The record does not reveal another basis for the stop. Judgment reversed, motion to suppress granted, and matter remitted for further proceedings. (County Ct, Schenectady Co [Drago, J])

Burglary (Elements) (Evidence)	BUR; 65(15) (20)
Evidence (Sufficiency) (Uncharged Crimes) (Writings)	EVI; 155(130) (132) (140)

People v Taylor, 46 AD3d 1213, 847 NYS2d 786 (3rd Dept 2007)

The defendant was convicted of two counts of third-degree burglary.

Holding: The court correctly admitted the letter the defendant wrote to his paramour as the letter did not provide proof of a prior bad act or an uncharged crime. See *People v Ventimiglia*, 52 NY2d 350; *People v Molineux*, 168 NY 264. The letter, which included statements such as “I’m in the crime lifestyle for life” and “[t]his is a crime family,” reflects the defendant’s general beliefs. Because intent was a necessary element of burglary, it could be used to infer his subjective intent (see *People v Hunter*, 32 AD3d 611, 612), and the court gave a limiting instruction about its use. See *People v Wilder*, 93 NY2d 352, 358. After he testified that he wrote the letter out of anger and frustration, the prosecution was allowed, in order to correct a

possible mistaken impression given to the jury, to ask him about pictures in his apartment and another letter he wrote, both of which indicated his interest in organized crime. See *People v Rojas*, 97 NY2d 32, 36, 39. The defendant failed to preserve his sufficiency of the evidence argument, as he only made a general objection at the end of the prosecution’s proof. Even if he had preserved the argument, the evidence was sufficient and the verdict was not against the weight of the evidence. See *People v Bleakley*, 69 NY2d 490, 495. Judgment affirmed. (County Ct, Albany Co [Breslin, J])

Sex Offenses (Sentencing)	SEX; 350(25)
<i>People v Titmas</i> , 46 AD3d 1308, 848 NYS2d 776 (3rd Dept 2007)	

Holding: The court erred in adjudicating the defendant a level three sex offender because it improperly assessed fifteen points for a history of alcohol and drug abuse. The defendant’s occasional use of alcohol, his occasional use of marijuana that ended seven years before the adjudication, and his one-time use of LSD six years before the adjudication does not provide clear and convincing evidence of a history of drug and alcohol abuse. See *eg People v Irizarry*, 36 AD3d 473. Order reversed and the defendant is adjudicated a level two sex offender. (County Ct, Sullivan Co [LaBuda, J])

Admissions (Interrogation) (Miranda Advice) (Spontaneous Declaration)	ADM; 15(22) (25) (37)
Constitutional Law (General) (United States Generally)	CON; 82(20) (55)

People v VanPatten, No. 100315, 3rd Dept, 12/27/2007

The defendant, an inmate, was convicted of making a terroristic threat for sending a letter to a district attorney threatening his life and the lives of his family and other government employees unless he stopped prosecuting Penal Law article 49 violations.

Holding: The court erred in denying the defendant’s motion to suppress his statements as they were elicited in violation of his *Miranda* [*Miranda v Arizona*, 384 US 436 (1966)] rights. When the police investigator interrogated him, the defendant was in a correctional facility classroom, correction officers were outside the door, and he was not allowed to leave on his own; thus, he was in custody and *Miranda* warnings were necessary. See *People v Alls*, 83 NY2d 94, 102-103. The defendant did not spontaneously confess; he made the statements after the investigator gave a lengthy description of the questions he planned to ask. The investigator “should have known that his statements were likely to elicit an incriminating response (see *People v*

Third Department *continued*

Paulman, 5 NY3d [122] at 129 . . .).” The defendant’s later statements were not admissible as there was no definite, pronounced break in the interrogation. The admission of the statements was not harmless error. Penal Law 490.20 is not unconstitutionally vague as applied to the defendant; he cannot reasonably contend that threatening to murder the District Attorney and others unless certain types of prosecutions ceased did not meet the statutory elements of Penal Law 490.20(1). See *People v Jenner*, 39 AD3d 1083, 1085. Judgment reversed, motion to suppress granted, and matter remitted. (County Ct, Madison Co [DiStefano, J; McDermott, J (suppression motion)])

Judges (Disqualification) JGS; 215(8)

Search and Seizure (Search Warrants [Issuance] [Suppression]) SEA; 335(65[k] [p])

People v Alteri, No. 101004, 3rd Dept, 1/17/2008

Holding: The court correctly granted the defendant’s motion to suppress evidence seized during the execution of an improperly issued search warrant and dismissed the eavesdropping charge. Because there was a close working relationship between the town court, the town’s emergency dispatch, and the defendant, who was a town dispatcher, both town justices recused themselves and the matter was transferred to another justice court. See CPL 170.15(3). After the recusal and transfer, the town police applied to one of the recused justices for a search warrant, which the justice signed. Based on evidence discovered during the execution of the search warrant, the defendant was charged in a new single-count indictment with eavesdropping. Judges are not deprived of jurisdiction when they voluntarily recuse themselves to avoid the appearance of impropriety. See *People v Moreno*, 70 NY2d 403, 406; *Matter of Fitzgerald v Wells*, 9 AD2d 812 *lv den* 7 NY2d 711 *app dismissed* 9 NY2d 864. However, in order to be constitutionally valid, a search warrant must be issued by a neutral, detached magistrate. See *People v Bilsky*, 95 NY2d 172, 177. Because the justices recused themselves to avoid impropriety, it cannot be concluded that the neutral, detached magistrate requirement was met. Order affirmed. (County Ct, Essex Co [Meyer, J])

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

Sex Offenses (Sentencing) SEX; 350(25)

People v Carey, Nos. 501124, 501415, 3rd Dept, 1/17/2008

The defendant was convicted of two counts of second-degree promoting prostitution and one count of

third-degree promoting prostitution in 1983. In 1992 while on parole for those offenses, he was convicted of substance abuse offenses. As part of his new sentence, he was required to serve the remainder of his 1983 sentence. When he was paroled again in 2006, he was notified that he was subject to the Sex Offender Registration Act, Correctional Law art 6-C (SORA). At that time, he waived his right to a hearing and consented to a risk level two designation, but he later moved to withdraw his waiver.

Holding: The court correctly denied the defendant’s motion to withdraw his waiver and concluded that he is subject to SORA since he was still serving his sentence on the 1983 offenses when the Legislature added second-degree promoting prostitution to the list of sex offenses. See Correction Law 168-f, 168-g. The totality of the circumstances shows that the defendant received meaningful representation by defense counsel. Before he stipulated to a level two designation, the defendant and his counsel knew that the Board of Examiners of Sex Offenders had recommended a level three determination and they were aware of the evidence that could have been presented in support of that recommendation. Thus, the stipulation was not inappropriate. Orders affirmed. (County Ct, Albany Co [Breslin, J])

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

People v Hackett, No. 100942, 3rd Dept, 1/24/2008

The defendant was pulled over by a state trooper after he drove over the fog line. Before the trooper approached his car, the defendant leaned toward the passenger seat. When asked about his movement, he said that he was reaching for his cell phone, which he showed to the trooper. The trooper detained the defendant for a traffic violation, handcuffed him, and placed him in the police car. A warrant check revealed no outstanding warrants. After backup arrived, the trooper went to the defendant’s car, opened the passenger door and checked the floor, which was clean. The trooper then shone his flashlight underneath the seat and found a loaded handgun. Cocaine was also found in the car.

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Third Department *continued*

Holding: The court erred in denying the defendant's motion to suppress the physical evidence found during the search of his car. Because there was no imminent threat to the trooper's safety when he conducted the search and he did not have probable cause for the search, the search was unlawful. After a person exits a vehicle, a search of the vehicle is unlawful unless there is an actual and specific threat to the officer's safety or other justification for the search. *See People v Torres*, 74 NY2d 224, 231 n.4. None of the defendant's actions, including that he seemed nervous and kept looking at his car, presented a specific threat. Judgment reversed, motion to suppress granted, and matter remitted for further proceedings. (County Ct, Chemung Co [Hayden, JJ])

Fourth Department

Evidence (Hearsay) EVI; 155(75)

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

People v Cruz, 45 AD3d 1462, 845 NYS2d 667 (4th Dept 2007)

The defendant and two codefendants were charged with first-degree robbery. One of the codefendants made incriminating statements that included the word "we." That codefendant later fled the country and was tried in absentia.

Holding: The court erred in admitting statements by a nontestifying codefendant that implicated the defendant. At the first trial, which ended in a mistrial for other reasons, the court allowed the admission of the codefendant's statements over the defendant's objection that such admission would violate *Bruton v United States* (391 US 123 [1968]). Although the defendant did not object to the statement's admission at the second trial and thus failed to preserve the issue, it will be reviewed in the interest of justice. A *Bruton* violation occurs when a confession of a nontestifying codefendant that facially incriminates the defendant is admitted at their joint trial because it deprives the defendant of his right of confrontation. *See People v Wheeler*, 62 NY2d 867, 869. The limiting instruction given by the court did not sufficiently alleviate the prejudice to the defendant and the error was not harmless beyond a reasonable doubt. *See gen People v Crimmins*, 36 NY2d 230, 237. The admission of the testimony also violated *Crawford [v United States]* (541 US 36 [2004]) because the out-of-court statements were testimonial in nature and were inadmissible as the codefendant was unavailable and the defendant did not have a prior opportunity to cross-examine him. *See Davis v Washington*, 126 S Ct 2266, 2273-2274 (2006). Judgment reversed and matter remitted for a new trial. (County Ct, Erie Co [Troutman, JJ])

Evidence (Exhibits) (General) EVI; 155(55) (60)

Juries and Jury Trials (Challenges) JRY; 225(10) (50) (55)
(Qualifications) (Selection)

People v Givans, 45 AD3d 1460, 845 NYS2d 665 (4th Dept 2007)

Holding: The court erred in denying the defendant's for cause challenges of two prospective jurors. The defendant challenged for cause a total of four jurors; all of the challenges were denied. One of the jurors said that she would favor law enforcement and give greater weight to their testimony. Those statements and the statements of another prospective juror cast doubt on their ability to render a fair verdict following the relevant legal standards and the court did not elicit from the jurors unequivocal assurance of their impartiality. *See People v Bludson*, 97 NY2d 644, 645; *People v Arnold*, 96 NY2d 358, 364. Because the defendant used all of his preemptory challenges before the end of jury selection, the judgment must be reversed. The court also erred in admitting a cell phone text message into evidence because the prosecution failed to demonstrate the authenticity or reliability of the message or that the defendant read or retrieved the message. *See People v Johnson*, 250 AD2d 922, 928-929 *aff'd* 93 NY2d 254. The court improperly allowed the jury to access all contents of the cell phone and to view items that were not admitted into evidence at trial. *See People v Vizzini*, 183 AD2d 302, 307-308. Judgment modified, convictions for second-degree criminal possession of a controlled substance and conspiracy reversed, judgment affirmed as amended, and matter remitted for a new trial on those counts. (County Ct, Jefferson Co [Martusewicz, JJ])

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

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

Matter of Harewood v Leclarie, 45 AD3d 1455, 846 NYS2d 533 (4th Dept 2007)

The petitioner did not report to work at the mess hall. Instead, he went downstairs and asked a correction officer if the law library had notified him to pick up the legal materials that he needed for a court deadline. The officer, who did not know about the work assignment, gave him a pass to the library.

Holding: There is substantial evidence to support the hearing officer's determination that the petitioner violated inmate rules that prohibit being out of place in an area of the correctional facility and failing to follow facility regulations and staff directions related to movement within the facility. *See gen People ex rel Vega v Smith*, 66 NY2d 130, 139. The determination was based on the petitioner's admissions, the fact that he did not have permission to go

Fourth Department *continued*

Holding: Because the petitions allege sufficient factual and legal grounds, the court erred in dismissing them without holding a hearing. *Cf Bowie v Bowie*, 182 AD2d 1049, 1050. The respondent's failure to comply with the orders over a significant period of time was undisputed. The court incorrectly concluded that it did not have the authority to enforce the prior orders. The court had the authority to enforce the orders by, for example, holding the respondent in contempt for interfering with the petitioner's visitation rights. *See Family Court Act 156*. The court did admonish the respondent early on, which did not cause the respondent to comply. Order reversed, petitions reinstated, and matter remitted for a hearing on the petitions. (Family Ct, Ontario Co [Reed, J])

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

Reckless Endangerment (Elements) RED; 326(10)
 People v Boggs, 46 AD3d 1402, 847 NYS2d 804 (4th Dept 2007)

Holding: The defendant pleaded guilty to first-degree reckless endangerment. Although the defendant failed to preserve the issue of the facial sufficiency of his guilty plea, preservation is not required because his recitation of the facts underlying the crime to which he pleaded casts significant doubt upon his guilt. *See People v Lopez*, 71 NY2d 662, 666. The defendant's statements that he grabbed a couple of knives and threatened a trooper and a police officer with them are insufficient to establish the depraved indifference element of the offense or that he created a grave risk of death to the officers. *See gen People v Feingold*, 7 NY3d 288, 290, 294-295; *cf People v Torres*, 174 AD2d 430 *lv den* 79 NY2d 865. The prosecution conceded that reversal is required. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Livingston Co [Kohout, AJ])

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

Matter of Cody v Fischer, 46 AD3d 1371, 848 NYS2d 489 (4th Dept 2007)

Nine days after the petitioner was transferred to a new correctional facility, a search of his cell revealed materials related to organizations of which he was a member while in other correctional facilities. The organizations had been approved by the deputy commissioner for program services, but were not approved by the correctional facility to which the petitioner had been transferred.

Holding: After a Tier III hearing, the respondent determined that the petitioner violated inmate rule 105.12 (7 NYCRR 270.2(B)(6)(iii)), which prohibits possession of unauthorized organizational materials. Unauthorized organizations are defined as gangs or other organizations that have not been approved by the deputy commissioner for program services. The respondent erred in determining that the petitioner violated this inmate rule because the materials had been approved by the deputy commissioner at the time the petitioner acquired them. *See gen Matter of Morrero v Coombe*, 236 AD2d 887. Determination annulled, petition granted, and respondent directed to expunge references to the violation from the petitioner's institutional record.

Counsel (Conflict of Interest) COU; 95(10) (15) (24)
 (Competence/Effective Assistance/Adequacy)
 (Multiclient Representation)

People v Durand, 46 AD3d 1336, 847 NYS2d 890 (4th Dept 2007)

The defendant alleges that he was denied effective assistance of counsel because he was represented by the same attorney as the two codefendants, he was advised to testify before the grand jury and during his testimony he gave incriminating statements that were used against him at trial, and the attorney did not conduct plea negotiations on his behalf despite having negotiated favorable plea bargains for the codefendants.

Holding: The court should have conducted a *Gomberg* hearing (*People v Gomberg*, 38 NY2d 307) regarding the defendant's allegation that he was denied effective assistance of counsel at the pretrial stage of the proceeding before it denied his motion to dismiss the indictment on that ground. Case held, decision reserved, and matter remitted for a *Gomberg* hearing and reconsideration of the motion to dismiss the indictment. (County Ct, Wayne Co [Kehoe, J])

Search and Seizure (Search Warrants [Execution]) (Warrantless Searches) SEA; 335(65[f]) (80)

People v Ellison, Jr., 46 AD3d 1341, 848 NYS2d 499 (4th Dept 2007)

An individual brought an undercover officer to the defendant's studio apartment to buy cocaine. While the officer was in the apartment, he saw 20 to 30 clear bags filled with what he believed was cocaine. As soon as the officer and the individual left the building, the individual was arrested and placed in a marked police car. About 10 minutes later, the police forcibly opened the defendant's door with a battering ram and secured the defendant and the

Fourth Department *continued*

other occupants while a search warrant could be obtained. After the police at the apartment were notified that the warrant had been signed, but before the warrant was brought to the apartment, the officers began the search. The officers found five small bags of cocaine, the prerecorded buy money, \$110 in cash, glassine envelopes, and photo identification and mail bearing the defendant's name.

Holding: The court erred in denying the defendant's motion to suppress the physical evidence seized because the officers started the search before knowing the contents of the warrant. *See People v Okun*, 135 AD2d 1064, 1065-1066. There was no evidence that the supervising officer knew of the warrant's contents after it was signed, but before it was brought to the scene. Even though the warrant was signed without any limitations and the warrant application was routine, the police did not have the requisite knowledge of the warrant's contents before it was brought to them. Judgment reversed, motion to suppress granted, and new trial granted on counts one and two of the indictment. (Supreme Ct, Monroe Co [Valentino, J; Fisher, J (suppression hearing)])

Driving While Intoxicated DWI; 130(5) (15)
(Chemical Test [Blood or Urine]) (Evidence)

People v Freeman, 46 AD3d 1375, 848 NYS2d 800 (4th Dept 2007)

The defendant was convicted of second-degree vehicular assault, two counts of driving while intoxicated, and other charges.

Holding: The court erred in denying the defendant's motion to suppress the results of the compulsory blood test performed on him because the application for the test was incomplete. The trooper who made the application relied on statements made by civilian witnesses to another trooper, double hearsay, to support his belief that the accident occurred "in the course of" the defendant's operation of a motor vehicle. *See Vehicle and Traffic Law 1194(3)(b)(1)*. While the applicant can include double hearsay statements that satisfy the *Aguilar-Spinelli* test [*Aguilar v Texas*, 378 US 108 [1964]; *Spinelli v United States*, 393 US 410 [1969]], the applicant must disclose that the application is supported by hearsay and must identify the sources of the hearsay. *See People v Whelan*, 165 AD2d 313, 321-322 *lv den* 78 NY2d 927. The trooper's application failed to disclose that the information was based on statements from civilian witnesses and did not show that the trooper had an independent basis for having reasonable cause to believe that the accident occurred in the course of the defendant's operation of his vehicle. Without the blood test results, the defendant's conviction for driving while

intoxicated per se cannot stand because that offense must be proved by chemical analysis. *See Vehicle and Traffic Law 1192(2)*. As to the other convictions, the error in denying the motion was harmless. Judgment modified, conviction for driving while intoxicated per se reversed, motion to suppress blood test results granted, and judgment affirmed as modified. (County Ct, Ontario Co [Reed, JJ])

Double Jeopardy (Jury Trials) DBJ; 125(10) (15)
(Lesser Included and Related Offenses)

Homicide (Murder) HMC; 185(40[d] [g] [m] [p])
[Definition] [Degrees and Lesser Offenses] [Instructions] [Intent]

People v Gause, 46 AD3d 1332, 848 NYS2d 495 (4th Dept 2007)

After the codefendant shot the decedent in the head, neck, and chest, the defendant repeatedly struck the decedent in the head with a metal pipe. The defendant was charged with one count each of depraved indifference murder and intentional murder. The court instructed the jury to consider either count first and if it reached a verdict of guilty on that count, it should not consider the other count. The jury found the defendant guilty of depraved indifference murder and they did not consider the other charge.

Holding: Although the defendant failed to preserve the issue of legal insufficiency of the evidence supporting his conviction, it will be reviewed in the interest of justice. *See CPL 470.15(6)(a)*. The defendant's conduct does not constitute depraved indifference murder. *See gen People v Suarez*, 6 NY3d 202, 212-213. Because the jury did not consider the intentional murder charge, however, double jeopardy does not bar the prosecution from trying the defendant on that charge. *See People v Charles*, 78 NY2d 1044, 1047. Judgment reversed, count two of the indictment dismissed, and new trial granted on count one. (County Ct, Monroe Co [Keenan, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (Resentencing) SEN; 345(70.5)

People v Hernandez, 46 AD3d 1425, 847 NYS2d 508 (4th Dept 2007)

Holding: The court properly denied the defendant's application for resentencing under the 2005 Drug Law Reform Act (L 2005, ch 643, § 1) (DRLA-2) because the defendant was eligible for parole in June 2006, which was within three years of his October 2005 application. The defendant served his minimum sentence, was released on parole twice, and both times violated parole and was

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again incarcerated after each violation. “[W]e conclude that DRLA-2 was never intended to apply to class A-II felony offenders “who have served their term of imprisonment, have been released from prison to parole supervision, and whose parole is then violated, with a resulting period of incarceration”” ([*People v Smith (Norma)*, [45 AD3d 1478] at __ [Nov 23, 2007]).” Order affirmed. (County Ct, Onondaga Co [Aloi, JJ])

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Johnson, 46 AD3d 1384, 847 NYS2d 807 (4th Dept 2007)

Holding: The court erred in granting the defendant’s motion to dismiss the indictment pursuant to CPL 190.50(5), 210.20(1)(c), and 210.35(4). At arraignment on February 24, the prosecution gave the defendant the requisite written notice that the matter would be presented to a grand jury on February 28. On March 1, the defendant and his attorney appeared in court and the prosecution filed a certification stating that the grand jury voted to indict the defendant. The indictment was not filed until March 24. The defendant had sufficient time to consult with his attorney before the indictment was filed and because neither the defendant nor defense counsel notified the prosecution that the defendant wanted to appear before the grand jury, the defendant was not deprived of his right to testify. See *People v Lyons*, 40 AD3d 1121 *lv den* 9 NY3d 878. Order reversed, motion denied, indictment reinstated, and matter remitted for further proceedings on the indictment. (Supreme Ct, Monroe Co [Valentino, JJ])

Appeals and Writs (Briefs) (Counsel) APP; 25(15) (30)

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

People v Lafferty, 46 AD3d 1477, __ NYS2d __ (4th Dept 2007)

Holding: The defendant’s appellate counsel filed a brief pursuant to *People v Crawford* (71 AD2d 38) and asked to be relieved as counsel, claiming no nonfrivolous issues existed to raise. A review of the record reveals an issue of whether the court imposed a more severe sentence than that bargained for without allowing the defendant to withdraw his guilty plea. See *People v Barber*, 31 AD3d 1145. The record reveals that the court did not advise the defendant that his sentence would include a fine or that he would receive an additional consecutive sentence for his violation of probation resulting from the convictions. Motion granted and new counsel to be assigned to brief this issue and any other issues that counsel may find. (County Ct, Cattaraugus Co [Himelein, JJ])

Speedy Trial (Consent to Delay) (Prosecutor’s Readiness for Trial) SPX; 355(15) (32)

People v Piquet, 46 AD3d 1438, 847 NYS2d 799 (4th Dept 2007)

Holding: The court correctly denied the defendant’s motion to dismiss the indictment pursuant to CPL 30.30. Because the felony indictment superseded the misdemeanor information, the prosecution was required to be ready for trial within six months of the date the action was commenced. See *People v Cooper*, 90 NY2d 292, 294. The prosecution satisfied the speedy trial requirements when it announced its readiness for trial at the arraignment on the misdemeanor charges. See *People v Berry*, 5 AD3d 866, 867-868 *lv den* 3 NY3d 637. The prosecution could have presented the misdemeanor charges to a grand jury at any time before the defendant pleaded guilty or the trial started (see CPL 170.20(2)), and the decision to elevate the charge to a felony does not change that time limit. See *People v Capellan*, 38 AD3d 393, 394 *lv den* 9 NY3d 873. Even if the felony indictment was such a substantial break in the proceedings that the prosecution was required to declare readiness again, the prosecution satisfied that requirement by declaring readiness at the defendant’s arraignment on the indictment. See *People v Cortes*, 80 NY2d 201, 214 *rearg den* 81 NY2d 1068. The only post-readiness delay chargeable to the prosecution was the 26-day adjournment requested in anticipation of the grand jury presentation; the remaining adjournments were either requested by the defendant or attributable to the defendant’s motions. See *People v Reed*, 19 AD3d 312, 314 *lv den* 5 NY3d 832. Judgment affirmed. (County Ct, Monroe Co [Marks, JJ])

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

Contempt (Elements) CNT; 85(7)

People v Vandewalle, Jr. 46 AD3d 1351, 847 NYS2d 816 (4th Dept 2007)

The defendant was convicted of several crimes that arose from his violation of orders of protection that ordered him to stay away from his girlfriend and her home, avoid contact or communication with her, and refrain from offensive conduct with respect to her.

Holding: The evidence is legally insufficient to support the second-degree burglary conviction. No reasonable inference can be drawn that the defendant, when he unlawfully entered the home, intended to engage in offensive conduct against his girlfriend in violation of the order; at most, the evidence showed that he intended to violate the order by not staying away from her home or by attempting to contact her. Cf *People v Lewis*, 5 NY3d 546, 551-553. The intent to commit a crime element of burglary

Fourth Department *continued*

cannot be satisfied by intended conduct that would be innocuous if an order did not prohibit it. With respect to the criminal contempt conviction, the evidence was insufficient to show that the defendant's voice mails were intended to harass, annoy, threaten, or alarm his girlfriend or that he lacked any purpose of legitimate communication. See Penal Law 215.51(b)(iv). The evidence showed that the defendant left the voice mails in an attempt to continue the couple's relationship, which does not support the inference that he intended to harass, annoy, threaten, or alarm her. Judgment modified, burglary conviction reduced to second-degree criminal trespass, first-degree criminal contempt reduced to second-degree criminal contempt, sentences vacated, judgment affirmed as modified, and matter remitted for sentencing on the reduced counts. (County Ct, Ontario Co [Doran, J])

Arrest (Probable Cause) ARR; 35(35)

Evidence (Sufficiency) EVI; 155(130)

People v Perez, KA 06-02146, 4th Dept, 1/9/2008

While looking for the source of loud music, two police officers knocked on the defendant's apartment door. He opened the door a crack and told them that he was not dressed. He initially refused to give his name, but then gave them an incorrect name and birth date. After the officers told him that they already knew his name, he again refused their request, but then gave them the correct information. When the officers tried to arrest him, he tried to shut his door, but one of them grabbed him and pulled him out of his apartment. The defendant hit the officers during the ensuing struggle.

Holding: The evidence was legally insufficient to support the assault, resisting arrest, and obstructing governmental administration convictions. The evidence did not show that the arrest was lawful as the officers lacked reasonable cause to believe that the defendant committed an offense in their presence. See CPL 140.10(1)(a). The defendant did not have to open his door or respond to the officer's requests for identification (see *People v Offen*, 96 Misc 2d 147, 150), and the officers lacked reasonable cause to believe the defendant committed the crime of criminal impersonation because they knew that the defendant initially gave them a fictitious name. See *gen People v Sadiq*, 236 AD2d 638, 639 *lv den* 89 NY2d 1100. Because the arrest was unlawful, the remaining charges are not supported by legally sufficient evidence. Judgment reversed, indictment dismissed, and matter remitted for proceedings pursuant to CPL 470.45. (County Ct, Herkimer Co [Kirk, J]) ⚖

Defender News (continued from page 8)**Fund for Modern Courts Calls for Consolidation of Town and Village Courts**

In February 2008, the Fund for Modern Courts released a report recommending that the state's town and village courts be consolidated (www.moderncourts.org/documents/justice_courts_08.pdf). The Fund for Modern Courts concluded that consolidation would result in economic savings for localities, better use of criminal defense and prosecutorial resources, greater financial accountability, improved administration, and greater oversight by the NYS Commission of Judicial Conduct. Chief Judge Judith Kaye's Special Commission on the Future of the Courts is expected to release a report on the town and village court system in early 2008. (www.nycourtreform.org.)

Donation of "Print365" Software Saves Paper and Balances Printer Usage

NYSDA recently received a generous donation of software called *Print365*, a "client-server" application that carefully monitors printer usage by each of our several network printers. *Print365*, created and distributed by Krawasoft, Inc., "consists of server and client software. Client software, which is installed on [any] computer with a printer connected, monitors print jobs and sends data to the server [which] . . . saves it in the database for further usage." (www.krawasoft.com/print365.html.) For any selected time period, it will produce reports of how many pages were sent to each printer, including date/time, printer name, computer name, document, pages printed, number of copies, cost, color mode, duplex mode, paper size, print quality, paper length, paper width, scale, and orientation. The reports can be formatted as HTML web pages or Excel files. This information can be used to "balance" printer usage, pinpoint bottlenecks, and even cost out printing jobs.

Installation was very easy and the program has worked flawlessly. *Print365* has helped NYSDA determine the placement of printers for even distribution of printing jobs. Its built-in reporting capabilities allow us to estimate costs and total paper usage. Also, it helps us determine whether we can realize savings by either redirecting or choosing alternatives to print jobs.

NYSDA extensively tested several printer utilities using a variety of criteria, including reporting options, ease of installation, intuitive usage, and stability, and we judged *Print365* to be the best. We thank Krawasoft for their donation. ⚖

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