



Public Defense Backup Center
REPORT

Volume XXIII Number 4 September–October 2008

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Sex Offender Updates

New State Laws on Sex Offender Residency and Registration of Internet Identifiers

On September 25, the Governor signed Chapter 568, which requires the Division of Parole, the Division of Probation and Correctional Alternatives, and the Office of Temporary and Disability Assistance to establish regulations governing the housing of level two and three sex offenders who are on probation or parole and sex offenders who are in need of emergency shelter. The regulations, which are due in January 2009, must address several issues, including whether there is a concentration of sex offenders in a particular location, accessibility to family members, friends or other support services, and the availability of permanent, stable housing in order to reduce the likelihood that such offenders will be transient.

In Approval Memorandum 33, Governor Paterson noted the difficulties caused by current state law governing residency of particular offenders and “the proliferation of local ordinances imposing even more restrictive residency limitations,” and concluded: “This bill recognizes that the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State.” The enactment of Chapter 568 and the Governor’s memorandum provide strong support for the argument that state law preempts local sex offender residency restrictions. Attorneys interested in additional materials on preemption may contact the Backup Center.

Sex offender registration amendments were also enacted this year. As of April 2008, all registered sex offenders are required to provide the Division of Criminal Justice Services with information about their Internet access accounts and Internet identifiers, such as email addresses and names used for chat, instant messaging, social networking, and similar Internet communications. Additionally, Chapter 67, also known as the Electronic Security and Targeting of Online Predators Act or e-STOP, prohibits certain parolees and probationers from using the Internet to communicate with minors. For more information on these and other new sex offender and criminal justice laws, see Al O’Connor’s 2008 Legislative Review (p. 7).

Static-99 New York Website Launched

Recently the Division of Criminal Justice Services, in partnership with Public Safety Canada, launched a website that provides information on Static-99, a widely-used sex offender risk assessment instrument. The site, www.static99.org, provides the Static-99 coding rules, information on how to score the instrument, including a guide on how to score New York criminal histories, a lengthy New York case law summary, self-test materials, and research citations. Attorneys are encouraged to become familiar with the Static-99 instrument and the materials provided on this website.

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Table of Lesser Included Offenses, 18th Revision

Courtesy of the *NY Defender Digest*
(Available in Printed Copies Only,
Not on the Web)

State Supreme Court Rules on Use of Hearsay in Civil Confinement Case

In opining whether a respondent facing civil confinement under Mental Hygiene Law (MHL) article 10 has a “mental abnormality,” a psychiatrist may rely upon hearsay evidence if the

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evidence is accepted in that profession as a basis in forming the opinion and there is sufficient proof that the evidence is reliable. See *Matter of State of New York v J.A.*, 2008 NY Slip Op 28377, 2008 NY Misc LEXIS 5791 (Sup Ct, Bronx Co 9/26/2008). In *J.A.*, the State's expert psychiatrist relied upon an unsigned 1967 presentence report and a 1992 inmate status report, which repeated the presentence report's allegations that the respondent fondled two children in 1961, to conclude that the respondent suffers from pedophilia. The court held that the evidentiary rules in MHL 10.08(g) and CPLR article 45 apply in MHL article 10 trials. Importantly, "[e]ven if the reliability of the hearsay evidence is established, the hearsay evidence may not form the sole basis for the expert's opinion on an ultimate issue in the case." Emphasizing the length of time between the 1961 offenses and the creation of the reports, discrepancies between the reports and the respondent's rap sheets and certificates of conviction, and the lack of corroboration, the court concluded that the State failed to establish the reliability of the sex abuse allegations. The court also noted that the allegations were inadmissible under the business records exception to the hearsay rule, as the source of the allegations was unknown.

EDNY Concludes that Level One Sex Offenders May Petition for Modification of Risk Level

In *Woe v Spitzer*, 571 F Supp 2d 382 (EDNY 2008), the court rejected the plaintiff's argument that his procedural due process rights were violated when the Sex Offender Registration Act (SORA) was amended to increase the time period of registration for level one offenders from ten to twenty years, concluding that the plaintiff failed to state a protected liberty interest in the right to a ten year registration period. The court also held that SORA provides the plaintiff "with all the process that is due in connection with the determination of the risk level to be assigned." At the end of its decision, the court noted that Correction Law 168-o(2) permits level one sex offenders to petition for modification of their risk offense level, and unlike higher level offenders, level one offenders may petition for a reduction at any time. "With respect to level one offenders, an adjustment of the risk level below level one would necessarily relieve the offender from any registration requirement."

DWI News

Urine Test Results Held Inadmissible; Prosecution Failed to Present Necessary Live Testimony

In several recent driving while ability impaired cases, Nassau County District Court Judge Norman St. George has held that, in order for urine test results to be admitted at trial, prosecutors must present testimony from the lab

technicians who performed the tests. (www.newsday.com, 8/12/2008.) In *People v Levy*, 2008 NY Slip Op 51878(U), 2008 NY Misc LEXIS 5965 (Dist Ct, Nassau Co 9/15/2008), the prosecution presented testimony from the police officers who handled the sample before it was mailed to an out-of-state lab for testing, the lab employee who received the sample and placed a portion of it into test tubes, and a supervisor from the lab. The lab supervisor testified about the normal procedures the lab follows when it receives and tests a urine sample, and that he determined, after reviewing the lab's three hundred page litigation package, that presumptive and confirmatory tests were performed on the defendant's sample. The court concluded that the test results were not admissible, as the prosecution failed to present testimony regarding the chain of custody for the test tube samples and testimony from a witness with personal knowledge about the actual tests performed and whether those tests were performed on the defendant's sample. The court also refused to admit the lab's litigation package under the business record exception. Citing the Court of Appeals' recent decision in *People v Rawlins*, 10 NY3d 136 (2008), the court concluded that "the results of the urine tests are both testimonial and accusatory—since positive urine test results—combined with testimony regarding the defendant's operation of her vehicle, would result in the defendant being found guilty of Driving While Ability Impaired by Drugs."

Nassau County's "Wall of Shame" Violates Arrestee's Due Process Rights

In *Bursac v Nassau County Executive Thomas R. Suozzi*, No. 17966/08 (Sup Ct, Nassau Co 10/21/2008), the court found that the respondent violated the petitioner's due

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THE REPORT IS PRINTED ON RECYCLED PAPER

process rights by posting her name, picture, and identifying information on its Internet website, known as the DWI Wall of Shame. Since it was unveiled this past May, the Wall of Shame has received nationwide media attention. In June, the petitioner was arrested in Nassau County for driving while intoxicated and driving while ability impaired. A week later, the respondent posted the petitioner's information on the website and did not remove it, despite the petitioner's removal request. The court concluded that the respondent's "actions, in publishing and maintaining the petitioner's name, picture and identifying information embedded in a press release on the County's Internet website, which results in limitless and eternal notoriety, without any controls, is sufficient to be the 'plus' in the 'stigma plus' due process analysis in the case at bar." However, the court did note that the respondent did not violate the petitioner's right to a presumption of innocence by posing her arrest information.

In a press release, County Executive Suozzi stated that the county will appeal the decision, but that in the interim, all names and photos that were on the website have been removed and it will only publish the names and photos of persons convicted of drunk driving on the site. The county will continue to release to the media the names and photos of persons arrested for DWI. (<http://www.nassaucountyny.gov/agencies/CountyExecutive/NewsRelease/2008/10-21-08.html>.)

Handling a Criminal Case in New York— New Edition Available in Print and on Westlaw

The 2008–2009 edition of Gary Muldoon's *Handling a Criminal Case in New York* has recently been released. It is available in print and on Westlaw under the subdirectory HCCNY. This popular treatise is published by West Group and can be purchased online at <http://www.west.thompson.com> or by phone at 1-800-344-5008.

Loan Forgiveness for Public Defenders

In August, the President signed the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (JRJ), which is part of the Higher Education Opportunity Act (Public Law 110-315, available at www.gpoaccess.gov). According to a National Legal Aid and Defender summary about the Act, the JRJ is meant "to encourage individuals to enter into and remain in criminal justice careers as prosecutors and public defenders by setting up a system of loan repayment benefits to relieve the high cost of law school debt." Funding of \$25,000,000 during fiscal year 2009 and necessary amounts for the following 5 years is authorized. However, appropriation of money is a sepa-

rate legislative process, regulations have yet to be promulgated, and there are of course restrictions. Even optimistic estimates indicate that the program will not be actually functioning until Spring 2009. For more information about the JRJ, please contact the Backup Center.

Meanwhile, in July the *National Law Journal* published an article regarding a new IRS revenue ruling (Rev Rul 2008-34) on student loan assistance. (www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1202422888903.) The ruling concludes that law students who receive certain types of loan repayment assistance from their law schools in exchange for work in (some) law-related public service positions do not need to claim the assistance as income. (www.irs.gov/irb/2008-28_IRB/ar06.html.)

Report Reveals Lack of Standards for Determining Public Defense Eligibility

In its report, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, the Brennan Center for Justice reveals a nationwide lack of standards for appointing criminal defense counsel. (www.brennancenter.org/content/resource/eligible_for_justice/.) The report highlights a variety of problems with the eligibility screening process, including allowing prosecutors and public defender programs to make eligibility determinations, considering non-liquid assets, posting of bail by the defendant or another individual, and the income and assets of the defendant's friends and family in assessing eligibility, and lack of confidentiality during the screening process. The report makes several recommendations for improving the process, such as establishing uniform screening criteria, protecting screening from conflicts of interest, determining eligibility by comparing the individual's available income and resources to the actual cost of retaining private counsel, and procedural protections including the right to appeal ineligibility determinations.

Over the years, NYSDA has studied and reported on the use of inconsistent and arbitrary methods for determining eligibility for public defense representation throughout New York State. NYSDA's 1994 report, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*, made many of the same observations and recommendations as the Brennan Center report. (http://www.nysda.org/documents/TOC_NYSDAEligibilityReport.htm.) A comparison of these reports makes clear that the eligibility screening process remains fraught with conflicts of interest and results in the unconstitutional denial of the right to appointed counsel.

Court of Appeals Affirms Removal of Judges Restaino and Jung

On June 5, 2008, the Court of Appeals affirmed the Commission on Judicial Conduct's decision recommending that Judge Robert M. Restaino, Niagara Falls City Court, be removed from office. Judge Restaino was charged with improperly ordering the imprisonment of 46 defendants who were present in his courtroom on March 11, 2005 because he could not determine which individual's cell phone made a noise during the court's session. The Court held: "Here, the public which petitioner serves has, we think, irretrievably lost 'confidence in his ability to properly carry out his' constitutionally-mandated responsibilities in a fair and just manner

By indiscriminately committing into custody 46 defendants, petitioner deprived them of their liberty without due process, exhibited insensitivity, indifference and callousness so reproachable that his continued presence on the Bench cannot be tolerated." See *Matter of Restaino*, 10 NY3d 577, 590-591 (2008).

In late October, the Court of Appeals affirmed the removal of Fulton County Family Court Judge David F. Jung. (<http://www.nycourts.gov/ctapps/decisions/oct08/150opn08.pdf>.) As reported in the Jan-Feb 2008 issue of the *REPORT*, the judicial conduct Commission recommended that Judge Jung be removed because he violated litigants' due process rights, including the right to be

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CONFERENCES & SEMINARS

Sponsor: National Association of Criminal Defense Lawyers
Theme: 1st Annual Defending Drug Cases Seminar
Dates: November 13-14, 2008
Place: Houston, TX
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Bar Association
Theme: Handling DWI Cases in New York—2008 Update
Date: November 13, 2008
Place: Albany, NY
Contact: NYSBA: tel (518) 463-5600; website www.nysba.org/cle

Sponsor: **New York State Defenders Association**
Theme: **Winning Criminal Defense Strategies**
Date: **November 14, 2008**
Place: **Poughkeepsie, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**

Sponsor: New York County Lawyers' Association
Theme: NYCLA Ethics Institute: Confronting Ethical Issues Arising in Criminal Law Practice
Date: November 19, 2008
Place: New York County Lawyers' Association, New York City
Contact: NYCLA: tel (212) 267-6646 x245; website www.nycla.org

Sponsor: National Legal Aid and Defender Association
Theme: Annual Meeting: Creating Change, Achieving Justice
Dates: November 19-22, 2008
Place: Washington, DC
Contact: NLADA: tel (202) 452-0620 x207 (Risa Hoffman); email r.hoffman@nlada.org; website www.nlada.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Last Chance Ethics
Date: December 6, 2008
Place: New York City
Contact: NYSACDL: tel (212) 532-4434; email nysacdl@aol.com; website www.nysacdl.com

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Skills Training
Dates: December 11-14, 2008
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620 x207 (Risa Hoffman); email r.hoffman@nlada.org; website www.nlada.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: 29th Annual Advanced Criminal Law Seminar
Dates: January 11-16, 2009
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: **New York State Defenders Association**
Theme: **42nd Annual Meeting & Conference**
Dates: **July 26-28, 2009**
Place: **Saratoga Springs, NY**
Contact: **NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org**
♻️

From My Vantage Point

by Jonathan E. Gradess*

WHY WE NEED THE COMMISSION NOW

At the recent Annual Dinner for the Homeless Action Committee in Albany, a good friend of mine from one of the larger Legal Aid Societies in the State was pleasantly surprised when I described why I remained optimistic about the chance for public defense reform *now*, even in the midst of the current fiscal downturn. Because she seemed buoyed by my thinking I thought it would be good to share my thoughts with readers.

The economic emergency is actually a reason to begin the independent public defense commission *now*. The long term benefits of state oversight, particularly its economic ones, cannot be realized without a structure that takes hard looks at long-standing questions: the improvement of quality, the scope of the right to counsel, including converting many jailable offenses to civil penalties; the generation of new and creative revenue streams, broadening the base for financing defense services; and the development of private and public partnerships to enhance funding support, including building an endowment for the services. All of these are tasks for the early phase-in years of the IPDC.

This is a positive moment for the Governor to begin the IPDC because expectations will be so reduced that those who know the great need for reform will be delighted with modest beginnings. Inclusion of the IPDC in the budget even at such a level will signal a strong commitment. More importantly, implementation planning for infrastructure can be done incrementally to keep costs reasonable, with the economy at its nadir, while still focusing on important goals that need to be reached in the first couple of years: establishing the Commission's members, bringing on a competent core staff, evaluating current programs against existing standards, designing regions, developing a case management system, record keeping programs and databases for decision-making, and standards development. There is an already identified revenue stream, the Indigent Legal Services Fund (ILSF), to pay start up costs. Significantly the ILSF now anticipates \$15 million more next year than initially projected and in some cases relied on for county budget development.

This is an opportune moment for action for another reason. The lawsuit against the State has survived a motion to dismiss, and five counties have now been joined as defendants. Several former Court of Appeals Judges—Joseph Bellacosa, George Bundy Smith, and Stewart F. Hancock—and others have editorialized about the value of settling *now*. The counties and the State would benefit from the settlement as would the plaintiffs

because more can be controlled through negotiation than through litigation. As an added advantage, implementing the vital recommendation made by Judge Kaye would pay a meaningful tribute to her as she leaves the bench at the end of 2008.

Many many people want this reform *now*. More than 160 groups statewide have joined the Campaign for an Independent Public Defense Commission. These include the New York State Association of Criminal Defense Lawyers, National Bar Association Region II, Womens Bar Association of New York, NYSDA, and other bar associations as well as scores of church groups, Community Action programs, other service organizations, and good government groups. (See the full list at www.newyorkjusticefund.org/campaign.htm). Several hundred individuals have joined the campaign. The New York State Bar Association supports implementation of the Kaye Commission recommendations as does the Black, Puerto Rican, Hispanic and Asian Caucus in the Legislature. The IPDC has bi-partisan support. A bill that would establish the IPDC (S.4311-A/A.9087-A) is sponsored by one of the state's best-known Republican Senators and is supported by a majority of Assembly members. Counties and cities are passing resolutions favoring the idea. The New York State Association of Counties (NYSAC) passed a resolution supporting state takeover of public defense services, and the Campaign is working with NYSAC to design the mechanics of reaching that goal through a fair and reasonable formula that protects counties from untoward economic consequences.

Most importantly, and also quite relevant to the fiscal crisis, New York is beginning to understand that it cannot continue systems that propel people mindlessly toward prison, it cannot fail to restore the lives of those released, and it must begin to embrace structures and ideas long rejected. Appreciating the high costs of collateral consequences and understanding recidivism have led the state to explore reentry programs. Recognizing the relationship of crime and substance abuse has led to drug courts. Appreciating alternatives to criminal justice processing for substance abuse has led to the decriminalization of public intoxication and marijuana possession.

It is now time for the State to recognize the pivotal role that adequately-funded, well-equipped defense services can play in reducing our inappropriate and highly costly overreliance on jails and prisons. If you starve the defense, so that lawyers stumble forward in courtrooms after only a few hurried and hushed moments of client hallway conversation, you end up with a system where people are *wrongly incarcerated* (meaning sent away for something they didn't do). They are *over incarcerated* (meaning sent away for a longer period than their culpability would warrant). And they are *unnecessarily incarcerated* (meaning locked away when keeping them in the

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

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.

The St. Lawrence County Office of the Public Defender is seeking two **Assistant Public Defenders** to represent indigent clients in family court, county court, and justice courts. Applicants must be admitted to the New York State Bar and have a NYS driver's license or equivalent. Newly admitted attorneys will be considered. Salary: \$42,000-\$61,000 DOE, excellent benefits, and participation in the NYS Retirement System. To apply, send a cover letter and résumé to Brian D. Pilatzke, Public Defender, St. Lawrence County Office of the Public Defender, 48 Court Street, Canton, NY 13617, or email to bpilatzke@co.st-lawrence.ny.us.

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 Oneida County Public Defender-Criminal Division is accepting applications for **Assistant Public Defender (Criminal Division)—3rd Assistant**. Assistant Public Defenders assist the Public Defender in the representation of indigent persons charged with crimes at all stages of a criminal proceeding; keep abreast of all procedures and policies within the Public Defender's Office; and assist the Public Defender in maintaining law files which may be useful in criminal defense work. Applicants must be admitted to the Bar of New York State and have a valid NYS driver's license or submit a valid driver's license with application subject to obtaining a NYS driver's license. Salary: \$43,895, and excellent benefits package, including health insurance and membership in NYS Retirement System. To apply, send a complete résumé, including elementary education and all employment, listing employers' addresses and telephone numbers; three references with addresses and telephone numbers; a writing sample; and a certificate of good standing from the Appellate Division of admission to Frank J. Nebush, Jr., Oneida County Public Defender, Criminal Division, 250 Boehlert Center at

Union Station, 321 Main Street, Utica, NY 13501; fax (315) 798-6419; email fnebush@ocgov.net. For more information, visit www.oneidacounty.org.

Full-time **Director** for the Monroe County (Rochester) Conflict Defender's Office sought. The Director supervises a staff of ten attorneys and support staff and is responsible for the functions of the Conflict Defender's Office in the Department of Public Safety. Job skills include thorough knowledge of New York Penal Law and Criminal Procedure Law and familiarity with Family Court. Duties include developing and managing a budget; maintaining records of attorneys assigned; issuing periodic reports; reviewing attorney vouchers prior to submission to assigning judges and making recommendations to assigning judges regarding payment; maintaining a brief bank; issuing an electronic newsletter; preparing an annual report; carrying a partial caseload of appellate work; and acting as liaison between the Conflict Defender's Office and other County departments, law enforcement agencies, the private bar, and other governmental agencies. Commitment to providing legal services to the indigent required. Private practice experience helpful. Above-average computer skills helpful for publication and distribution of e-newsletter and maintenance of the office web site. Salary \$70,000-\$90,000 DOE. People of color, women, and people with disabilities encouraged to apply. To apply, send cover letter, resume, writing sample, and at least three references by e-mail to mcorbitt@mcbca.org (preferred), or by mail to Mary Corbitt, Executive Director, Monroe County Bar Association, The Hon. Michael A. Telesca Center for Justice, One West Main Street, Rochester, NY 14614. Applications must be postmarked by December 5, 2008. ☞

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heard and the right to counsel. Recognizing the fundamental nature of these rights, the Court concluded that Judge Jung's "steadfast adherence to longstanding policies that have seriously compromised the due process rights of litigants justifies removal." The Court noted that "part and parcel of effecting the 'best interests' of a child is affording that child's parent the rights inherent in the parental bond."

Reports on the Future of the Justice Courts Released

September 2008 featured the release of two reports on the present and future of New York's Justice Courts. (http://www.courts.state.ny.us/press/pr2008_6.shtml.) Justice court reform is the focus the Special Commission on the Future of New York State Courts' report, *Justice Most Local: The Future of Town and Village Courts in New York State*. (www.nycourtreform.org/Justice_Most_Local_

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2008 Legislative Review

By Al O'Connor*

[Ed. Note: The REPORT annually presents Staff Attorney Al O'Connor's review of relevant New York State legislation.]

New Crimes

➤ Chap. 69 (A.614) (Criminal Mischief – Interference with Emergency Calls). Effective: July 6, 2008.

Adds a new subdivision to Penal Law § 145.00 (criminal mischief in the fourth degree — Class A misdemeanor) to criminalize disabling or removing telephone equipment with the intent to interfere with the placing of a call for emergency assistance.

Penal Law § 145.00 — A person is guilty of criminal mischief in the fourth degree when: having no right to do so, nor any reasonable ground to believe he or she has such right, he or she:

4. With intent to prevent a person from communicating a request for emergency assistance, intentionally disables or removes telephonic, TTY or similar communication sending equipment while that person: (a) is attempting to seek or is engaged in the process of seeking emergency assistance from police, law enforcement, fire or emergency medical services personnel; or (b) is attempting to seek or is engaged in the process of seeking emergency assistance from another person or entity in order to protect himself, herself or a third person from imminent physical injury. The fact that the defendant has an ownership interest in such equipment shall not be a defense to a charge pursuant to this subdivision.

In an approval message, Governor Paterson wrote: "Although this is a laudable step, an abuser can keep a victim from making or completing a call by means other than disabling or removing telephone equipment. For example, if the abuser physically restrains the victim from using the telephone, or simply hangs up the telephone without damaging the equipment, that is an equally blameworthy and harmful act, and should be subject to the same punishment."

➤ Chap. 405 (A.8488-a) (Luring a Child). Effective: October 4, 2008.

Penal Law § 120.70 Luring a child.

1. A person is guilty of luring a child when he or she

lures a child into a motor vehicle, aircraft, watercraft, isolated area, building, or part thereof, for the purpose of committing against such child any of the following offenses: an offense as defined in section 70.02 of this chapter; an offense as defined in section 125.25 or 125.27 of this chapter; a felony offense that is a violation of article one hundred thirty of this chapter; an offense as defined in section 135.25 of this chapter; an offense as defined in sections 230.30, 230.33 or 230.34 of this chapter; an offense as defined in sections 255.25, 255.26, or 255.27 of this chapter; or an offense as defined in sections 263.05, 263.10, or 263.15 of this chapter. For purposes of this subdivision "child" means a person less than seventeen years of age. Nothing in this section shall be deemed to preclude, if the evidence warrants, a conviction for the commission or attempted commission of any crime, including but not limited to a crime defined in article one hundred thirty-five of this chapter.

2. Luring a child is a class E felony, provided, however, that if the underlying offense the actor intended to commit against such child constituted a class A or a class B felony, then the offense of luring a child in violation of this section shall be deemed respectively, a class C felony or class D felony.

The legislation also adds this new crime to the list of Megan's Law offenses defined in the Correction Law.

➤ Chap. 74 (A.9480) (Aggravated Harassment — Displays of Nooses). Effective: November 1, 2008.

Adds a new subdivision (5) to Penal Law § 240.31 (aggravated harassment in the first degree) dealing with displays of nooses:

Penal Law § 240.31 — A person is guilty of aggravated harassment in the first degree when with intent to harass, annoy, threaten or alarm another person, because of a belief or perception regarding such person's race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation, regardless of whether the belief or perception is correct, he or she:

5. Etches, paints, draws upon or otherwise places or displays a noose, commonly exhibited as a symbol of racism and intimidation, on any building or other real property, public or private, owned by any person, firm or corporation or any public agency or instrumentality, without express permission of the owner or operator of such building or real property.

(Class E felony)

* Al O'Connor is the Backup Center Senior Staff Attorney. He coordinates the Association's amicus and legislative work and annually summarizes legislation relevant to criminal defense.

➤ **Chap. 304 (S.4053) (Impersonating another on the internet). Effective: November 1, 2008.**

Adds a new subdivision to Penal Law § 190.25 (criminal impersonation in the second degree — Class A misdemeanor) relating to impersonating others on the internet.

Penal Law Section § 190.25 — A person is guilty of criminal impersonation in the second degree when he:

4. Impersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another, or by such communication pretends to be a public servant in order to induce another to submit to such authority or act in reliance on such pretense.

➤ **Chap. 308 (S.6466-a) (Criminalizes presence at an animal fight). Effective: July 21, 2008.**

Adds a new subdivision (5) to Agriculture and Markets Law § 351 to criminalize the “knowing presence as a spectator at any place where an exhibition of animal fighting is being conducted.” First offense — violation punishable by fine of up to \$500; second and subsequent offense within 5 years — misdemeanor punishable by 1 year imprisonment and/or \$1,000 fine.

➤ **Chap. 639 (S.8201-a) (Unauthorized recording). Effective: December 6, 2008.**

In 1994, the Legislature enacted the crime of unauthorized operation of a recording device in a motion picture theater, a violation. This bill expands the crime to live theaters, and upgrades the offense to a Class A misdemeanor (second degree) or Class E felony (first degree) under certain aggravating circumstances.

Penal Law § 275.33 Unlawful operation of a recording device in a motion picture or live theater in the second degree.

A person is guilty of unlawful operation of a recording device in a motion picture or live theater in the second degree when he or she violates section 275.32 of this article:

1. for financial profit or commercial purposes; or
2. in circumstances where the material recorded is fifteen or more minutes, or all or a substantial portion, of the motion picture or live theatrical performance; or
3. in circumstances where such person has previously been convicted within the past five years of violating section 275.32 or 275.34 of this article or this section.

(Class A misdemeanor)

Penal Law § 275.34 Unlawful operation of a recording device in a motion picture or live theater in the first degree.

A person is guilty of unlawful operation of a record-

ing device in a motion picture or live theater in the first degree when he or she commits the crime of unlawful operation of a recording device in a motion picture or live theater in the second degree as defined in section 275.33 of this article and has previously been convicted within the past ten years of violating section 275.33 of this article or this section.

(Class E felony)

➤ **Chap. 566 (A.2385) (Disturbance of a funeral or memorial service). Effective: September 25, 2008.**

Penal Law § 240.21 criminalizes the disturbance of a religious service (Class A misdemeanor). This bill adds funeral, burial or memorial services to the statutory scheme. The legislation is a response to the crackpot activities of the Westboro Baptist Church of Topeka, Kansas, which has demonstrated at the funerals of soldiers killed in Iraq, claiming their deaths were God’s vengeance for American society’s tolerance of homosexuality.

➤ **Chap. 586 (A.10343-c) (Confining companion animals in extreme temperatures). Effective: January 23, 2009.**

Adds a new section to the Agriculture and Markets Law (§ 353-d) prohibiting the confinement of companion animals in vehicles in extreme temperatures (hot or cold) without proper ventilation or protection. First offense — violation carrying \$50 - \$100 fine; second and subsequent offenses \$100 - \$250.

➤ **Chap. 431 (S.1862) (Facilitating a sexual performance by a child with a controlled substance). Effective: November 1, 2008.**

Establishes a new Class B felony of facilitating a sexual performance by a child with a controlled substance or alcohol.

Penal Law § 263.30 Facilitating a sexual performance by a child with a controlled substance or alcohol.

1. A person is guilty of facilitating a sexual performance by a child with a controlled substance or alcohol when he or she:

- (a) (i) knowingly and unlawfully possesses a controlled substance as defined in section thirty-three hundred six of the public health law or any controlled substance that requires a prescription to obtain, (ii) administers that substance to a person under the age of seventeen without such person’s consent, (iii) intends to commit against such person conduct constituting a felony as defined in section 263.05, 263.10, or 263.15 of this article, and (iv) does so commit or attempt to commit such conduct against such person; or
- (b) (i) administers alcohol to a person under the age of seventeen without such person’s consent, (ii) intends to commit against such person conduct constituting a

felony defined in section 263.05, 263.10, or 263.15 of this article, and (iii) does so commit or attempt to commit such conduct against such person.

2. For the purposes of this section, “controlled substance” means any substance or preparation, compound, mixture, salt, or isomer of any substance defined in section thirty-three hundred six of the public health law.

(Class B felony)

➤ **Chap. 279 (S.8376-a) (Unlawful possession of “skimmer devices” — Grand Jury Business Records). Effective: Penal Law amendments — November 1, 2008; Grand Jury amendments (p. 12) — August 6, 2008.**

Establishes new crimes relating to unlawful possession of a “skimmer device,” a “device designed or adapted to obtain personal identifying information from a credit card, debit card, public benefit card, access card or device, or other card or device that contains personal identifying information.”

Penal Law § 190.85 Unlawful possession of a skimmer device in the second degree.

1. A person is guilty of unlawful possession of a skimmer device in the second degree when he or she possesses a skimmer device with the intent that such device be used in furtherance of the commission of the crime of identity theft or unlawful possession of personal identification information as defined in this article.

(Class A misdemeanor)

Penal Law § 190.86 Unlawful possession of a skimmer device in the first degree.

A person is guilty of unlawful possession of a skimmer device in the first degree when he or she commits the crime of unlawful possession of a skimmer device in the second degree and he or she has been previously convicted within the last five years of identity theft in the third degree as defined in section 190.78, identity theft in the second degree as defined in section 190.79, identity theft in the first degree as defined in section 190.80, unlawful possession of personal identification information in the third degree as defined in section 190.81, unlawful possession of personal identification information in the second degree as defined in section 190.82, unlawful possession of personal identification information in the first degree as defined in section 190.83, unlawful possession of a skimmer device in the second degree as defined in section 190.85, unlawful possession of a skimmer device in the first degree as defined in this section, grand larceny in the fourth degree as defined in section 155.30, grand larceny in the third degree as defined in section 155.35, grand larceny in the second degree as defined in section 155.40 or grand larceny in the first degree as defined in section 155.42 of this chapter.

(Class E felony)

The law also amends the restitution statute (Penal Law § 60.27) to provide that a victim of an identity theft offense is eligible for restitution for the “value of the time reasonably spent . . . attempting to remediate the harm incurred . . . from the offense.”

Sex Offenders

➤ **Chap. 67 (S.6875-a) (Sex Offenders — disclosure of internet screen names — prohibition on e-mail communication with minors). Effective: April 28, 2008.**

Chapter 67 requires registered sex offenders to provide DCJS with internet service account information, and their “internet identifiers,” such as e-mail addresses, and “designations used for chat, instant messaging, social networking or other similar internet communication.” Offenders must notify DCJS within 10 days of a change in this information, or face felony charges for failure to comply with the Sex Offender Registration Act. DCJS is authorized to release this information to “authorized internet entities” that run social networking sites accessible to persons under the age of 18.

Chapter 67 also includes onerous (and possibly unconstitutional) restrictions on e-mail communication between offenders and persons under age 18 as a mandatory term and condition of probation and parole or post-release supervision. It bars defendants over the age of eighteen, who have been convicted of a sex offense involving a victim under age eighteen, from communicating by e-mail with minors. (The bill imposes the same ban on defendants classified as Level 3 offenders, and those who used the internet in the commission of the crime. The bill includes only one exception for parents who are not otherwise prohibited from communicating with their children. Thus, an eighteen year-old high-school student convicted of the misdemeanor offense of sexual misconduct for having sex with a 16 year-old girlfriend would be prohibited from e-mail communication with his younger siblings for six years. A defendant convicted of a felony level sex offense could be barred from internet communication with siblings, and other minor relatives (including grandchildren) for ten, fifteen, twenty and even twenty-five years.

➤ **Chap. 568 (A.4988) (Regulations concerning housing of sex offenders). Effective: January 23, 2009.**

This bill requires the Division of Parole, the Division of Probation and Correctional Alternatives, and the Office of Temporary and Disability Assistance to promulgate rules regarding the placement of level 2 and 3 sex offenders. The rules must address the following issues:

(a) the location of other sex offenders required to register under the sex offender registration act, specifically whether there is a concentration of registered sex

- offenders in a certain residential area or municipality;
- (b) the number of registered sex offenders residing at a particular property;
- (c) the proximity of entities with vulnerable populations;
- (d) accessibility to family members, friends or other supportive services, including, but not limited to, locally available sex offender treatment programs with preference for placement of such individuals into programs that have demonstrated effectiveness in reducing sex offender recidivism and increasing public safety; and
- (e) the availability of permanent, stable housing in order to reduce the likelihood that such offenders will be transient.

(Amending Executive Law §§ 259-a, 243 and Social Services Law § 20)

➤ **Chap. 296 (A.11500-a) (Sex Offense Conviction — Automatic Revocation of Teacher Certificate). Effective: July 21, 2008.**

Amends Education Law § 305 to require automatic revocation of a certificate of qualification as a teacher of any person convicted of a registerable sex offense. The legislation also adds a new section to the Criminal Procedure Law (CPL § 380.95) requiring district attorneys to notify the Commissioner of Education of a teacher's sex offense conviction.

➤ **Chap. 430 (S.1531) (Sex Offenders — Prohibition on holding real estate license). Effective: August 5, 2008.**

Prohibits persons convicted of a registerable sex offense from holding a license as a real estate broker or real estate salesman. The civil disability can be lifted by executive pardon or a certificate of good conduct.

➤ **Chap. 232 (S.4332) (Megan's Law — addition of new federal crimes as registerable offenses). Effective: July 7, 2008 and applies retroactively to offenses previously committed where defendant has not completed sentence by effective date.**

Adds 18 U.S.C. 2422(b) (enticement or coercion of minor to engage in prostitution or sexual activity); 18 U.S.C. 2423 (transportation of minor with intent to engage in criminal sexual activity); and 18 U.S.C. 2425 (use of interstate facilities to transmit information about a minor to engage in sexual activity) to the list of registerable offenses under the New York Sex Offender Registration Act (Correction Law § 168-a).

Penal Law

➤ **Chap. 291 (A.9813) (Defrauding vulnerable elderly persons). Effective: September 19, 2008.**

Amends Penal Law 190.65 (scheme to defraud in the first degree) to add a provision relating to the defrauding of vulnerable elderly persons. As defined in Penal Law § 260.30, a vulnerable elderly person is a "person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable or adequately providing for his or her own health or personal care."

Penal Law § 190.65 — 1. A person is guilty of scheme to defraud in the first degree when he or she:

- (c) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person, more than one of whom is a vulnerable elderly person as defined in subdivision three of section 260.30 of this chapter or to obtain property from more than one person, more than one of whom is a vulnerable elderly person as defined in subdivision three of section 260.30 of this chapter, by false or fraudulent pretenses, representations or promises, and so obtains property from one or more such persons.

(Class E felony)

➤ **Chap. 68 (A.9818) (Assault on persons 65 or older). Effective: June 29, 2008.**

Adds a new subdivision to Penal Law § 120.05 (assault in the second degree) relating to victims age 65 or older by persons more than ten years younger.

Penal Law § 120.05 — A person is guilty of assault in the third degree when:

- 12. With intent to cause physical injury to a person who is sixty-five years of age or older, he or she causes such injury to such person, and the actor is more than ten years younger than such person.

(Class D felony)

➤ **Chap. 400 (A.5188-a) (Falsely Reporting an incident of child abuse). Effective: February 1, 2009.**

Expands the crime of falsely reporting an incident in the third degree [Penal Law § 240.50 (4) — Class A misdemeanor] to cover the false report of an "occurrence or condition of child abuse or maltreatment" to a mandatory child abuse reporter. The law was previously limited to false reports made to the statewide central register of child abuse.

➤ **Chap. 45 (A.6011-d) (Assault on city marshals — traffic enforcement agents). Effective: July 22, 2008.**

Adds city marshals and traffic enforcement officers and agents to the list of persons protected by Penal Law §

120.05 (3) and (11) (assault on certain persons with intent to prevent them from performing lawful duties, or while they are performing assigned duties).

➤ **Chap. 590 (A.10765) (Computer Tampering/Duplication — Medical Records). Effective: November 1, 2008.**

Adds a new subdivision (2) to the crime of computer tampering in the second degree (Penal Law § 156.26) and establishes the new crime of unlawful duplication of computer related material in the second degree relating to tampering and unlawful duplication of medical records.

Penal Law § 156.26 - A person is guilty of computer tampering in the second degree when he or she commits the crime of computer tampering in the fourth degree and he or she intentionally alters in any manner or destroys:

2. computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals and as a result of such alteration or destruction, such individual or individuals suffer serious physical injury, and he or she is aware of and consciously disregards a substantial and unjustifiable risk that such serious physical injury may occur.

(Class D felony)

Penal Law § 156.29 Unlawful duplication of computer related material in the second degree.

A person is guilty of unlawful duplication of computer related material in the second degree when having no right to do so, he or she copies, reproduces or duplicates in any manner computer material that contains records of the medical history or medical treatment of an identified or readily identifiable individual or individuals with an intent to commit or further the commission of any crime under this chapter.

(Class B misdemeanor)

➤ **Chap. 426 (A.11636) (Coercion in the second degree — compelling the joining of a street gang). Effective: November 1, 2008.**

A person is guilty of coercion in the second degree if he or she, by certain threats, “compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in conduct which he or she has a legal right to engage.” This bill adds to the statutory definition: “or compels or induces a person to join a group, organization or criminal enterprise which such latter person has a right to abstain from joining.” The bill memo states the purpose is to criminalize threatening persons to compel them to join street gangs.

(Class A misdemeanor)

➤ **Chap. 226 (S.1829-c) (Offense upgrade — Identify theft of member of armed forces). Effective: November 4, 2008.**

Elevates the crime of identify theft when the victim is a member of the armed forces deployed outside of the United States.

Penal Law § 190.80-a Aggravated identity theft.

A person is guilty of aggravated identity theft when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and knows that such person is a member of the armed forces, and knows that such member is presently deployed outside of the continental United States and:

1. thereby obtains goods, money, property or services or uses credit in the name of such member of the armed forces in an aggregate amount that exceeds five hundred dollars; or
2. thereby causes financial loss to such member of the armed forces in an aggregate amount that exceeds five hundred dollars.

(Class D felony)

The bill also amends Penal Law § 190.83 (Unlawful possession of personal identification information in the first degree) by adding new subsections concerning victims who are members of the armed forces.

Penal Law § 190.83 Unlawful possession of personal identification information in the first degree.

A person is guilty of unlawful possession of personal identification information in the first degree when he or she commits the crime of unlawful possession of personal identification information in the second degree and:

3. with intent to further the commission of identity theft in the second degree:
 - (a) he or she supervises more than two accomplices, and
 - (b) he or she knows that the person whose personal identification information that he or she possesses is a member of the armed forces, and
 - (c) he or she knows that such member of the armed forces is presently deployed outside of the continental United States.

(Class D felony)

➤ **Chap. 601 (S.2061-a) (Criminal Mischief — Jointly owned property). Effective: November 1, 2008.**

Amends Penal Law § 145.13 to provide that in criminal mischief prosecutions “property of another shall include property jointly or co-owned by another person.” The bill

provides it is “no defense that one believes that he or she has a reasonable ground or right to damage such property because he or she owns such property along with another person unless such other person has given . . . consent to damage such property.” The bill is intended to countermand the holding in *People v. Person*, 239 A.D.2d 612 (2d Dept. 1997).

➤ **Chap. 434 (S.3079-a) (Criminal Impersonation — Federal law enforcement officers). Effective: November 1, 2008.**

Penal Law § 190.26 (criminal impersonation in the first degree — Class E felony) applies to the impersonation of police officers. This bill adds federal law enforcement officers to the statutory scheme.

➤ **VETOED (S.6440) (Gambling — Coin operated gambling devices).**

Technical amendment to Penal Law § 225 (6) and (7-a) to clarify that games of amusement that provide an extra ball, time or game do not constitute “coin operated gambling devices.”

➤ **Chap. 312 (S.6764) (Enterprise Corruption — new predicate offenses). Effective: October 19, 2008.**

Adds disseminating indecent material to minors in the first degree (Penal Law § 235.22) and promoting a sexual performance by a child (Penal Law § 263.15) to the list of offenses that can support an enterprise corruption prosecution.

➤ **Chap. 70 (A.5513-c) (Non-Support of a Child — Age increase). Effective: November 1, 2008.**

This bill amends Penal Law § 260.05 to increase the age limit for criminal prosecution for a non-support of a child from 16 to 18 when there is an outstanding child support order.

➤ **VETOED (S.7899) (Fireworks permits authorized for private citizens).**

Amends Penal Law § 405 to allow fireworks permits to be issued to private citizens for displays at places of public accommodation (weddings, parties, etc.).

➤ **Chap. 510 (A.9673) (Aggravated harassment — digital messages). Effective: December 3, 2008.**

Amends the aggravated harassment statute (Penal Law § 240.30) to apply to digital recordings — reportedly in response to an incident in Yonkers where a defendant delivered threats to various households on CD-ROM.

➤ **Chap. 257 (S.7528) (Criminalizes possession of “plastic knuckles”). Effective: November 1, 2008.**

Adds plastic knuckles to the list of *per se* weapons included in Penal Law § 265.01 (criminal possession of a

weapon in the fourth degree - Class A misdemeanor) and makes various conforming amendments to Penal Law sections that refer to metal knuckles (e.g., Penal Law § 10.00 (12) — defining plastic knuckles as deadly weapons).

➤ **VETOED (S.7852-a) (Technical amendment — unlawfully dealing with a child).**

Penal Law § 260.21 (unlawfully dealing with a child in the second degree — Class B misdemeanor) prohibits an owner lessee, manager or employee of a place where alcoholic beverages are sold or given away to permit a child less than 16 to enter or remain. This prohibition literally applies to many restaurants, delis and pizzerias. The statute has been amended to replace “alcoholic beverages” with “liquor.”

Criminal Procedure Law

➤ **Chap. 401 (A.7197) (Waiver of Indictment permitted for Class A drug felonies). Effective: November 1, 2008.**

In light of the 2004 Drug Law Reform Act’s elimination of life sentences for Class A-I and A-II drug felonies, this bill amends CPL § 195.10 to authorize waiver of indictment and pleas to superior court informations on Class A felony drug crimes.

➤ **Chap. 587 (A.10502) (Youthful Offenders — sealing of accusatory instruments). Effective: January 1, 2009.**

This bill amends CPL § 720.15 (1) to require sealing of accusatory instruments filed against defendants who are eligible for youthful offender status, as opposed to the current sealing practice upon consent of the apparently eligible youth.

➤ **Chap. 279 (S.8376-a) (Unlawful possession of “skimmer devices” — Grand Jury Business Records). Effective: Penal Law amendments — November 1, 2008; Grand Jury amendments — August 6, 2008.**

The bill criminalizes possession of “skimmer devices” (see Penal Law section). It also includes an unrelated section dealing with admissibility of business records in the grand jury without the need for personal appearance by an authenticating witness. The new rule will apply to telecommunications records (including internet service provider records) and certain banking and financial records.

Section 14. Section 190.30 of the criminal procedure law is amended by adding a new subdivision 8 to read as follows:

8. (a) A business record may be received in such grand jury proceedings as evidence of the following facts and similar facts stated therein:

(i) A person's use of, subscription to and charges and payments for communication equipment and services including but not limited to equipment or services provided by telephone companies and internet service providers, but not including recorded conversations or images communicated thereby; and

(ii) financial transactions, and a person's ownership or possessory interest in any account, at a bank, insurance company, brokerage, exchange or banking organization as defined in section two of the banking law.

(b) Any business record offered for consideration by a grand jury pursuant to paragraph (a) of this subdivision must be accompanied by a written statement, under oath, that (i) contains a list or description of the records it accompanies, (ii) attests in substance that the person making the statement is a duly authorized custodian of the records or other employee or agent of the business who is familiar with such records, and (iii) attests in substance that such records were made in the regular course of business and that it was the regular course of such business to make such records at the time of the recorded act, transaction, occurrence or event, or within a reasonable time thereafter. Such written statement may also include a statement identifying the name and job description of the person making the statement, specifying the matters set forth in subparagraph (ii) of this paragraph and attesting that the business has made a diligent search and does not possess a particular record or records addressing a matter set forth in paragraph (a) of this subdivision, and such statement may be received at grand jury proceedings as evidence of the fact that the business does not possess such record or records. When records of a business are accompanied by more than one sworn written statement of its employees or agents, such statements may be considered together in determining the admissibility of the records under this subdivision. For the purpose of this subdivision, the term "business records" does not include any records prepared by law enforcement agencies or prepared by any entity in anticipation of litigation.

(c) Any business record offered to a grand jury pursuant to paragraph (a) of this subdivision that includes material beyond that described in such paragraph (a) shall be redacted to exclude such additional material, or received subject to a limiting instruction that the grand jury shall not consider such additional material in support of any criminal charge.

(d) No such records shall be admitted when an adversarial examination of such a records custodian or other employee of such business who was familiar with such records has been previously ordered pur-

suant to subdivision eight of section 180.60 of this chapter, unless a transcript of such examination is admitted.

(e) Nothing in this subdivision shall affect the admissibility of business records in the grand jury on any basis other than that set forth in this subdivision.

➤ **Chap. ___ (S.5565-a) (Court officers reclassified as police officers). Effective: Upon Governor's signature.**

Reclassifies uniformed court officers employed by the unified court system as police officers (formerly peace officers). [Amending CPL § 1.20 (34) and 2.10 (21)(c)].

➤ **Chap. 231 (S.4146) (Final orders of observation — commitment to non-OMH facilities). Effective: August 6, 2008.**

Amends CPL §§ 730.40, 730.50 and 730.60 to authorize OMH to place persons held on a final order of observation in non-OMH facilities that are licensed by OMH to accept such persons.

➤ **Chap. 317 (S.7548) (Audio-visual court appearances). Effective: July 21, 2008.**

Amends CPL § 182.20 to add Herkimer County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

➤ **Chap. 467 (S.7712-a) (Technical amendment — statute of limitations for criminal sexual act/sodomy offenses). Effective: August 5, 2008.**

Technical amendment to CPL § 30.10 (2)(a) to account for the nomenclature change from sodomy to criminal sexual act. The bill eliminates the reference to criminal sexual act, and replaces it with the phrase "a crime defined or formerly defined in section 130.50 of the penal law."

Corrections / Parole

➤ **Chap. 1 (S.6422) (SHU confinement barred for mentally ill inmates). Effective: No later than July 1, 2011.**

This legislation bars the Department of Correctional Services from placing inmates with serious mental disorders in Special Housing Units for disciplinary confinement. Except in exceptional circumstances, such inmates shall be placed in residential treatment units jointly operated by DOCS and the Office of Mental Health. Inmates covered by the ban include:

- (1) a. schizophrenia (all sub-types),
- b. delusional disorder,
- c. schizophreniform disorder,
- d. schizoaffective disorder,
- e. brief psychotic disorder,

- f. substance-induced psychotic disorder (excluding intoxication and withdrawal),
 - g. psychotic disorder not otherwise specified,
 - h. major depressive disorders, or bipolar disorder I and II;
- (2) inmates who are actively suicidal or who have engaged in a recent, serious suicide attempt;
 - (3) inmates diagnosed with a serious mental illness that is frequently characterized by breaks with reality, or perceptions of reality, that lead the individual to experience significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;
 - (4) inmates diagnosed with an organic brain syndrome that results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health;
 - (5) inmates diagnosed with a severe personality disorder that is manifested by frequent episodes of psychosis or depression, and results in a significant functional impairment involving acts of self-harm or other behavior that have a seriously adverse effect on life or on mental or physical health; or
 - (6) inmates who have been determined by a mental health clinician to have otherwise substantially deteriorated mentally or emotionally while confined in segregated confinement and is experiencing significant functional impairment indicating a diagnosis of serious mental illness and involving acts of self-harm or other behavior that have a serious adverse effect on life or on mental or physical health.

The bill gives oversight authority to the New York State Commission on Quality of Care for the Mentally Disabled to enforce compliance with its terms. Governor Pataki vetoed a similar bill in 2006.

➤ **Chap. 310 (S.6731) (Restores discretion to the Board of Parole to discharge persons serving life sentences from parole supervision). Effective: July 21, 2008.**

Restores discretion to the Board of Parole, eliminated in 1998, to discharge persons serving life sentences from parole supervision.

➤ **Chap. 486 (S.8521) (Mandatory termination of sentence under 2004 Drug Law Reform Act). Effective: August 5, 2008 and applies to previously imposed sentences.**

The 2004 Drug Law Reform Act provided for mandatory termination of drug sentences after 3 years of unre-

voked parole supervision for Class A-I and A-II drug felonies, and 2 years of unrevoked parole supervision for lesser drug offenses. The Division of Parole interpreted this law as prohibiting termination of supervision when the parolee was presumptively released by the Department of Correctional Services, and not released by action of the Board of Parole. This bill clarifies that presumptively released parolees are entitled to termination of sentence after 2 or 3 years.

Freedom of Information Law

➤ **Chap. 499 (A.1975) (Freedom of Information Law — subject matter lists on internet). Effective: January 2, 2009.**

Amends the Freedom of Information Law [Public Officers Law § 87 (3)(c)] to require state agencies to post their subject matter lists online.

➤ **Chap. 223 (S.962-c) (FOIL — charges for electronic and other records). Effective: August 6, 2008.**

Limits the amount an agency can charge for electronic and other non-paper records under the FOIL to “i) an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record [and] ii) the actual cost of the storage devices or media provided to the person making the request in complying with such request; and iii) the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency’s information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy.”

The bill provides that “preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested.” Agencies shall provide estimates of preparation costs or the costs of outside professional services.

Crime Victims

➤ **Chap. 162 (A.2656) (Crime Victims Compensation — Lost wages of parent). Effective: September 1, 2008.**

Amends the Crime Victim’s Compensation Act [Executive Law § 631 (2)] to provide that “[a]n award for loss of earnings shall include earnings lost by a parent or guardian as a result of the hospitalization of a child victim under age eighteen for injuries sustained as a direct result of a crime.”

➤ **VETOED (A.9915-a) (Crime Victims — Payment for HIV prophylaxis treatment).**

Provides for streamlined direct payments from the Crime Victims Board to pharmacies for HIV prophylaxis

treatment of victims of sexual assault with significant possible exposure to HIV.

Reentry—Collateral Consequences

➤ **Chap. 534 (S.4956-a) (Employment Discrimination — evidence of employee’s prior criminal record excluded in certain actions). Effective: September 4, 2008.**

This bill amends Executive Law § 296 (15) to provide employers with a rebuttable presumption when they are sued for negligent hiring or maintaining an employee (or supervising a hiring manager) in relation to persons with criminal records. The presumption states: “there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervision a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.”

➤ **Chap. 469 (S.7723) (Employment—barbering license). Effective: August 5, 2008.**

Amends General Business Law §§ 434 and 438 to provide that in determining good moral character for purposes of issuing a barbering license the secretary of state “shall not automatically disqualify an applicant on the basis of a criminal conviction.” Similar bills were vetoed by Governors Pataki and Spitzer in 2006 and 2007.

Miscellaneous

➤ **Chap. 141 (S.8714) (Post-Release Supervision Re-sentencing proceedings). Effective: July 9, 2008.**

Enacted in the wake of the decisions in People v. Sparber, 10 N.Y.3d 457 (2008), and Garner v. Department of Correctional Services, 10 N.Y.3d 358 (2008), Chapter 141 provides an orderly process for returning inmates serving determinate sentences for crimes committed on or after September 1, 1998 to sentencing courts for possible resentencing when commitments are silent about post-release supervision. The bill does not mandate new post-release supervision terms. It expressly authorizes courts to impose determinate sentences without post-release supervision when the district attorney consents to such a disposition, which might occur, for example, when imposition of post-release supervision would now trigger a defendant’s right to withdraw a guilty plea under People v. Catu, 4 N.Y.3d 242 (2005). The bill also contemplates that sentencing courts might “otherwise” [new Cor. Law § 601-d (5)] choose not to impose post-release supervision. For exam-

ple, a court might rule that imposition of post-release supervision after maximum expiration of the original sentence would violate double jeopardy.

S.8714 applies to all inmates in DOCS’ custody or on parole serving determinate sentences (for crimes committed on or after September 1, 1998) whose original court commitment fails to include post-release supervision. If DOCS or Parole has the sentencing minutes and the minutes clearly reflect a post-release supervision term, the inmate or parolee will not be subject to resentencing under the bill. When the minutes are silent or unavailable, DOCS or Parole must notify the sentencing court, which must then take the following action within certain time frames:

1. Within ten days of the notice the sentencing court may issue a superceding commitment reflecting imposition of post-release supervision when the sentencing minutes clearly reflect that post-release supervision was initially imposed, and provide an explanation for this conclusion to DOCS or Parole, the inmate, and the attorney who represented him or is currently representing him.
2. If the sentencing court cannot dispose of the matter by issuing a superceding commitment, it must assign counsel to the inmate pursuant to County Law § 722, and calendar the matter within twenty days of the notice from DOCS or Parole. The court must assign “the attorney who appeared for the defendant in connection with the judgment or sentence or, if the defendant is currently represented concerning his or her conviction or sentence or with respect to an appeal from his or her conviction, such present counsel.”
3. “The court shall promptly seek to obtain sentencing minutes, plea minutes and any other records and shall provide copies to the parties and conduct any reconstruction proceedings that may be necessary to determine whether to resentence such person.”
4. “The court shall commence a proceeding to consider resentence no later than thirty days after receiving notice” from DOCS or Parole, and shall issue a written determination and order no later than forty days from such notice.
5. The defendant may “with counsel” consent to extend these time frames. The district attorney may apply for one ten day extension for “extraordinary circumstances.”

The bill makes clear these proceedings are without prejudice to an inmate’s or parolee’s right to seek other immediate relief. It states:

Nothing in this section shall affect the power of any court to hear, consider and decide any petition, motion or proceeding pursuant to article four hundred forty of the criminal procedure law, article sev-

enty or seventy-eight of the civil practice law and rules, or any authorized proceeding. [Correction Law § 601-d (8)]

➤ **VETOED (S.7273) (Authorizes state troopers to plea bargain traffic tickets).**

Countermands the State Police regulation that prohibits troopers from plea bargaining traffic tickets. This bill was vetoed by Governor Spitzer in 2007.

Executive Law § 231—Prosecution of certain violations of the vehicle and traffic law.

1. The division of state police shall make no rule or regulation nor shall otherwise limit a member of the state police's ability to modify or recommend the modification of a charge before a court relating to a petty violation of the vehicle and traffic law. In addition, a member who has issued a citation or uniform traffic ticket (hereafter referred to as the "issuing member") to a person for committing a petty violation of the vehicle and traffic law shall be authorized to appear before the court if authorized by the local district attorney where such violation is returnable on behalf of the people of the state of New York, at a date designated by the court, and recommend to the court the modification of the original charge or charges. 2. This section is not intended to affect any plea bargain limitations otherwise provided for in this chapter or other law of this state, including, but not limited to, those limitations set forth for the alleged commission of a violation of article thirty-one of the vehicle and traffic law.

➤ **Chap. 569 (A.5258-c) (Safe Harbour for Exploited Children Act - minors engaged in prostitution). Effective: April 1, 2010.**

This legislation encourages a treatment-oriented response when minors are arrested for prostitution offenses. It establishes a presumption that "sexually exploited children" arrested for prostitution offenses should be charged in PINS proceedings, as opposed to juvenile delinquency petitions, in Family Court, and establishes treatment programs for them, including safe houses in all social service districts in New York. A "sexually exploited child" is defined as "any person under the age of eighteen who has been subject to sexual exploitation because he or she:" a) is a victim of a sex trafficking crime; b) is an abused child as defined in Family Court Act 1012(e)(iii), or c) engages in prostitution, loitering for the purpose of prostitution, or sexual performance by a child offenses. Although the Act does not dictate charging decisions in adult criminal court for 16 and 17 year-olds, it does strongly encourage prosecutors to offer sexually exploited minors adjournments in contemplation of dismissal on

these charges. The Act specifies that "all of the services created under this article may, to the extent possible provided by law, be available to all sexually exploited children . . . as a condition of an adjournment in contemplation of dismissal issued in criminal court."

➤ **Chap. 326 (S.8665) (Family Court orders of protection — persons not related by consanguinity or affinity). Effective: July 21, 2008.**

Expands the authority of Family Court to issue orders of protection in matters involving persons in "intimate relationships," who are not related by consanguinity or affinity. The new authority extends to:

persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

➤ **Chap. 491 (S.8706) (Reporting names of patients for gun purchase instant criminal background checks). Effective: November 1, 2008.**

Authorizes OMH and OMRDD to report names of patients to DCJS and the FBI for purposes of Brady bill National Instant Criminal Background Checks. The bill is in response to the Virginia Tech massacre last year.

➤ **Chap. 265 (S.7811) (Fulton County District Attorney). Effective: July 7, 2008.**

Authorizes assistant district attorneys in Fulton County to live in adjoining counties.

Peace Officer Status—All bills vetoed except where noted:

- A.9844 — uniformed members of the fire marshal's office in the village of Southampton
- A.9889 — dog control officers in the city of Salamanca
- A.10397 — uniformed court officers employed by the village of Northport village justice court
- S.6847-a — employees of the village court of the village of Westhampton Beach serving as uniformed court officers
- S.7469 — uniformed court officers of the town court of the town of New Windsor

(continued on page 39)

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

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

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

Indiana v Edwards, 554 US ___, 128 Sct 2379 (2008)

The respondent was charged with attempted murder, battery, and other crimes. In the time leading up to his first trial, the court held three competency hearings and twice found the respondent incompetent to stand trial. After his condition improved and he was found competent, he asked to proceed pro se. The court rejected his request and he was represented by counsel. The jury convicted of him of two offenses, but did not reach a verdict on the attempted murder and battery charges. Prior to his second trial, the court denied the respondent's new request to proceed pro se. He was represented by counsel and was convicted of the remaining offenses. The state appellate court reversed his conviction and ordered a new trial and the state supreme court affirmed.

Holding: Under the Sixth and Fourteenth Amendments, defendants have the right to proceed without counsel if the choice is made voluntarily and intelligently (see *Faretta v California*, 422 US 806 [1975]); however, the right of self-representation is not absolute. See *Martinez v Court of Appeal of Cal., Fourth Appellate Dist.*, 528 US 152, 163 (2000). A defendant's competence to proceed on his own and enter a guilty plea does not require a standard that is higher or different from the competency to stand trial standard set forth in *Dusky v United States*, 362 US 402 (1960). See *Godinez v Moran*, 509 US 389 (1993). The Constitution allows states to limit a defendant's right to self-representation by requiring representation by counsel at trial if the defendant lacks the capacity to conduct his trial defense without counsel. A different standard is needed for the waiver of counsel at trial because a defendant may be able to work with counsel at trial, but not be able to present his own defense. Self-representation in certain circumstance may deprive the defendant of the right to a fair trial. "[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." Judgment vacated and case remanded.

Dissent: [Scalia, J] "A mentally ill defendant who knowingly and voluntarily elects to proceed *pro se* instead of through counsel receives a fair trial that comports with the Fourteenth Amendment. *Godinez v Moran*, 509 US 389 (1993)." The only situation in which the right of self-representation has been denied is when it is necessary to allow the trial to proceed in an orderly fashion. See *Illinois v Allen*, 397 US 337, 343 (1970).

Arraignment (General)

ARN; 31(10)

Counsel (Attachment) (Right to Counsel) (Scope of Counsel [Entry])

COU; 95(9) (30) (38[b])

Rothgery v Gillespie County, Texas, 554 US ___, 128 Sct 2578 (2008)

Texas police arrested the petitioner without a warrant as a felon in possession of a firearm because they incorrectly believed that he had a felony conviction. At his initial appearance, a magistrate found probable cause for the arrest and set bail. There was no prosecutor at that appearance. The court did not respond to the petitioner's oral and written requests for appointed counsel. He was later indicted, rearrested, and new bail was set, which he could not post. Six months after the initial appearance, a lawyer was appointed and uncovered the criminal history error. The indictment was dismissed and the petitioner filed a section 1983 action claiming that timely appointment of counsel would have obviated his rearrest, indictment, and three-week imprisonment. The district court granted summary judgment to the respondent and the circuit court affirmed.

Holding: The petitioner's Sixth Amendment right to the assistance of counsel attached at his initial court appearance, as that marked the commencement of the prosecution. See *McNeil v Wisconsin*, 501 US 171, 175 (1991). Commencement of the prosecution is not dependent upon a prosecutor's knowledge of the arrest and initial appearance. "[B]y the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in the aid of prosecution, the State's relationship with the defendant has become solidly adversarial." See *Michigan v Jackson*, 475 US 625 (1986). The question of attachment is separate from the "critical stage" question; it is a mistake to assume that "attachment necessarily requires the occurrence or imminence of a critical stage." Whether the delay in the appointment of counsel prejudiced the petitioner's rights is not before the Court. Judgment vacated and matter remanded.

Concurrence: [Roberts, J] A sufficient reason for reexamining *Brewer v Williams*, 430 US 387 (1977) and *Jackson* has not been shown.

US Supreme Court *continued*

Concurrence: [Alito, J] Attachment marks the beginning of the prosecution, not the beginning of entitlement to the assistance of counsel. *See Moore v Illinois*, 434 US 220 (1977). The substantive right to “Assistance of counsel for his defence” refers to defense at trial and is meant to guarantee that defendants receive effective assistance at trial. As a practical matter, assistance of counsel includes “critical stages” that may so prejudice the outcome that the defendant must be represented at those stages to ensure genuinely effective assistance at trial. *See United States v Ash*, 413 US 300, 309-310 (1973). “Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial ‘critical stage,’ as necessary to guarantee effective assistance at trial.” *Cf McNeil*, 501 US at 177-178.

Dissent: [Thomas, J] The right to counsel attaches when the formal charging document is filed upon which the defendant is going to be tried. No such document was filed at the time of the petitioner’s initial appearance, and the appearance was not an adversary proceeding since the prosecution did not know of the arrest and had not decided whether to press charges.

Evidence (Hearsay) **EVI; 155(75)**
Witnesses (Confrontation of Witnesses) **WIT; 390(7)**

Giles v California, 554 US __, 128 SCt 2678 (2008)

The petitioner was tried for the shooting death of his ex-girlfriend. The prosecution introduced a statement that the decedent made to police three weeks before her death. The statement included allegations that the petitioner was jealous, choked and punched her, and threatened her with a folding knife. The statements were admitted under a California statute permitting admission of out-of-court statements describing the infliction or threat of physical injury on a declarant when the declarant is unavailable to testify at trial and the statements are deemed trustworthy. While the case was on appeal, the Supreme Court decided *Crawford v Washington*, 541 US 36 (2004). The state appellate courts affirmed the conviction based on the doctrine of forfeiture by wrongdoing.

Holding: The forfeiture by wrongdoing exception to the Confrontation Clause requires that the defendant engage in conduct designed to prevent the witness from testifying, which was not established at trial. The common law interpretation of the exception was that it did not apply where the defendant had caused the person to be absent, but did not do so to prevent the person from testifying, and Federal Rule of Evidence 804(b)(6) requires intent to make the witness unavailable to testify. “The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial, on the basis

of a prior *judicial* assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury. It is akin, one might say, to ‘dispensing with jury trial because a defendant is obviously guilty.’ *Crawford*, 541 US at 62.” However, evidence which shows that the defendant previously abused or threatened to abuse the witness in order to dissuade the witness from seeking police help or cooperating with a criminal prosecution, particularly in domestic violence situations, is relevant to the applicability of the forfeiture by wrongdoing exception. The issue of whether the statements were testimonial is not decided, as it was not raised by the respondent. Judgment vacated and matter remanded.

Concurrence: [Thomas, J] Statements such as those made by the decedent are not testimonial. *See Hammon v Indiana*, 547 US 813 (2006).

Concurrence: [Alito, J] Although it appears that the decedent’s statement falls outside of the Confrontation clause, that issue is not before the Court.

Concurrence in part: [Souter, J] In cases where the defendant is being tried for the murder of the declarant, forfeiture of the right of confrontation cannot be based solely on a judge’s finding by a preponderance of the evidence that the defendant killed the declarant. There must be evidence that the defendant intended to prevent the declarant from testifying. *Cf Davis v Washington*, 547 US 813, 833 (2006).

Dissent: [Breyer, J] The defendant’s purpose in preventing testimony was not an essential element of the forfeiture by wrongdoing doctrine at common law, and it should not be a requirement now. The focus must be on the defendant’s intent, which can be presumed where the defendant’s action is known to produce a particular result, *ie*, the witness’s unavailability.

Death Penalty (Cruelty) **DEP; 100(40) (50) (155[s])**
(Deterrence) (States
[Louisiana])

Sex Offenses (General) **SEX; 350(4)**

Kennedy v Louisiana, 554 US __, 128 SCt 2641 (2008)

The petitioner was convicted of raping his eight-year-old stepdaughter and sentenced to death under Louisiana law. The state supreme court affirmed.

Holding: The Louisiana statute that authorizes the death penalty for child rape, even if the crime does not result or was not intended to result in the death of the child, violates the Eight Amendment. The constitutionality of a death penalty statute is governed by state consensus, precedent, and “the Court’s own understanding and interpretation of the Eight Amendment’s text, history, meaning, and purpose.” *See Enmund v Florida*, 458 US 782, 788, 797-801 (1982). The states have moved away from making child rape a capital offense. In 1995, Louisiana

US Supreme Court *continued*

reauthorized the death penalty for child rape, followed by five other states. However, forty-four states and the federal government do not authorize the death penalty for child rape. This legislative comparison, as well as statistics regarding the number of executions for child rape, show that the national consensus is against capital punishment for child rape. "As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken." Allowing capital punishment for child rape also raises systemic concerns, such as the problem of unreliable child testimony and a potential increase in non-reporting. Judgment reversed and matter remanded.

Dissent: [Alito, J] National consensus against making child rape a capital offense is based on unreliable statistics. Dicta in *Coker v Georgia*, 433 US 584 (1977), led state courts and legislators to believe that state law authorizing the death penalty for child rape would be declared unconstitutional, thus discouraging legislative action. And the Court does not offer another basis for finding an Eighth Amendment violation.

[Ed. Note: In connection with the denial of the respondent's petition for rehearing, the Court amended the majority opinion with a footnote acknowledging that the US Code of Military Justice authorizes the death penalty for child rape, but concluding that this law does not change the Court's judgment.]

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

Weapons (Firearms) (General Possession) WEA; 385(21) (22) (30)

District of Columbia v Heller, 554 US __, 128 SCt 2783 (2008)

The District of Columbia denied the respondent's application for a registration certificate for a handgun he wanted to keep in his home. The respondent filed a federal lawsuit to enjoin enforcement of the District's laws which ban the registration of handguns, prohibit the carrying of an unlicensed firearm in the home, and require that firearms kept in the home be unloaded and disassembled or bound by a trigger lock or other similar device. The district court dismissed the complaint, and the Court of Appeals reversed.

Holding: "[T]he District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." The Second Amendment provides an individual right to keep and bear arms and that right is not limited

by the Amendment's prefatory clause, "A well regulated Militia, being necessary to the security of a free State." The original meaning of "keep and bear arms" includes the individual right to possess and use weapons in case of confrontation. Most people choose handguns for self-defense; thus, the District's total ban on handguns is invalid. And the requirement that firearms kept in the home be kept inoperable at all times is invalid as it prevents individuals from using firearms "for the core lawful purpose of self-defense." As with the First Amendment's right of free speech, the right to keep and bear arms is not unlimited; bans on possession of firearms by felons and the mentally ill and on the carrying of firearms in certain locations, such as schools and government buildings, and restrictions on the commercial sale of firearms, do not violate the Amendment. Unless the respondent is disqualified from exercising his Second Amendment rights, the District must allow him to register his handgun and give him a license to carry it in his home. Judgment affirmed.

Dissent: [Stevens, J] The Second Amendment protects the right of an individual to possess and use firearms in connection with state-organized militia. See *United States v Miller*, 307 US 174 (1939). Nothing in the history or interpretation of the Amendment suggests that it gives individuals the right to possess and use weapons for self-defense.

Dissent: [Breyer, J] "[S]elf-defense alone, detached from any militia-related objective, is not the Amendment's concern." The right protected by the Amendment does not prevent legislatures from enacting gun regulation that is consistent with that right, such as the District's gun laws.

New York State Court of Appeals

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

People v Baret, 11 NY3d 31, 862 NYS2d 446 (2008)

Defendant Baret and co-defendant Nunez were charged with possession and sale of cocaine. The prosecution offered a no-split deal requiring Baret to plead guilty to a sale with a two to six year sentence, and Nunez to plead to attempted sale with a sentence of probation. Both men agreed and entered their pleas. Before sentencing, Baret moved to withdraw his plea because Nunez had threatened him. The court denied the motion without a hearing and the Appellate Division affirmed.

Holding: The trial court properly exercised its discretion in denying the defendant's motion without a fact-finding hearing. See *People v Tinsley*, 35 NY2d 926, 927. The defendant's affidavit in support of his motion lacked sufficient specific details about the threats to warrant a hearing. "One would expect a man who had in truth been

NY Court of Appeals *continued*

threatened with violence, and found the threat credible enough that he would accept a two to six year prison term rather than defy it, to be able to tell his story in much more specific detail." Order affirmed.

Dissent: [Jones, J] Since connected or no-split plea offers are inherently coercive, they deserve heightened scrutiny. The defendant's allegations of coercion sufficiently raised doubts about the voluntariness of his guilty plea to merit a hearing. *See People v Picciotti*, 4 NY2d 340, 344.

Prior Convictions (General) (Pleading) PRC; 295(7) (15)

Weapons (Possession) WEA; 385(30)

People v Montilla, 10 NY3d 663, 862 NYS2d 11 (2008)

A month after the defendant pleaded guilty to third-degree assault, but before he had been sentenced, he was arrested and indicted for third-degree criminal possession of a weapon and second-degree menacing. The defendant argued that there was insufficient evidence to support the possession charge, as that offense requires a prior conviction and he had not been convicted of the assault charge since he had not yet been sentenced for that offense. The court rejected that argument and the defendant was convicted after a bench trial. The Appellate Division affirmed.

Holding: While the Penal Law does not define the term "convicted," CPL 1.20(13) defines "conviction" as "the entry of a plea of guilty to, or a verdict of guilty upon, an accusatory instrument other than a felony complaint, or to one or more counts of such instrument." Penal Law 265.02(1), the third-degree weapons possession law, is not a recidivist sentencing statute, and it does not require that a sentence on the prior conviction be imposed prior to the commission of the present offense. It is appropriate to import the CPL's definition of "conviction" into other statutes. *See Matter of Gunning v Codd*, 49 NY2d 495, 498-499. Order affirmed.

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

People v Packer, 10 NY3d 915, 862 NYS2d 321 (2008)

Holding: "The court's determination – that defendant's consent was involuntarily given because it was insufficiently distinguishable from the illegal frisk – finds record support. The People's contention that the court applied an erroneous legal standard is unavailing." Order affirmed.

Autopsies (General) AUT; 53.5(10)

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

People v Freycinet, 11 NY3d 38, 862 NYS2d 450 (2008)

The defendant was convicted of second-degree manslaughter in connection with the death of his girlfriend. At the time of the trial, the medical examiner who performed the autopsy and prepared a written report no longer lived in the state and was not available to testify. The autopsy report, which was redacted to eliminate the examiner's opinions on the cause and manner of death, described the decedent's stab wounds; the court admitted the report into evidence over the defendant's Confrontation Clause objection. Another medical examiner testified as to the manner and cause of death based on that report. The Appellate Division affirmed the conviction.

Holding: The redacted autopsy report was not testimonial within the meaning of *Crawford v Washington* (541 US 36 [2004]). Documents that fall within the business records exception to the hearsay rule can be testimonial. Factors that should be considered when determining whether a report of scientific procedures is testimonial include the extent to which the procedure was conducted by an arm of law enforcement; whether the report is a contemporaneous record of objective facts, as opposed to human judgment; whether a pro-law enforcement bias is likely to shape the report's contents; and whether the report explicitly links the defendant to the crime. *See People v Rawlins*, 10 NY3d 136, 149-156. The medical examiner's office is not a law enforcement agency, and is not subject to control by the prosecution. *See People v Washington*, 86 NY2d 189, 192. Although the medical examiner used judgment in characterizing the injury as a stab wound, the redacted report is significant because it reflects the examiner's contemporaneous, objective account of observable facts and was not influenced by a pro-law enforcement bias. And the report did not directly link the defendant to the crime. Order affirmed.

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles]) (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(10[a]) (15[k])

People v Estrella, 10 NY3d 945, 862 NYS2d 857 (2008)

Holding: "The courts below did not err in declining to suppress the cocaine recovered from the defendant's car. The record supports the finding that the officer who stopped the car reasonably believed the windows to be over-tinted in violation of VTL § 375 (12-a) (b) (3). The officer was not chargeable with knowledge that the tinting

NY Court of Appeals *continued*

was legal in Georgia, where the car was registered.” Order affirmed.

Counsel (Competence/Effective Assistance/Adequacy) (Duties) COU; 95(15) (20)

Grand Jury (General) (Procedure) (Witnesses) GRJ; 180(3) (5) (15)

People v Simmons, 10 NY3d 946, 862 NYS2d 852 (2008)

The defendant was arrested for a misdemeanor. At arraignment, an attorney from the assigned counsel misdemeanor panel was appointed to represent the defendant. At the next court appearance, the prosecutor notified the defendant that his case would be presented to the grand jury. Defense counsel orally notified the prosecution that the defendant wanted to testify before the grand jury. However, neither the defendant, who was in jail, nor defense counsel appeared at the grand jury presentation. The defendant was indicted for two felony offenses. The defendant filed a pro se CPL 190.50(5)(a) motion to dismiss the indictment because the prosecution did not honor his right to testify. The defendant stated that his attorney refused to file the motion. At arraignment on the indictment, at defense counsel’s request, the court relieved defense counsel and appointed an attorney from the assigned counsel felony panel. The defendant’s new attorney filed the pro se motion with the supreme court, and the court denied the motion. The defendant was convicted of the felony offenses, and the Appellate Division affirmed.

Holding: The failure of the defendant’s first attorney to facilitate the defendant’s testimony before the grand jury is not per se ineffective assistance of counsel. *See People v Wiggins*, 89 NY2d 872, 873. The defendant failed to show that he was prejudiced by his attorney’s failure; he did not even claim that the outcome would have been different if he testified in the grand jury. Order affirmed.

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

People v Shemesh, No. 201, 9/16/2008

Holding: “There is record support for the finding below that the District Attorney failed to accord the defendant reasonable time to exercise his right to appear as a witness before the Grand Jury.” Order affirmed.

Parole (General) (Release [Consideration for]) PRL; 276(10) (35[b])

Matter of Siao-Pao v Dennison, No. 200, 9/16/2008

Holding: “The courts below applied the correct legal standards and properly considered the Board of Parole’s written determination, which, when evaluated in the context of the parole hearing transcript, demonstrated that the Board considered the required statutory factors (*see* Executive Law § 259-i; *Matter of Silmon v Travis*, 95 NY2d 470, 476 [2000]). The Board’s written determination, while less detailed than it might be, is not merely ‘conclusory’ and so does not violate Executive Law § 259-i (2)(a)(I).” Order affirmed.

First Department

Defenses (Agency) DEF; 105(3)

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

People v Brown, 52 AD3d 204, 859 NYS2d 136 (1st Dept 2008)

The defendant had sold narcotics to an undercover officer several times. The officer, who was posing as a member of organized crime, mentioned to the defendant that he was replacing an employee who supposedly performed unspecified duties for \$1,500 per week. In support of his agency defense, the defendant testified that his codefendant was the actual seller, that he did not ask for or receive compensation for the sales, and that he participated in the sales because he hoped that the buyer would hire him to replace the employee. The court instructed the jury to consider, among other factors, whether the defendant expected a benefit from the sales.

Holding: The court’s agency charge was proper. The agency defense cannot be established when the defendant received a substantial benefit, as opposed to a tip or incidental benefit; the defense is meant to limit the liability of a person who helps another obtain drugs primarily as a favor, instead of for economic reasons. *See People v Lam Lek Chong*, 45 NY2d 64, 74-75 *cert den* 439 US 935. That the defendant was motivated to participate in the sales because of his serious expectation that the buyer would hire him is inconsistent with the agency defense, even though the expected benefit was not part of the proceeds of the sales. Judgment affirmed. (Supreme Ct, Bronx Co [Clancy, JJ])

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)

Sentencing (Presence of Defendant and/or Counsel) SEN; 345(59.5)

People v Adams, 52 AD3d 243, 859 NYS2d 170 (1st Dept 2008)

First Department *continued*

Holding: “The sentencing court erred by permitting defendant to represent himself at his ultimate sentencing proceeding, without making the proper inquiry to establish he understood the risks of self-representation (*see People v Wardlaw*, 6 NY3d 556, 558 [2006]). However, denial of the right to counsel at a particular proceeding does not invariably require the remedy of repetition of the tainted proceeding, or any other remedy (*see id.* at 559). Here, the court indicated prior to sentencing that it intended to impose the minimum sentence permitted by law, and it ultimately did so. Furthermore, by the time defendant chose to go pro se, his counsel had already sufficiently litigated issues relating to defendant’s second felony offender status, and those issues were meritless in any event. Therefore, the tainted proceeding had no adverse impact (*id.*), and remand for resentencing would serve no useful purpose.” Judgment affirmed. (Supreme Ct, New York Co [Stackhouse, J (trial); Carro, J (sentence)])

Trial (Public Trial) TRI; 375(50)

Witnesses (Confrontation of Witnesses) (Police) WIT; 390(7) (40)

People v Waite, 52 AD3d 237, 859 NYS2d 162 (1st Dept 2008)

The defendants waived their right to a *Hinton* hearing (*People v Hinton*, 31 NY2d 71), on the condition that their family members be allowed in the courtroom for the testimony of two undercover officers.

Holding: The court erred in concluding that the conditional waiver of their right to a *Hinton* hearing amounted to a concession of the grounds required for allowing the undercover officers to testify solely using their shield numbers. The right to confront witnesses is not waived by a waiver of the right to a public trial. The right to confront a witness about his or her identity may be restricted if the three-part test in *People v Stanard*, 42 NY2d 74, 83-84, is satisfied. *See People v Waver*, 3 NY3d 748. A credible showing that an undercover officer would be endangered by revealing his or her name in open court could be a sufficient basis for limited closure of the courtroom (*see People v Ramos*, 90 NY2d 490 *cert den sub nom Ayala v New York*, 522 US 1002), and could demonstrate grounds for allowing anonymous testimony. *See People v Washington*, 40 AD3d 228 *lv den* 9 NY3d 927. But that showing was not made in this case, as the defendants merely waived the right to a completely open trial. Further, since the waiver of the right to confront witnesses is a distinct constitutional right, waiver of which must be voluntary, knowing, and intelligent (*see People v Seaberg*, 74 NY2d 1, 11), the conditional waiver of a public trial should not be consid-

ered a confrontation waiver. The error was not harmless. Judgment reversed and matter remanded for new trial. (Supreme Ct, Bronx Co [Marvin, JJ])

Misconduct (Judicial) (Prosecution) MIS; 250(10) (15)

Self-Incrimination (Conduct and Silence) (Comment) SLF; 340(5) (10)

People v Council, 52 AD3d 297, 860 NYS2d 48 (1st Dept 2008)

Holding: The defendants were charged with first-degree offering a false instrument for filing in connection with the filing of recertification forms in 1999 and 2000. The prosecution improperly introduced into evidence the 1999 form and strenuously argued that it contained false information, which it did not. It was only after the jury started deliberating and indicated on the verdict sheet that the defendants were guilty of offering that form that the prosecution told the court that the form should not have been included in the indictment. The court struck the counts related to the form without explanation to the jury. The prosecution also improperly introduced a 2001 recertification form, which allegedly contained false information, but was not charged in or added to the indictment. That form constitutes an uncharged crime, which could be admissible to show intent or absence of mistake, but the court failed to instruct the jury that it could not be considered as evidence of propensity. The introduction of the two forms prejudiced the defendants by severely weakening any claim that the inclusion of the incorrect information in the 2000 form was mere error, with no intent to defraud. Although the defendants failed to preserve the issue, it is reviewed in the interest of justice. The prosecution violated the defendants’ right against self-incrimination by arguing that the defendants’ refusal to speak to a government investigator was evidence of their guilty intent. *See Republic of Haiti v Duvalier*, 221 AD2d 379, 386. Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Barrett, J (speedy trial motion); Tallmer, J (trial and sentence)])

Witnesses (Credibility) WIT; 390(10)

People v Valdez, 53 AD3d 172, 861 NYS2d 288 (1st Dept 2008)

Holding: The jury in the defendant’s first trial could not reach a verdict on a larceny count. At the retrial, as soon as the single identification witness was sworn, the prosecution improperly elicited information regarding the witness’s service in the military, college degrees, rank when on the police force, and the 47 commendations he received as a police officer. However, since only general objections were raised, the issue was not preserved. The interest of justice jurisdiction is not invoked because the

First Department *continued*

record does not show any basis for doubting the accuracy of critical portions of the witness's account and the account was essentially unchallenged. But the error is discussed because it risked the fairness of the proceeding and this practice of eliciting evidence to prematurely buttress a witness's credibility is not uncommon. The defendant's theory was that the witness was mistaken about what happened, not that the witness was lying; testimony about the witness's background and achievements is not admissible because its purpose was to bolster the witness's credibility. "A witness's life experience does not become admissible simply because the accuracy of his observation on one occasion has been called into question or because his account has in some respects been contradicted. . . . Certainly, there appears no reason to suppose that an accumulation of advanced degrees will render one a more reliable observer or relator of street crime. Nor is there reason to suppose that one's opportunity accurately to observe a particular transaction will be improved by a valorous history." Judgment affirmed. (Supreme Ct, New York Co [Solomon, JJ])

Concurrence: [Andrias, JJ] The testimony was admissible as it is counsel's job to let the jury know about the witness and why the witness should be believed, the testimony was brief, and it did not prejudice the defendant.

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

**Instructions to Jury (General
(Theories of Prosecution
and/or Defense)** **ISJ; 205(35) (50)**

**People v Hill, 52 AD3d 380, 860 NYS2d 518
(1st Dept 2008)**

The defendants, Hill and Dandridge, were convicted of gang assault in connection with a fight during which a third defendant stabbed the complainant.

Holding: The court's jury instructions on accessorial liability and justification did not follow the standard jury instructions and were confusing and erroneous. Although defendant Hill's conviction was based on legally sufficient evidence and was not against the weight of the evidence, the conviction must be reversed as the jury charge errors were not harmless. The accessory charge was confusing as it could have led the jury to believe "that any person who was involved in any way in the fight was guilty of gang assault, whether or not that person engaged in conduct intended to aid the primary actor who caused serious physical injury." The justification charge was improper because the court did not give separate instructions on the use of ordinary physical force and deadly physical force, which could have led jurors to believe that the duty to retreat applied to both kinds of

force. Defendant Dandridge's conviction was not supported by sufficient evidence and was against the weight of the evidence. The evidence did not show that her "limited involvement in the altercation was intended to aid, or actually aided, any other member of the group to cause physical injury." Judgment as to Hill modified, gang assault conviction vacated, matter remanded for new trial on that count, and judgment affirmed as modified; judgment as to Dandridge reversed and indictment dismissed. (Supreme Ct, New York Co [McLaughlin, JJ])

**Homicide (Mental
Condition) (Murder
[Definition] [Evidence]
[Instructions])** **HMC; 185(35) (40 [d] [j] [m])**

Witnesses (Experts) **WIT; 390(20)**

**People v Florestal, 53 AD3d 164, 860 NYS2d 86
(1st Dept 2008)**

The defendant was found guilty of depraved indifference murder in connection with the death of her child. The child's father pleaded guilty to second-degree murder.

Holding: The court erred in instructing the jury "that depraved indifference must be determined by an objective view of the circumstances, rather than according to the defendant's state of mind." Prior to the defendant's trial, the Court of Appeals held that depraved indifference to human life is a separate element of depraved indifference murder, which is comprised of depravity and indifference (see *People v Suarez*, 6 NY3d 202, 214), and a month prior to her sentencing, the Court concluded that depraved indifference to human life is a culpable mental state. See *People v Feingold*, 7 NY3d 288, 294. The current formulation of depraved indifference murder should be applied because this is a direct appeal (see *People v Dickerson*, 42 AD3d 228, 234-235 *lv den* 9 NY3d 960), and the law was sufficiently modified at the time of the defendant's trial for her to raise the issue and for the court to have ruled on it. The defendant adequately preserved the issue and the court confronted and resolved it. The court improperly precluded the defendant from introducing expert testimony from a forensic psychologist regarding the defendant's mental state related to depraved indifference. The theory of the defense was that the defendant's experiences, including a traumatic childhood and physical abuse by the child's father, rendered her unable to assist her child. The court could have concluded that the average juror would not have understood the effects of the history of abuse on her ability to comprehend the danger to the child or provide the child with sufficient medical assistance. Judgment reversed and matter remanded for new trial. (Supreme Ct, New York Co [Wetzel, JJ])

First Department *continued*

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

Juveniles (Abuse) (Neglect) **JUV; 230(3) (80)**

Matter of Kadiatou B., 52 AD3d 388, 861 NYS2d 20 (1st Dept 2008)

Holding: The court correctly dismissed the derivative neglect petition brought against the respondent parents. The neglect petition was based on the court’s 2002 finding of child abuse related to the 1999 death of one of the respondents’ children and the severe injury to another child. The 1999 conduct is sufficiently remote in time from the neglect petition, particularly since the evidence supporting the abuse finding was vague and nonspecific. The conduct that caused the death was never defined, the parents were not found to have committed an intentional, reckless, or negligent act against the children, and they were not found criminally liable or responsible for the injuries. “[T]he finding was reached solely on the basis of the legal construct *res ipsa loquitur*.” The petitioner failed to present evidence that dismissal of the neglect petition would be harmful to the child. Instead, the respondents have shown a positive change in circumstances; they complied with the petitioner’s service plan, they have been active participants in a family services program, and the case worker and social workers testified that the interactions between the parents and the child have been positive. Order affirmed. (Family Ct, Bronx Co [Richardson, JJ])

Evidence (Weight) **EVI; 155(135)**

Homicide (Manslaughter [Vehicular]) (Murder [Defenses] [Definition] [Evidence]) **HMC; 185(30[v]) (40[a] [d] [j])**

People v Wells, 53 AD3d 181, 862 NYS2d 20 (1st Dept 2008)

Holding: Under the standard set forth in *People v Register*, 60 NY2d 270 *cert den* 466 US 953, which was the law at the time of the conviction, the defendant’s second-degree depraved indifference murder conviction comports with the weight of the evidence. The evidence established that the decedent was killed as a result of the defendant’s operation of a motor vehicle at a high rate of speed on city streets while intoxicated. The defendant failed to preserve his argument that depraved indifference murder requires a finding that he acted with a mental state beyond recklessness or that depraved indifference related to something other than the circumstances under which the risk-creating conduct took place. The trial court correctly declined to consider evidence that his intoxication negated the element of depraved indifference under

the *Register* standard and Penal Law 15.05(3), which precludes evidence of intoxication as a defense to a crime involving reckless behavior. The defendant’s conviction would be the same under the new standard set forth in *People v Feingold*, 7 NY3d 288. The evidence supports a finding that the defendant’s conduct evinced a depraved indifference to human life. Judgment affirmed. (Supreme Ct, New York Co [Carruthers, JJ])

Concurrence: [McGuire, JJ] The court need not and should not decide whether, under *Feingold*, the evidence is sufficient to support the defendant’s conviction. “If voluntary intoxication remains irrelevant under *Feingold* as a defense to a depraved indifference prosecution, it must be that an individual can be depravely indifferent to a risk without being aware of it. How that could be is far from obvious.”

Search and Seizure (Automobiles and Other Vehicles **SEA; 335(15[k]) (70)**

[Investigative Searches]

(Standing to Move to Suppress)

People v Cheatham, 54 AD3d 297, 863 NYS2d 407 (1st Dept 2008)

Holding: The court erred in granting the defendants’ motions to suppress physical evidence as the defendants failed to establish standing to challenge the vehicle search. The defendant Cheatham relied on the statutory presumption set forth in Penal Law 220.25(1) and the defendant McDowell did not make factual assertions regarding standing. The police stopped the car in which the defendants were passengers for a traffic violation. The police found cocaine in the pocket of the passenger front door where Cheatham had been sitting and Cheatham told the police that he had purchased cocaine and placed it in the passenger door. The prosecution argued that they plan to rely on Cheatham’s location in the car and his statements to police to establish possession. With regard to McDowell, the prosecution argued that they will rely on his movements in the back seat of the car after he saw the police lights to establish possession. Since the prosecution is not relying solely on the statutory presumption of possession, the defendants do not have automatic standing to challenge the search and therefore must show that they have a personal legitimate expectation of privacy in the area searched. *See People v Wesley*, 73 NY2d 351, 357. “We do not hold that the People can avoid the automatic standing rule of [*People v*] *Millan*[, 69 NY2d 514,] by pointing to some irrelevant fact or by resort to speculation.” Instead, the prosecution must provide evidence that tends to show that the defendants had actual or constructive possession of the drugs. “We leave for another day the issue of what the appropriate remedy might be in the event of a failure of proof by the People at trial that leaves their case resting solely on the statutory presumption.”

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Order reversed, motion to suppress physical evidence denied, indictment reinstated, and matter remitted for decision on the defendant Cheatham's motion to suppress his statements and for further proceedings on the indictment. (Supreme Ct, New York Co [Tejada, JJ])

Robbery (Elements) (Evidence) ROB; 330(15) (20)**People v McDaniel, 54 AD3d 577, 863 NYS2d 210
(1st Dept 2008)**

Holding: The defendant's conviction for first-degree robbery was supported by legally sufficient evidence and was not against the weight of the evidence. The prosecution proved beyond a reasonable doubt that during the incident the defendant displayed what appeared to be a firearm (*see* Penal Law 160.15[4]). Also, "[a]s defense counsel's own pre-charge comments make clear, the victim's demonstrations during her testimony established that defendant made an objective display that could reasonably be perceived of as a firearm and that the victim actually perceived that display (*see People v Lopez*, 73 NY2d 214, 220 . . .)." Judgment and order affirmed. (Supreme Ct, Bronx Co [Seewald, JJ])

Dissent in part: [Catterson, JJ] The majority has now adopted a completely subjective test to establish the elements of first-degree robbery, in violation of clear Court of Appeals precedent in *Lopez* and *People v Baskerville*, 60 NY2d 374. The complainant testified that the defendant held one hand to her neck, threatened to kill her if she did not give him money, and held his other hand under the arm near his waist, but did not say anything about shooting her and did not explain the basis for her fear that he had a gun in his coat. There was no evidence that the defendant consciously displayed a weapon or what appeared to the complainant to be a weapon, as required for a first-degree robbery conviction.

Second Department**Assault (Serious Physical Injury) ASS; 45(60)****Defenses (Justification) DEF; 105(37)****Evidence (Prejudicial) (Uncharged EVI; 155(106) (132)
Crimes)****People v Adames, 52 AD3d 617, 859 NYS2d 725
(2nd Dept 2008)**

The defendant was convicted of first-degree assault and fourth-degree criminal possession of a weapon in connection with an incident at his apartment during which he stabbed the complainant in the chest and back with a steak knife.

Holding: The prosecution failed to present legally sufficient evidence that the complainant suffered serious physical injury. *See* Penal Law 10.00(10), 120.10(1); *People v Gray*, 30 AD3d 771, 772-773. The only evidence relevant to serious physical injury was the complainant's testimony that she occasionally has pain in one of the wounds and that she has scars, but the scars were not described or shown to the jury. The court erred in denying the defendant's request for a justification charge under Penal Law 35.20(3), as there was a reasonable view of the evidence that the defendant reasonably believed that deadly physical force was necessary to prevent a burglary. The court improperly allowed the prosecution to question the defendant's companion regarding remote uncharged domestic violence incidents and present evidence of those incidents. The evidence did not permit a non-speculative inference that the companion testified falsely out of fear of the defendant and the probative value did not outweigh the potential for prejudice. Judgment reversed, first-degree assault count dismissed, and new trial ordered on remaining counts. (Supreme Ct, Kings Co [Brennan, JJ])

**Discovery (Brady Material and DSC; 110(7) (20)
Exculpatory Information)
(Matters Discoverable)****Driving While Intoxicated DWI; 130(3) (15)
(Breathalyzer) (Evidence)****People v Robinson, 53 AD3d 63, 860 NYS2d 159
(2nd Dept 2008)**

The defendant sought disclosure of the computer source code for the Intoxilyzer 5000EN, the breathalyzer machine used to test his blood alcohol content. The court denied his discovery motion and he was convicted of driving while intoxicated per se.

Holding: The Intoxilyzer source code is discoverable pursuant to CPL 240.20(1)(c) and (1)(k). However, the court did not deprive the defendant of his right to challenge the reliability of the machine used to test him. The machine is on the state Department of Health's list of approved breath-testing instruments and is presumed reliable. *See* 10 NYCRR 59.4(b)(4)(xx); *People v Hampe*, 181 AD2d 238, 241. The defendant failed to present evidence that the machine used to test him was unreliable, such as a change in the software that altered its reliability, or show that it was reasonably likely that the source code contained material, exculpatory evidence that is unavailable from other sources. *See Matter of Constantine v Leto*, 157 AD2d 376, 379. The defendant was given documentation regarding the particular machine which he needed to challenge the accuracy of the machine's BAC determination, and he was able to cross-examine the officer who conducted the test. The defendant failed to show that the prosecution could produce a written document using the

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machine's Erasable Program Read Memory chip that a defense expert could read or that removal of the chip would not affect the machine's operability. The prosecution did not have actual or constructive possession of the source code as it is owned and copyrighted by the manufacturer and is a trade secret, and the state does not have a possessory interest in the source code or other copyrightable material. Judgment affirmed. (Supreme Ct, Kings Co [Mullen, JJ])

Sentencing (Persistent Felony Offender) (Pronouncement) SEN; 345(58) (70)

People v Bazemore, 52 AD3d 727, 860 NYS2d 602 (2nd Dept 2008)

Holding: The court erred in sentencing the defendant as a persistent felony offender under Penal Law 70.10. Although the defendant failed to preserve this argument for appeal, it is reviewed in the interest of justice. The court failed to set forth in the record the reasons why it concluded that the defendant's history and character and the nature and circumstances of his criminal conduct indicate that extended incarceration and lifetime supervision will best serve the public interest. "The court's conclusory recitation at sentencing that it had considered all the facts submitted during a hearing and the arguments of counsel was insufficient to fulfill the mandate of Penal Law 70.10(2) (*see People v Murdaugh*, 38 AD3d [918,] at 919-920 . . .)." Judgment modified, sentence vacated, judgment affirmed as modified, and matter remitted for resentencing in compliance with Penal Law 70.10(2) and CPL 400.20(7). (Supreme Ct, Kings Co [Starkey, JJ])

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

Counsel (Anders Brief) COU; 95(7)

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

Matter of David Ontario C., 52 AD3d 707, 858 NYS2d 916 (2nd Dept 2008)

Holding: The appellant's 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 whether the appellant failed to plan for her son's future for more than one year after he came into the petitioner's care. *See* Social Services Law 384-b(7)(a). 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. (Family Ct, Kings Co [Pearl, JJ])

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

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

Matter of Marvin P., 52 AD3d 722, 858 NYS2d 904 (2nd Dept 2008)

The appellant was involved in two Mental Hygiene Law proceedings, an application for a first retention order under CPL 330.20 and an application for the involuntary administration of medication pursuant to Mental Hygiene Law article 33.

Holding: The court properly denied the appellant's motion to proceed pro se. The appeal must be dismissed as "no appeal lies as of right or by permission from an interlocutory order in a CPL 330.20 proceeding (*see* CPL 330.20[21]) . . ." The record supports the court's conclusion that the appellant was unable to knowingly and intelligently waive his right to counsel (*see People v Providence*, 2 NY3d 579, 583-584), despite the fact that the court did not question the appellant before making its decision. The court's decision was based on its observations of the appellant's appearance in court, its opportunity "to assess his ability to comprehend the proceedings," and on the forensic reports provided to it. Appeal dismissed and order affirmed. (Supreme Ct, Orange Co [Horowitz, JJ])

Juveniles (Adoption) (Parental Rights) (Permanent Neglect) JUV; 230(5) (90) (105)

Matter of Samuel Fabien G., 52 AD3d 713, 861 NYS2d 369 (2nd Dept 2008)

Holding: The court correctly concluded that the appellant father permanently neglected his two children. However, as the attorney for the children concluded, termination of the father's parental rights may not be warranted. Based on new facts and allegations that the Court is permitted to consider (*see Matter of Michael B.*, 80 NY2d 299, 318), including that no adoptive resource is available for either child, that the children are now 12 years old, and that one of the children has stated a clear desire to return to his father's care, it is not clear that it is in the best interest of the children to terminate the father's parental rights. *See Matter of Marc David D.*, 20 AD3d 565. Orders modified by deleting provisions terminating the father's rights and transferring guardianship and custody for the purpose of adoption, orders affirmed as modified, and proceedings remitted for dispositional hearings. (Family Ct, Kings Co [Pearl, JJ])

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

Counsel (Anders Brief) COU; 95(7)

Second Department *continued***People v Santiago, 52 AD3d 745, 858 NYS2d 908**
(2nd Dept 2008)

Holding: The appellant's 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 whether the defendant's plea was knowingly entered. 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 [Weber, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)**People v Washington, 52 AD3d 667, 858 NYS2d 901**
(2nd Dept 2008)

Holding: The court erred in designating the defendant a level two sex offender. The court failed to make the required findings of fact and conclusions of law (*see* Correction Law 168-n[3]), and the hearing court did not indicate what factors it considered and what factors it determined were established. The record is insufficient to allow this Court to make its own findings of fact and conclusions of law. *See People v Middleton*, 33 AD3d 777. Order reversed and matter remitted for new hearing and determination. (County Ct, Nassau Co [Sullivan, JJ])

Juveniles (General) (Neglect) JUV; 230(55) (80)**Narcotics (General) NAR; 265(27)****Matter of Anastasia G., 52 AD3d 830, 861 NYS2d 126**
(2nd Dept 2008)

Holding: The court erred in concluding that the appellant father neglected his child. The petitioner failed to present a prima facie case that the father neglected his child by misusing a drug or drugs. *See* Family Court Act 1012, 1046. The only admissible evidence presented was the testimony of a caseworker that the father admitted in a phone conversation that he used drugs. However, there was no evidence of the type of drugs he used or the frequency, duration, or repetitiveness of his drug use. Nor was there evidence that he was ever under the influence of drugs while with his child (*see Matter of Stefanel Tyasha C.*, 157 AD2d 322, 326), or that his child's physical, mental, or emotional condition was impaired or was in imminent danger of becoming impaired. *See* Family Court Act 1012(f)(i)(B). The fact that the father was not in a drug treatment program, on its own, was insufficient to establish neglect. *See Matter of Keira O.*, 44 AD3d 668, 670. Order reversed, petition denied, and proceeding dismissed. (Family Ct, Richmond Co [DiDomenico, JJ])

Lesser and Included Offenses LOF; 240(5) (7)
(Definition) (General)**Sentencing (Second Felony SEN; 345(72) (80)**
Offender) (Weapons)**People v Henry, 52 AD3d 841, 860 NYS2d 619**
(2nd Dept 2008)

Holding: The court properly concluded that the defendant was a second violent felony offender. The defendant's prior conviction of attempted third-degree criminal possession of a weapon, based on his possession of a loaded semi-automatic handgun, is a violent felony offense. The defendant waived indictment and was prosecuted by superior court information that charged him with third-degree criminal possession of a weapon and attempted third-degree criminal possession as a lesser included offense. He pleaded guilty to the lesser included offense, which covered all the charges, and the court explained to the defendant that he was charged with third-degree criminal possession, but that he was pleading to the lesser offense with a lesser term of imprisonment. And the defendant acknowledged at sentencing that the conviction was for a class E violent felony offense. Attempted third-degree criminal possession of a weapon is a class E violent felony offense when the defendant pleads guilty to that offense to avoid the harsher penalty associated with third-degree criminal possession. *See People v Tolbert*, 93 NY2d 86, 88. Because the top charge in the superior court information was third-degree criminal possession of a weapon, it does not matter that the information also charged the lesser included offense. *See* CPL 70.02(1)(d); *People v Dickerson*, 85 NY2d 870, 871. Judgments affirmed. (Supreme Ct, Westchester Co [Molea, JJ])

Sex Offenses (General) SEX; 350(4) (20) (25)
(Psychiatric Exam) (Sentencing)**Matter of John N., 52 AD3d 834, 860 NYS2d 218**
(2nd Dept 2008)

Holding: The court erred in denying the petitioner's application to retain the respondent in a mental health facility for involuntary psychiatric care for a period not to exceed six months. *See* Mental Hygiene Law (MHL) 9.13, 9.33. The respondent is in need of involuntary care and treatment (*see* MHL 9.01), and the record shows that the petitioner established by clear and convincing evidence that the respondent is mentally ill, needs further care and treatment, and poses a substantial threat of physical harm to himself or others. *See Matter of Dionne D.*, 5 AD3d 766. The petitioner introduced an evaluation by a sex offender treatment specialist that reported that the respondent continued to have violent sexual fantasies which involved behavior similar to the behavior underlying his sexual

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assault conviction. The petitioner also presented testimony from a psychiatrist who interviewed the respondent several months earlier, reviewed the facility’s treatment records, and spoke with the respondent’s treating physicians; the respondent refused to be interviewed again in connection with the retention application. The psychiatrist concluded that the respondent had limited insight into his mental illness, was in need of further sex offender treatment, and would pose a risk to the community if released because of the likelihood that he would relapse into substance abuse and criminal conduct. Order reversed and petition granted. (Supreme Ct, Suffolk Co [Bivona, JJ])

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

People v Lorick, 52 AD3d 844, 859 NYS2d 380
 (2nd Dept 2008)

Holding: The appellant’s 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 the voluntariness of the defendant’s plea because the court failed to inform the defendant that the sentence would include a period of post-release supervision. 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, Orange Co [DeRosa, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Marrero, 52 AD3d 797, 861 NYS2d 116
 (2nd Dept 2008)

Holding: The court erred in designating the defendant a level three sex offender. The prosecution failed to establish by clear and convincing evidence that the defendant should be assessed 10 points under risk level factor 10, recency of prior felony or sex crime. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary* [1997 ed.]. Under factor 10, the prior felony or sex crime must have occurred less than three years before the current offense; the three-year time period does not include time during which the defendant was incarcerated or civilly committed. The defendant’s prior sex crime and his conviction and sentence to probation for that crime occurred more than three years before he committed the current offense. The defendant violated his probation and was resentenced to a six-month jail term. The probation violation and jail term do not change the

date from which the three-year time period is measured. And, even if the jail time was subtracted, the prior sex crime was still more than three years before the current offense. Without these 10 points, the defendant’s presumptive risk level drops from a level three to a level two. Order reversed and the defendant is designated a level two sex offender. (County Ct, Westchester Co [Bellantoni, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Nichols, 52 AD3d 799, 862 NYS2d 60
 (2nd Dept 2008)

Holding: The court properly designated the defendant a level three sex offender. However, “the court erred in assessing him 10 points under risk factor 15 for an inappropriate living situation based solely on the fact that he was living in a trailer park, as such evidence was insufficient as a matter of law to meet the burden of establishing, by clear and convincing evidence, that the defendant’s living situation was inappropriate (*see People v Ruddy*, 31 AD3d 517, 518).” Order affirmed. (County Ct, Dutchess Co [Dolan, JJ])

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

People v Smith, 52 AD3d 847, 860 NYS2d 621
 (2nd Dept 2008)

Holding: The court erred in denying the defendant’s challenge to a prospective juror. “The juror indicated during voir dire that he believed he was present at a press conference when the defendant’s arrest was announced, he knew the District Attorney of Westchester County socially, he was personal friends with the Assistant District Attorney who had been assigned to the case before trial, and he might know some of the police officers who would be testifying for the People. Trial courts should lean toward disqualifying prospective jurors of dubious impartiality, and considering all of these circumstances, the defendant’s challenge for cause as to this juror should have been granted (*see People v Rentz*, 67 NY2d 829 . . .).” Judgment reversed and new trial ordered. (County Ct, Westchester Co [Bellantoni, JJ])

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

Search and Seizure (Stop and Frisk) (Weapons-frisks) SEA; 335(75) (85)

People v Solano, 52 AD3d 848, 861 NYS2d 715
 (2nd Dept 2008)

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Holding: The defendant's second-degree depraved indifference murder conviction is not supported by legally sufficient evidence. The evidence showed that the decedent was killed during a one-on-one shooting after he was shot point blank in the head from a distance of six to sixteen inches, which clearly shows the intent to kill. *See People v Payne*, 3 NY3d 266, 271. This is a rare case in which the conviction must be reversed, rather than reduced to second-degree manslaughter. *See People v McMillon*, 31 AD3d 136. The court correctly denied the defendant's motion to suppress money and papers found in his pocket. At 4:30 am, the defendant ran in front of a moving police car and the officer had to brake to avoid hitting him. The officer approached the defendant and asked him where he was going and what he was doing. The approach was justified and the questions were merely requests for information. *See People v Hollman*, 79 NY2d 181, 191. Because the defendant gave evasive answers and the officer saw a bulge in his jacket pocket, the officer properly exercised her right of inquiry. *See People v De Bour*, 40 NY2d 201, 215. The defendant's refusal to identify the object and the circumstances leading up to the inquiry provided justification for the pat-down search for a weapon. *See Matter of Anthony S.*, 181 AD2d 682, 683. When the officer felt something hard in the pocket and because of the defendant's evasive answers, the officer legitimately feared for her safety and was justified in removing the object. *See People v Oppedisano*, 176 AD2d 667, 668. Judgment modified, conviction of second-degree murder vacated, sentence vacated, count two dismissed, and judgment affirmed as modified. (Supreme Ct, Queens Co [Roman, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)**People v Pietarniello**, 53 AD3d 475, 862 NYS2d 69 (2nd Dept 2008)

Holding: The court correctly adjudicated the defendant a level three sex offender. The court properly assessed points under risk factors 8 (age at first sex offense) and 9 (number and nature of prior crimes) for the same prior misdemeanor sex offense conviction. The Sex Offender Registration Act (SORA) Guidelines do not specifically discuss the assessment of points in more than one category for the same conduct, but the risk assessment instrument does allow for such a result. The court may assess points under risk factors 8, 9, and 10 (recency of prior felony or sex crime), as those categories represent cumulative, not duplicative predictors of recidivism. Both the defendant's young age at the time of the prior offense and that the prior offense was a sex crime must be considered in assessing his likelihood of re-offense. "[T]he

prior conviction, although older, was not so old as to be irrelevant, particularly in light of the significance placed on the age of the defendant at his or her first sex offense." The prosecution failed to present clear and convincing evidence that the defendant refused to participate in sex offender treatment while in prison. While the SORA case summary indicated that the defendant was removed from a treatment program because he was not amenable to treatment, it does not indicate the source or basis for the statement. And the defendant presented a New York State Department of Correctional Services' document which indicated that he did not refuse any recommended treatment programs while he was incarcerated. However, the associated five-point deduction from the total risk assessment score does not change the defendant's presumptive risk level. Order affirmed. (Supreme Ct, Kings Co [Brennan, JJ])

Discrimination (Race) DCM; 110.5(50)**Juries and Jury Trials (Challenges (Selection))** JRY; 225(10) (55)**People v Hall**, 53 AD3d 552, 861 NYS2d 411 (2nd Dept 2008)

Holding: During three rounds of jury selection, the prosecution exercised preemptory challenges against all five of the black prospective jurors who were called and not removed for cause. Defense counsel objected to the challenges pursuant to *Batson v Kentucky* (476 US 79 [1986]), and the court found that defense counsel made a prima facie showing of discrimination. The prosecution provided explanations for each of the challenges. The court concluded that those reasons were race neutral and denied the *Batson* motion. Defense counsel did not respond to the court's decision. After the prosecution challenged a sixth black juror, defense counsel renewed the *Batson* application, and the court concluded that the prosecution's explanation for that challenge was also race neutral. Again, defense counsel did not respond to the decision. The court properly concluded that defense counsel made a prima facie case of discrimination based on race and that the prosecution offered race neutral reasons for the challenges. "The court, however, did not perform the final step in the *Batson* procedure in that it did not invite argument, and made no finding, as to whether the reasons offered by the prosecutor, although facially neutral, were pretextual and not genuine reasons for the challenges." Appeal held in abeyance and matter remitted for a hearing and report on the defendant's *Batson* challenge. (Supreme Ct, Queens Co [McGann, JJ])

Discovery (Brady Material and Exculpatory Information) DSC; 110(7) (20) (30[t])

Second Department *continued*

**(Matters Discoverable) (Procedure
[Subpoena Duces Tecum])**

**People v McClain, 53 AD3d 556, 861 NYS2d 764
(2nd Dept 2008)**

Holding: The prosecution did not violate its disclosure obligations under *Brady v Maryland* (373 US 83 [1963]). “[T]he defendant and defense counsel knew of the possibility that the defendant’s arrest was captured by a surveillance camera from a nearby housing project. Further, the defendant consistently claimed the surveillance videotape would be exculpatory. Since the defendant knew of the possibility that the tape existed, it was not *Brady* material even if exculpatory (see *People v Singh*, 5 AD3d 403 . . .). Further, the prosecutor had no obligation to obtain, by subpoena duces tecum, demanded material which the defendant may himself have obtained (see CPL 240.20[2]).” Judgment affirmed. (Supreme Ct, Queens Co [Cooperman, JJ])

**Sentencing (Appellate Review) SEN; 345(8) (48)
(Mandatory Surcharge)**

**People v Correa, 53 AD3d 587, 860 NYS2d 406
(2nd Dept 2008)**

Holding: “The defendant’s valid and unrestricted written waiver of his right to appeal, as part of his plea agreement, precludes appellate review of his claim that the payment of the mandatory surcharges should have been deferred until he was released on parole (see generally *People v Ruiz*, 48 AD3d 834; *People v Pizarro*, 45 AD3d 609; *People v Quashie*, 42 AD3d 578).” Judgment affirmed. (Supreme Ct, Kings Co [Konviser, JJ])

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

**People v Ferguson, 53 AD3d 571, 862 NYS2d 95
(2nd Dept 2008)**

At the Sex Offender Registration Act (SORA) hearing, the prosecution sought to amend the Risk Assessment Instrument (RAI) by moving the 10 points assessed under risk factor 12 to risk factor 13. The prosecution argued that the Board of Examiners of Sex Offenders’ case summary made it clear that the Board intended to assess the points under factor 13. The prosecution argued that it was not required to provide written notice of the change to the defendant and the court (see Correction Law 168-n[3]), as it was not seeking a risk level that was different from the Board’s recommendation. The court denied the defendant’s objection to the lack of written notice.

Holding: The court erred in granting the prosecution’s motion. Section 168-n(3) requires the prosecution to

provide written notice at least 10 days before the hearing if it seeks a determination that differs from the Board’s recommendation. This section includes the total points assessed and the sex offender level designation, as well as the factual predicate for the recommendation. “Indeed, the factual predicate for the Board’s recommendation is the heart of the RAI, which frequently provides the ground upon which a defendant may find a basis to challenge a recommendation. This necessarily implicates the exact risk factor categories under which points are assessed.” The court failed to give the defendant a meaningful opportunity to respond to the prosecution’s proposed amendment. Order reversed and matter remitted for new hearing and determination. (County Ct, Suffolk Co [Hinrichs, JJ])

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles]) (Motions to Suppress [CPL Article 710]) (Plain View Doctrine) SEA; 335(10[a]) (45) (53)

**People v Glenn, 53 AD3d 622, 861 NYS2d 781
(2nd Dept 2008)**

The defendant was convicted of third-degree criminal possession of a weapon, but was acquitted of fifth-degree criminal possession of marijuana. At the suppression hearing, the arresting detective testified that he watched the defendant get out of a parked car, walk around to the passenger side of the car, open the passenger side door and keep it ajar while speaking with a man standing on the adjacent sidewalk. Four traffic lanes and one parking lane separated the detective and the defendant. After the detective saw the defendant holding a clear plastic bag, which he believed contained marijuana, he approached and arrested the defendant. When he looked in the open car door, the detective saw a gun inside the open glove compartment. The other officers who were present at the scene did not testify. The defendant and two defense witnesses testified that the defendant got out of the car and closed and locked both doors, and the defendant denied that the bag of marijuana was in his hand.

Holding: The court properly denied the defendant’s motion to suppress physical evidence. The court’s credibility determinations are entitled to great deference, and the record supports the court’s decision to credit the detective’s testimony. See *People v Edwards*, 29 AD3d 818, 818-819. The detective’s testimony was not unbelievable as a matter of law and it remained consistent throughout defense counsel’s cross-examination. Judgment affirmed. (Supreme Ct, Queens Co [Aloise, JJ])

Dissent: [Belen, JJ] The detective’s testimony was uncorroborated and contradicted the felony complaint and the arrest report. “[T]o credit the testimony of the

Second Department *continued*

arresting officer, one would have to believe that he had X-ray vision to see and recognize the contents of a plastic baggie, further obscured by 23 other small plastic bags within, and further obscured by the defendant's fist, from across five lanes of traffic." Because the detective's testimony is not credible, the prosecution failed to meet its burden of proof and the court should have granted the defendant's motion to suppress.

Third Department

Guilty Pleas (Withdrawal) GYP; 181(65)

Sentencing (Excessiveness) (Resentencing) SEN; 345(33) (70.5)

People v Armstead, 52 AD3d 966, 859 NYS2d 506 (3rd Dept 2008)

The defendant pleaded guilty to second-degree burglary in full satisfaction of the indictment, waived his right to appeal, and agreed to be sentenced as a second felony offender to seven years in prison and five years of post-release supervision. The court concluded that the defendant failed to accept responsibility for his actions at sentencing and before the probation department, and sentenced the defendant to a term of fifteen years in prison.

Holding: The court erred in sentencing the defendant to a term other than the one specified in the plea agreement as acceptance of responsibility was not a condition of his plea agreement and the court did not give him the opportunity to withdraw his plea. The defendant's appeal waiver does not foreclose review of this issue on appeal. See *People v Terrell*, 41 AD3d 1044, 1045. Although the defendant did not preserve the issue by moving to withdraw the plea or to vacate the judgment, it is reviewed in the interest of justice. The record and the presentence report do not indicate that the agreed-upon sentence was inappropriate or unlawful. Cf *People v Haslow*, 20 AD3d 680, 681 *lv den* 5 NY3d 828. Judgment modified, sentence vacated, matter remitted for resentencing in accordance with the plea agreement or to allow the defendant to withdraw his plea, and judgment affirmed as modified. (County Ct, Sullivan Co [LaBuda, JJ])

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

Grand Jury (General) (Witnesses) GRJ; 180(3) (15)

Juries and Jury Trials (Competence) (Qualifications) (Selection) JRY; 225(15) (50) (55)

People v Hoffler, 53 AD3d 116, 860 NYS2d 266 (3rd Dept 2008)

When jury selection began, the court questioned the prospective jurors about whether they could be fair and impartial. After the court dismissed some jurors on that basis, defense counsel objected to the court's questioning of the jurors before they were placed under oath. The commissioner of jurors told the court that the oath was administered, but when asked which oath was given, the commissioner read the oath given to jurors after selection is completed (*see* CPL 270.15[2]), and not the oath of truthfulness. Defense counsel objected again, but the court denied the objection and jury selection was completed without the oath being administered. Defense counsel also renewed the objection in the motion to set aside the verdict, which was denied.

Holding: The court erred in failing to swear any of the prospective jurors as required by CPL 270.15(1)(a), and the defendant's conviction must be reversed as a matter of law as the error "dissolved an important safeguard to defendant's constitutional right to a fair trial by an impartial jury and invalidated the whole trial (*see People v Wicks*, 76 NY2d 128, 132 . . .)." The defendant's objections were timely and drew the court's attention to the issue. The administration of the oath of truthfulness is a clear statutory directive and a key part of a criminal jury trial. As it would be impossible to quantify or assess the effect of this defect on the trial, harmless error does not apply. See *eg People v Damiano*, 87 NY2d 477, 485. The court correctly denied the defendant's motion to dismiss the indictment. Since the defendant has no right of cross-examination of witnesses before the grand jury, he was not denied a right of confrontation when the grand jurors considered statements made by an accomplice. See *People v Scalise*, 70 AD2d 346, 350. Judgment reversed and matter remitted for new trial. (County Ct, Rensselaer Co [McGrath, JJ])

Sentencing (General) SEN; 345(37)

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Hull, 52 AD3d 962, 859 NYS2d 508 (3rd Dept 2008)

The defendant pleaded guilty to one count each of possessing a sexual performance of a child and promoting a sexual performance of a child. At sentencing, the court entered an order of protection that barred the defendant from contacting four children, two of whom are his biological children, for a five-year period.

Holding: Because the issuance of an order of protection in a criminal case is meant to protect the rights of witnesses and complainants, it is not part of the sentence (*see People v Nieves*, 2 NY3d 310, 316), and it may be issued under CPL 530.13(4) independent of a plea agreement. See *People v Dixon*, 16 AD3d 517, 517. However, the terms of the order were overbroad with regard to the defendant's children, who were 15 and 16 years of age, as the defen-

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defendant's crime related to the downloading of pornographic videos of children and did not directly involve his children. Since the prosecution did not request the order and it was not part of the plea agreement, in the interest of justice, the order should be modified. Judgment modified by reversing the provision that set the expiration date of the no-contact order of protection beyond the 18th birthday of each of the defendant's children, expiration date set at age 18, and judgment affirmed as modified. (County Ct, Broome Co [Smith, JJ])

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

People v Smith, 52 AD3d 968, 860 NYS2d 645 (3rd Dept 2008)

Holding: The defendant was sentenced to four and a half years in prison and two years of post-release supervision. Although the prison term imposed at sentencing was longer than the one offered during the failed plea negotiations and the one sought by the prosecution after trial, there is no evidence that the court gave the defendant a longer sentence in retaliation for exercising his right to trial. *See People v Torra*, 309 AD2d 1074, 1076 *lv den* 1 NY3d 581. "The record does, however, reflect that defendant received an additional six months in prison based solely upon what the County Court apparently deemed to be an interrupting remark made by defendant during sentencing. Under such circumstances, we agree that the sentence imposed is harsh and excessive" Judgment modified by reducing sentence to four years and judgment affirmed as modified. (County Ct, Tioga Co [Sgueglia, JJ])

Admissions (Interrogation) ADM; 15(22) (25) (Miranda Advice)

Counsel (Attachment) COU; 95(9) (10) (24) (30) (40) (Conflict of Interest) (Multiclient Representation) (Right to Counsel) (Waiver)

People v Booker, 53 AD3d 697, 862 NYS2d 139 (3rd Dept 2008)

Holding: The court correctly denied the defendant's motion to suppress the four written statements he gave to the police. The defendant gave the first statement after he waived his right to counsel. The defendant rejected his attorney's advice not to speak with the police, and the attorney thereafter told the police that the defendant agreed to speak with them in his absence but that if they were going to arrest the defendant, they must notify him. The attorney's statements to the police sufficiently assured them that the defendant's decision to waive his

right to counsel was made in consultation with the attorney (*see People v Beam*, 57 NY2d 241, 254); thus, the defendant made a valid waiver. And the police transfer of the defendant to Albany did not violate the waiver as the police complied with the notification condition the attorney placed on the waiver. Before the defendant gave the three other statements, the attorney withdrew as counsel for the defendant after being told by the prosecutor that the defendant's girlfriend, who was also represented by the attorney, was being investigated for the same crime and that there was a potential conflict of interest in the continued representation of both of parties. The prosecutor and police officers were present when the attorney signed a written withdrawal, but the attorney was not able to communicate this to the defendant. After the defendant agreed to go with the police to the station, he waived his *Miranda* rights and gave the statements without ever asking for counsel or telling them he had an attorney. The police properly relied on the written withdrawal when they questioned the defendant and the defendant's lack of awareness of the withdrawal is irrelevant. *See People v West*, 81 NY2d 370, 376 n2; *People v Singer*, 44 NY2d 241, 251. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Defenses (Justification) DEF; 105(37)

Instructions to Jury (General) ISJ; 205(35) (50) (Theories of Prosecution and/or Defense)

People v Dillon, 53 AD3d 692, 863 NYS2d 265 (3rd Dept 2008)

The defendant was convicted of criminal contempt for violating an order of protection that directed him to refrain from assaultive or destructive conduct toward the complainant, his off-and-on live-in girlfriend.

Holding: The court erred in denying the defendant's request for a jury charge on the justification defense. At trial, the complainant initially testified that after an evening of drinking at a bar with friends, she and the group left to go to a party. On the way, she asked the driver to stop at her apartment so she could pick something up. The complainant did not expect the defendant to be home. When she saw him in the apartment, since she did not want him to discover her male friend in the car, she jumped on his back and when he threw her off of him, she injured her shoulder. Because the complainant gave a different version of the incident before the grand jury, the court allowed the prosecution to treat her as a hostile witness. In response to the prosecution's leading questions, the complainant's testimony was different but somewhat ambiguous and evasive, and she did not recant her initial direct testimony. The complainant's trial testimony was consistent with the defendant's theory that the com-

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plainant was the initial aggressor, as asserted by defense counsel in his opening statement and summation. There was a reasonable view of the evidence that the only force the defendant used against the complainant was his effort to get her off of his back, which would support a finding of justification, and thus, the defendant was entitled to a justification charge. *See People v Gant*, 282 AD2d 298, 299. Judgment reversed and matter remitted for new trial on count one of the indictment. (County Ct, St. Lawrence Co [Richards, JJ])

Narcotics (Penalties) NAR; 265(55)

Sentencing (General) (Resentencing) SEN; 345(37) (70.5)

People v Loyd, 53 AD3d 679, 861 NYS2d 176
(3rd Dept 2008)

The defendant pleaded guilty to two counts of second-degree criminal sale of a controlled substance and was sentenced to an aggregate term of seven years to life. The maximum term of imprisonment was 10 years to life. The defendant later moved for resentencing under the 2005 Drug Law Reform Act (DLRA-2, L 2005, ch 643). The court granted the application and after a resentencing hearing, sentenced the defendant to two consecutive determinate prison terms of five years and five years of post-release supervision.

Holding: The court failed to comply with the proper procedures when resentencing the defendant under DLRA-2. Although the defendant failed to preserve the issue, it is reviewed in the interest of justice. The court did not specify and inform the defendant of the term of a determinate sentence of imprisonment it would impose and enter an order to that effect. And the court failed to tell the defendant that unless he withdraws the application or appeals the order, the court will vacate his original sentence and impose the determinate sentence. Instead, the court resentenced the defendant to a determinate term that was not much more favorable than the original sentence. *See People v Paniagua*, 45 AD3d 98, 102 *lv den* 9 NY3d 992. Thus, the resentence must be vacated and the matter remitted to give the defendant the chance to make an informed decision about whether to withdraw his motion or appeal the resentence order. Judgment modified by vacating sentence, matter remitted for further proceedings, and judgment affirmed as modified. (County Ct, Sullivan Co [LaBuda, JJ])

Evidence (Sufficiency) (Weight) EVI; 155(130) (135)

Narcotics (Possession) NAR; 265(57)

Search and Seizure (Consent) SEA; 335(20)[f] [k])

[Coercion and Other Illegal Conduct] [Evidence and Burden of Proof]

People v Oldacre, 53 AD3d 675, 861 NYS2d 444
(3rd Dept 2008)

Based on a tip from an informant, a federal investigator started conducting surveillance of the defendant. He saw the defendant and his girlfriend drive to several locations and stay for short periods of time, and when the defendant walked passed him in the hotel lobby, he smelled like unburned marihuana. The investigator learned that the occupants of a particular hotel room had paid cash for the room and did not have a checkout date.

Holding: The defendant's conviction of third-degree criminal possession of a controlled substance was not supported by sufficient evidence and was against the weight of the evidence. Although the defendant failed to preserve his current sufficiency argument, it is reviewed in the interest of justice. The prosecution failed to present evidence that the defendant had constructive possession of the cocaine found in the camera bag in the hotel room by proof that he exercised dominion and control over the hotel room or his codefendant girlfriend. The codefendant testified that she and the defendant stayed in the room together for two nights, and that the camera bag was hers, but she denied the cocaine was hers. The room was not registered to the defendant or the codefendant and there was no evidence that any of the defendant's belongings were in the room, that he had a room key, that he helped pay for the room, or that he knew there was cocaine in the codefendant's camera bag. "[T]he link between defendant, the hotel room and the secreted drugs was insufficient (*see Matter of Christine E.*, 284 AD2d 167, 168 . . .)." The court properly denied the defendant's motion to suppress physical evidence. The federal investigator's testimony at the *Mapp* hearing established that the defendant consented to the search of his backpack and the hotel room. Because the investigator had a founded suspicion of criminal activity, it was proper for him to request to search the backpack. *See People Hollman*, 79 NY2d 181, 191. And the circumstances surrounding the defendant's consent to the hotel search support the court's conclusion that the consents were voluntary. *See People v Edwards*, 46 AD3d 698, 699 *lv den* 10 NY3d 764. Judgment modified, third-degree criminal possession of a controlled substance conviction reversed, count dismissed, sentence on that count vacated, and judgment affirmed as modified. (County Ct, Clinton Co [Ryan, JJ])

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

Third Department *continued*

People v Ortega, 53 AD3d 696, 861 NYS2d 174 (3rd Dept 2008)

Holding: The defendant’s plea was not voluntarily, knowingly, and intelligently entered. Although the defendant failed to preserve the issue by moving to withdraw the plea or vacate the conviction, it is reviewed as the plea allocation raises a possible defense and the court failed to conduct a further inquiry to ensure that the defendant knew of the defense and that the plea was knowing and voluntary. *See People v Lopez*, 71 NY2d 662, 666. The defendant pleaded guilty to first-degree continuing course of sexual conduct against a child and second-degree bail jumping in full satisfaction of two indictments. During the plea allocation, the defendant admitted to engaging in two or more sexual acts between October 25, 1995 and October 25, 1998. However, first-degree continuing course of sexual conduct (*see* Penal Law 130.75) was not effective until August 1, 1996. Because the defendant did not allocate to two acts of sexual conduct after the statute’s effective date, his allocation raised a possible defense. The court failed to ask whether the defendant knew of the defense and was waiving the defense; therefore, the conviction must be reversed. *See People v Wagoner*, 30 AD3d 629, 629-630. And since it was an integrated plea, the bail jumping conviction must also be reversed. *See People v Wolcott*, 27 AD3d 774, 775-776. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Ulster Co [Bruhn, JJ])

Admissions (Interrogation) ADM; 15(22) (25) (35) (Miranda Advice) (Voluntariness)

People v Passino, 53 AD3d 204, 861 NYS2d 168 (3rd Dept 2008)

The defendant, a state inmate, was charged with first- and second-degree placing a false bomb or hazardous substance for sending two letters that contained the word anthrax and a white powder. A state investigator questioned the defendant about the letters and the defendant gave a statement admitting that he sent the letters. The questioning took place in the visitors’ room at the correctional facility when no one else was present and the defendant was not restrained. The investigator told him he was free to leave the room at any time and did not administer *Miranda* warnings.

Holding: The court correctly denied the defendant’s motion to suppress his statement. The evidence did not show that the defendant was in custody when he made the statement. *See People v Dodt*, 61 NY2d 408, 415. “[N]othing has been presented that would support the conclusion that when defendant arrived at the visitors’

room for the interview, anything occurred that involved any ‘added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person’s freedom over and above that of ordinary confinement in a correctional facility’ (*People v Alls*, 83 NY2d [94], at 100[, *cert den* 511 US 1090 (1994)]).” Merely because a defendant is confined in a correctional facility does not mean he is in custody when questioned by authorities. Judgment affirmed. (County Ct, Washington Co [Berke, J (*Huntley* hearing); Pritzker, J (sentencing)])

Dissent: [Spain, JJ] Because the prosecution failed to present any evidence of the circumstances leading up to the interview, including who brought the defendant to the room, what he was told, and whether he had a choice about going to the interview, they did not meet their burden of proving that the defendant was not subjected to custodial interrogation.

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

Narcotics (Possession) NAR; 265(57)

People v Zabele, 53 AD3d 685, 861 NYS2d 178 (3rd Dept 2008)

The defendant pleaded guilty to fourth-degree criminal possession of a controlled substance. The police raided a house in which the defendant was an overnight guest and arrested him after they found methamphetamine.

Holding: The defendant’s plea allocation cast significant doubt upon his guilt as it negated an essential element of the offense. *See People v Lopez*, 71 NY2d 662, 666. The issue is reviewed despite the defendant’s waiver of the right to appeal and his failure to move to withdraw his plea. Although the defendant admitted that he knew that the owners produced the drugs in an outbuilding on the property, that he supplied some of the ingredients, and that he was allowed to go in the room where the drugs were made, he stated that the drugs belonged to the owners and he did not know if there were drugs present on the day of the raid. He denied knowing where the drugs were kept after they were made and that he had access to the drugs other than the amount the owners gave to him for his personal use. These statements negated the element of constructive possession (*cf People v Turner*, 27 AD3d 962, 963), and the court failed to ask the defendant further questions to determine whether his plea was voluntary. *See People v Wyant*, 47 AD3d 1068, 1069. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Otsego Co [Burns, JJ])

Habeas Corpus (State) HAB; 182.5(35)

Insanity (Civil Commitment) ISY; 200(3)

Third Department *continued***Sex Offenses (General) (Sentencing)** **SEX; 350(4) (25)****People ex rel David NN. v Hogan, 53 AD3d 841,
862 NYS2d 150 (3rd Dept 2008)**

The petitioner was in an Office of Mental Health (OMH) facility in St. Lawrence County pursuant to a Correction Law 402 commitment order. When that order expired, OMH did not release him because it had not completed its review of the petitioner under Mental Hygiene Law article 10. After the petitioner obtained two orders directing his release, OMH released him to the custody of the Division of Parole. The St. Lawrence County Supreme Court refused to consider the Attorney General's application for an order to show cause holding the petitioner in OMH custody during the article 10 review. Parole brought the petitioner to his approved residence in Chemung County and the Attorney General then obtained an ex parte order to show cause in that county which allowed OMH to detain the petitioner pending an article 10 probable cause hearing. The Attorney General failed to follow the required practice of notifying the court that the application had previously been made to another court. *See* Code of Prof Resp DR 7-102(a)(3) [22 NYCRR 1200.33 (a)(3)]. After he was involuntarily admitted to another OMH facility, the petitioner sought a writ of habeas corpus. Before the court considered the petition, it held the probable cause hearing. The court found probable cause to believe that the petitioner was a sex offender who required civil management, ordered him held in the OMH facility pending trial, and dismissed the habeas corpus petition.

Holding: The court properly denied the habeas corpus petition because it had already ordered the petitioner held in OMH custody pursuant to Mental Hygiene Law 10.06(k). Contrary to the petitioner's argument, OMH was an agency with jurisdiction when the article 10 petition was filed, even though he was not in OMH custody at that time. Article 10 only requires that an agency with jurisdiction have custody of the detained individual when he is nearing release and when the initial record review notice is given. *See Matter of State of New York v Millard*, 19 Misc 3d 283, 288. The petitioner's subsequent release from OMH custody did not divest OMH of its status as an agency with jurisdiction. The state held the petitioner without authority for two months but did not illegally use Mental Hygiene Law article 10 to extend his Correction Law 402 confinement. Order affirmed. (Supreme Ct, Chemung Co [Mulvey, JJ])

**Robbery (Degrees and Lesser
Offenses) (Elements)
(Evidence)** **ROB; 330(10) (15) (20)****People v Robertson, 53 AD3d 791, 861 NYS2d 492
(3rd Dept 2008)**

The defendant stole pants from a mall store. When he left the store and entered the mall, two store security guards followed him. Over the next 30 minutes, the defendant walked around the mall, went into another store, left the mall, reentered the first store, and left the mall again. The security guards then approached him in the parking lot and he swung a belt at them, punched one of the guards in the face, and tried to eat the tags from the pants. The jury convicted the defendant of first- and third-degree robbery, but the court dismissed the third-degree robbery count.

Holding: The evidence was insufficient to support the first-degree robbery conviction. The prosecution failed to establish that the defendant forcibly stole property and that he used or threatened the immediate use of a dangerous instrument in the course of immediate flight from the commission of the crime. *See* Penal Law 160.15(3). Although the security guards approached the defendant near the store, the encounter took place 30 minutes after the theft. There was no evidence that the defendant knew he was being followed or that he tried to evade the guards. And the defendant seemed to believe that he reached a place of temporary safety when he left the store and walked around the mall without being caught. Therefore, the defendant's use of force was not immediately after the taking, nor was his use of the belt in the course of immediate flight from the commission of the crime. The evidence is legally sufficient to establish the lesser included offense of petit larceny. Judgment modified by reducing conviction from first-degree robbery to petit larceny, vacating robbery sentence, and judgment affirmed as modified. (County Ct, Broome Co [Mathews, JJ])

**Guilty Pleas (General [Including
Procedure and Sufficiency of
Colloquy])** **GYP; 181(25)****Insanity (Civil Commitment)
(Post-Commitment Actions)** **ISY; 200(3) (45)****People v Copeman, 53 AD3d 854, 861 NYS2d 504
(3rd Dept 2008)**

The defendant entered a plea of not responsible by reason of mental disease or defect. The court found that the defendant suffered from a dangerous mental disorder and committed him to the Office of Mental Health (OMH) for confinement in a secure facility. Eight years later, defense counsel filed a CPL 440.10 motion to vacate the defendant's plea. The court never issued a decision on the motion. Nine months after the motion was filed, the prosecution appeared for a status conference, apparently unaware of the defendant's plea; neither the defendant nor defense counsel was present. The prosecution made a

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motion to dismiss the indictment in the interest of justice, which the court granted. Mental Hygiene Legal Service, as defendant’s counsel, told OMH that the indictment was dismissed and asked OMH for a decision on the defendant’s legal status. When OMH failed to respond, the defendant moved to dismiss OMH’s pending application for a subsequent retention order and for immediate release from custody.

Holding: The court properly reversed and vacated its order dismissing the indictment and reinstated the indictment. After the court accepted the defendant’s plea, the criminal proceeding was terminated and civil commitment proceedings began. *See People v Davis*, 195 AD2d 1, 5 *lv den* 83 NY2d 871. The court no longer had the authority to dismiss the indictment. Since the order was a nullity, the status of the proceedings remains as it was before the order was issued, and the defendant’s plea remains in effect. *See CPL 220.60(3); Matter of Lockett v Juviler*, 65 NY2d 182, 186. Order affirmed. (County Ct, St. Lawrence Co [Rogers, JJ])

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

Evidence (Sufficiency) EVI; 155(130)

People v Chapman, 54 AD3d 507, 862 NYS2d 660 (3rd Dept 2008)

The defendant was convicted of first-degree rape, first-degree sexual abuse, fourth-degree aggravated sexual abuse, and other offenses.

Holding: The rape, aggravated sexual abuse, and sexual abuse convictions are not supported by legally sufficient evidence. Although the defendant failed to preserve the issue, it is reviewed in the interest of justice. Regarding the rape and sexual abuse counts, the complainant’s testimony did not establish that the defendant used actual physical force or threats that caused her to fear immediate death or physical injury. Regarding the aggravated sexual abuse count, the evidence did not support the prosecution’s theory that the complainant was physically helpless at the time of the incident. Although she was intoxicated, she performed consensual oral sex on the defendant and did not initially protest when he inserted a vibrator into her vagina, but eventually told him to stop. This testimony showed that she was conscious at the time and was able to and did communicate to the defendant her unwillingness. *See People v Conto*, 218 AD2d 665, 666 *lv den* 87 NY2d 845. The defendant is entitled to a new trial on the remaining counts of the indictment as he was deprived of effective assistance of counsel. Though it appears that the counts in the indictment were not all joinable and the court raised the issue, defense counsel

failed to seek severance of the charges and the defendant likely was prejudiced by a joint trial. Counsel did not seek to preclude evidence of the defendant’s prior bad acts and failed to object to several instances of prejudicial hearsay testimony. And counsel did not make an opening statement, did not cross-examine some witnesses, gave a cursory and disorganized closing statement, and did not object to the prosecution’s inflammatory statements during closing argument. Although none of the errors alone constitutes ineffective assistance, taken together it is clear that defense counsel had no legitimate trial strategy. *See People v Baldi*, 54 NY2d 137, 147. Judgment reversed, rape, aggravated sexual abuse, and sexual abuse counts dismissed, and matter remitted for a new trial on the remaining counts. (County Ct, Washington Co [Berke, JJ])

Dissent: [Carpinello, JJ] There is a valid line of reasoning and permissible inferences that could lead a rational jury to conclude that the defendant committed the sexual offenses. While defense counsel’s representation was not error-free, it did not rise to the level of ineffective assistance of counsel.

Evidence EVI; 155(25) (30) (106) (125) (132)

(Circumstantial Evidence) (Common Plan or Scheme) (Prejudicial) (Relevancy) (Uncharged Crimes)

People v Arafet, 54 AD3d 517, 863 NYS2d 512 (3rd Dept 2008)

The defendant was convicted of stealing a trailer containing more than one million dollars in equipment. The trailer was stolen in Schenectady County and was found abandoned and empty on a northern New Jersey highway. The defendant’s fingerprint was found on a toll ticket that showed that a five-axle vehicle entered the highway near where the trailer was stolen. And there was evidence that the defendant’s cell phone travelled from New Jersey to the Albany area and back on the day of the theft, and the phone was used on the return trip to call Nelson Quintanilla and a warehouse leased by Jose Gotay’s company. Quintanilla and Gotay were previously charged or convicted of trailer thefts or receipt of stolen goods. The trailer was found less than 20 miles from the defendant’s house and the warehouse.

Holding: The court properly allowed evidence of four prior trailer thefts. The two thefts that involved Quintanilla and Gotay, but not the defendant, were properly admitted to show the significance of the phone records that suggested that the perpetrator was in contact with both men at the time of the incident. *See People v Montanez*, 41 NY2d 53, 58. The defendant’s two prior uncharged thefts were admissible as they showed a unique and distinctive modus operandi that was highly probative of

Third Department *continued*

identity. *See People v Robinson*, 68 NY2d 541, 547-548. Thefts of this kind are complicated criminal undertakings requiring accomplices and extensive planning and coordination. Since identity was the only issue at trial, and there was credible evidence that the perpetrator was in contact with Quintanilla while committing the crime, evidence that the defendant was previously involved with Quintanilla in a similar theft was relevant to establishing that the defendant committed this crime. The fourth theft was very similar to the instant offense, but involved the defendant and two others who were not linked to this offense. Even if the court erred in admitting the evidence, the error was harmless. Judgment affirmed. (County Ct, Schenectady Co [Hoye, JJ])

Dissent: [Rose, JJ] The evidence merely showed that the defendant specializes in a particular type of crime, which according to trial testimony was a fairly common occurrence, and there were more differences than similarities between this theft and the four other thefts.

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)**People v Barody, 54 AD3d 1109, 864 NYS2d 202 (3rd Dept 2008)**

Holding: The court erred in classifying the defendant as a level two sex offender. The Board of Examiners of Sex Offenders classified him as a level two offender, but recommended an upward modification to level three. The court concluded that the defendant's presumptive risk level was one, but upwardly modified the classification to a level two. An upward modification is only authorized when the aggravating factor is of a type or degree that is not adequately taken into account by the risk assessment guidelines, and the finding is supported by clear and convincing evidence. *See Sex Offender Registration Act: Risk Assessment Guidelines and Commentary*, at 4 (2006). "[I]n adjusting defendant's classification upward, County Court relied on the 'nature' of defendant's convictions for aggravated stalking and burglary. However, the record does not contain any facts underlying those two convictions." Even if either or both of the offenses involved sexual misconduct, the additional 10 points which could have been assessed would have kept the total risk factor score below risk level two. Order reversed and the defendant is classified as a level one sex offender. (County Ct, Schenectady Co [Giardino, JJ])

Fourth Department**Sentencing (General) (Pronouncement) (Resentencing) SEN; 345(37) (70) (70.5)****People v Barnum, 53 AD3d 1054, 862 NYS2d 231 (4th Dept 2008)**

Holding: The court erred by failing to impose a sentence for each of the two counts for which the defendant was convicted. *See People v Bradley*, 52 AD3d 1261. The record does not support the statement in the certificate of conviction that the court imposed concurrent sentences of five years of imprisonment for second-degree assault and endangering the welfare of a child. And a sentence of five years of imprisonment for one count of endangering the welfare of a child would be illegal as that offense is a class A misdemeanor. *See Penal Law 70.15(1)*. Judgment modified by vacating sentence, judgment affirmed as modified, and matter remitted for resentencing. (County Ct, Wayne Co [Kehoe, JJ])

Narcotics (Penalties) NAR; 265(55)**Sentencing (Resentencing) SEN; 345(70.5)****People v Casilla, 53 AD3d 1108, 861 NYS2d 903 (4th Dept 2008)**

Holding: The defendant's appeal from the denial of his second resentencing motion under the 2005 Drug Law Reform Act (DLRA-2, L 2005, ch 643) must be dismissed. The court had granted the defendant's first DLRA-2 motion and stated that the original sentence would stand. And the defendant withdrew his appeal from that order. He then filed a CPL 440.20 motion seeking to set aside his sentence on the ground that he was incorrectly sentenced as an A-I offender and that he played a minor role in the conspiracy to distribute drugs. The court, treating the motion as a second DLRA-2 motion, denied it. Since DLRA-2 does not permit successive motions, it also does not authorize appeals from such motions. Alternatively, the defendant did not have permission to appeal the denial of his 440.20 motion, as required by CPL 450.15(2). Appeal dismissed. (County Ct, Onondaga Co [Walsh, JJ])

Due Process (Fair Trial) DUP; 135(5)**Misconduct (Prosecution) MIS; 250(15)****People v Fredrick, 53 AD3d 1088, 861 NYS2d 895 (4th Dept 2008)**

Holding: The defendant was deprived of his right to a fair trial because of continuous prosecutorial misconduct during the trial and the failure of the court to take proper action to counter the effect of such misconduct. Although not preserved, the issue is reviewed in the interest of justice. During his opening and closing statements, the prosecutor improperly vouched for the credibility of the prosecution's witnesses. *See gen People v Bailey*, 58 NY2d 272, 277-278. He also improperly elicited testimony from a police officer who vouched for the confidential

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informant’s credibility. The prosecutor improperly elicited testimony from several police officers regarding the officers’ conviction rates, which was irrelevant and highly prejudicial, and referred to those rates as batting averages during his summation. *See People v Ashwal*, 39 NY2d 105, 109-110. And the prosecutor improperly elicited testimony regarding the defendant’s pretrial incarceration and testimony of the confidential informant that the defendant did not make certain exculpatory statements to him after the defendant’s arrest. Judgment reversed and new trial granted. (County Ct, Chautauqua Co [Ward, Jr., JJ])

Admissions (General) (Interrogation) ADM; 15(17) (22)

Counsel (Attachment) (Right to Counsel) COU; 95(9) (30)

People v Hall, 53 AD3d 1080, 861 NYS2d 889 (4th Dept 2008)

Holding: The court properly declined to grant the defendant’s motion to suppress his statement without a hearing. Although the prosecution did not refute the allegations in the defendant’s motion, they did consent to a court-ordered *Huntley* hearing, which is an acknowledgment that there is a disputed factual issue that precludes summary granting of the motion. *See People v Williams*, 19 Misc 3d 675, 679. The defendant’s family could not invoke his right to counsel on his behalf because at the age of 17, he was legally an adult. *See People v Mitchell*, 2 NY3d 272, 275-276. And the court properly found either that the defendant did not know that his family had retained an attorney for him or that the defendant had rejected the attorney. That the police denied the defendant’s request to call his mother does not warrant suppression of his statements. There was no evidence that the police intentionally denied the request to prevent the defendant from exercising his right to counsel and to obtain a confession by isolating and tricking the defendant so that he could not obtain counsel. And neither the defendant’s request nor his question about whether he should have an attorney was sufficient to invoke his right to counsel. The court correctly admitted police officer testimony that the defendant was told during questioning that his mother did not corroborate his alibi, as the testimony was offered to show the effect of the statement on the defendant and not to prove the truth of the mother’s statement. *See People v Daniels*, 265 AD2d 909, 910 *lv den* 94 NY2d 878. Judgment affirmed. (County Ct, Onondaga Co [Mulroy, JJ])

Narcotics (Penalties) (Treatment Programs) NAR; 265(55) (60)

Sentencing (Mandatory Surcharge) SEN; 345(48)

People v Harris, 53 AD3d 1116, 861 NYS2d 880 (4th Dept 2008)

Holding: The court erred in imposing a DNA databank fee for the defendant’s third-degree criminal possession of a controlled substance conviction as that offense is not a designated offense under Penal Law 60.35(1)(a)(v) and Executive Law 995(7)(b). Because the issue concerns the legality of his sentence, the defendant did not need to preserve it and the issue is not covered by his waiver of the right to appeal *See People v Benavides*, 19 AD3d 134, 135 *lv den* 5 NY3d 850. The record establishes that the defendant’s waiver of appeal was knowing, voluntary, and intelligent and such waiver bars the defendant from arguing on appeal that the court erred in denying his request for enrollment in the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) program as part of his sentence as authorized by Penal Law 60.04(6). Alternatively, the court properly exercised its discretion in denying the request. Judgment modified by vacating the DNA databank fee and judgment affirmed as modified. (Supreme Ct, Erie Co [Buscaglia, AJ])

Misconduct (Juror) MIS; 250(12)

Trial (Verdicts [Motions to Set Aside (CPL § 330 Motions)]) TRI; 375(70[a])

People v Saxton, 53 AD3d 1045, 862 NYS2d 673 (4th Dept 2008)

After the jury rendered its verdict, the defendant learned that a juror failed to disclose a prior affair with a witness to the altercation between the defendant and the complainant.

Holding: The court erred in summarily denying the defendant’s motion to set aside the verdict based on juror misconduct. This Court reserved decision on the appeal and remitted for a hearing on whether the juror misconduct prejudiced the defendant. After a hearing, the court concluded that the juror misconduct did prejudice the defendant’s right to an impartial jury, but denied the motion based on its finding that the defendant failed to show that he did not know about the misconduct before the jury rendered its verdict. The court erred in denying the motion again as the basis for the denial was beyond the scope of the remittal, and the prosecution never contested the defendant’s sworn allegation about when he learned of the relationship between the juror and the witness. *See CPL 330.30(2); see gen People v Wiggins*, 197 AD2d 802. Judgment reversed, motion to set aside the verdict granted, verdict set aside, new trial granted on counts three and five, counts one and two of the indictment dismissed without prejudice to re-presentation to another

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grand jury. (County Ct, Allegany Co [Euken, J (judgment); Michalski, J [proceedings after remittal])

Identification (Eyewitness) IDE; 190(10) (35) (57)
(Photographs) (Wade Hearing)

**People v Hill, 53 AD3d 1151, 860 NYS2d 780
(4th Dept 2008)**

Holding: The court erred in denying the defendant's motion to suppress the pretrial identifications. "The witnesses identified defendant from photo arrays that were compiled using a photograph of defendant taken after an illegal arrest, and thus those identifications should have been suppressed as the fruit of the illegal arrest (*see People v Dodt*, 61 NY2d 408, 417 . . .). Because none of the witnesses testified at the *Wade* hearing, the People did not establish that each witness had an independent basis for his or her in-court identification of defendant (*see [People v] Walker*, 198 AD2d [826] at 828 . . .)." Judgment reversed, motion to suppress pretrial identifications granted, and matter remitted for a new *Wade* hearing and a new trial, if the prosecution are so advised. (Supreme Ct, Erie Co [Burns, JJ]) ☞

Defender News *(continued from page 6)*

Part1.pdf.) The Commission's recommendations include consolidation of the justice courts, instituting new minimum age and education requirements for justices, and giving criminal defendants the option to have their cases heard by attorney justices. Concluding that it would be impossible to make the necessary improvements to the justice courts as they currently exist, the Commission proposes that the state legislature set up review panels in each of the state's 55 upstate counties that would develop court consolidation plans in accordance with specific guidelines and standards. The report provides extensive details regarding the composition of the review panels and the review process.

The other report, *Action Plan for the Justice Courts: Two Year Update* provides a review of the Office of Court Administration's implementation of the November 2006 plan for the justice courts. (www.nycourts.gov/whatsnew/pdf/JusticeCourts2YearUpdate9-08.pdf.) Some of the completed objectives discussed in the report are: supervising judges have been appointed for each judicial district outside of New York City and attorneys have been assigned to assist the supervising judges; all the justice courts have received digital recording equipment to ensure compliance with Rule 30.1 of the Rules of the Chief Judge, which requires all justice court proceedings to be recorded; and a redesigned education and training

program has been implemented for justices and clerks, including a new seven-week pre-bench training program for non-attorney justices. Of particular note, supervising judges are required to work with the justice courts to assure that defendants financially unable to hire an attorney have counsel. ☞

From My Vantage Point *(continued from page 5)*

community would have sufficed or been *more* effective at ensuring the community's safety).

These three categories represent thousands of people currently facing costly wrongful imprisonment in this State. Defense lawyers know what we need to make a difference in the lives of people in each of these categories to keep them out of jail and prison. At present we don't have those things, including time, access to experts and client services, and a partnership role in the State's effort to reduce its own addiction to incarceration.

We are asking New York State to join us in a paradigm shift. To recognize that when defenders are adequately trained, paid, and given resources, benefits will flow to the State at the same time they flow to our clients. Lawyers who do not have to ask about clients' cases while standing next to them before the judge; lawyers who know their witnesses before calling them to the stand; lawyers who have investigated facts, and researched law, traced family histories, and found prior critically important records; lawyers who have worked with client employers; and lawyers who make collegial decisions with clients—these lawyers can be true advocates, not disempowered cogs in an administrative processing apparatus. They become trusted gatekeepers preventing the wrongful incarceration of their clients.

New York needs an Independent Public Defense Commission that will build a competent, well-funded public defense system around the gatekeeper function just described, protect it from negative political interference, and administer it in a way that helps clients and the State both reach their goals.

The time for beginning the Independent Public Defense Commission is *now*. ☞

2008 Legislative Review *(continued from page 16)*

- S.7616-a — uniformed marine patrol officers in Cayuga County
- S.7729-a — village of Lake George seasonal constables
- S.8106 — uniformed officers of the fire marshal's office of the town of Huntington
- S.8183-a — uniform members of the bureau of fire prevention of the town of Islip
- S.8205 — security officers for the town court of the town of Alden
- Chap. 564 — certain employees of the New York City business integrity commission ☞

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