



# Public Defense Backup Center REPORT

Volume XXIV Number 2

March–May 2009

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### Rockefeller Drug Reform Becomes Reality in 2009–2010 State Budget

New York State's 2009–2010 budget included historic changes to the Rockefeller Drug Laws. After much negotiation, the Legislature passed the bill and delivered it to Governor Paterson, who signed it into law on April 7. The full text of Chapter 56 is available at <http://assembly.state.ny.us/leg/?bn=A00156&sh=t>; the majority of the Rockefeller reforms appear in Part AAA of the law. Judicial discretion is the highlight of the newly-enacted sentencing laws for first and second (non-violent) felony drug offenses. For example, judges no longer are required to sentence class B first felony offenders to imprisonment. Judges also have the authority to direct placement in the SHOCK incarceration program and judges no longer need DA consent to sentence a defendant to Willard parole supervision. As of October 7, 2009, judges will be able to divert many drug and marijuana offenders with identified alcohol or substance abuse problems to treatment. The reforms also authorize resentencing of inmates who were convicted of Class B drug offenses committed prior to January 13, 2005 and sentenced to indeterminate terms under the old sentencing law with maximum terms of more than 3 years, and conditional sealing of records upon successful completion of judicial diversion or similar drug treatment program. For a detailed review of the

Rockefeller reforms, see Staff Attorney Al O'Connor's article beginning on page 10, the Center for Community Alternatives' 2009 Rockefeller Drug Law Reform Sentencing Chart (p. 13), and CCA's early release checklists (pp. 14–15). For additional materials on these reforms, including memoranda from the Office of Court Administration and the New York State Department of Correctional Services, please contact the Backup Center.

### Sentencing Project Releases Report on Current State of Drug Courts in the US

In April 2009, the Sentencing Project released its report, *Drug Courts: A Review of the Evidence*, which is available at <http://tinyurl.com/ppdjmx>. The report reviews a number of recent studies that address recidivism rates, cost savings, the effect of sanctions to ensure program compliance, the role of judges in drug courts, treatment provided to participants, and the impact on the prison population. The authors note that drug court studies have not analyzed how the type of treatment received impacts the rate of success and they expressed concern about whether drug courts have increased the number of people arrested for drug crimes. Recommendations for future research include uniform tracking of participants' criminal histories, the effects of a pre-plea versus a post-plea model and the use of sanctions, and recording of demographics for graduates along with the rates of recidivism in the years that follow graduation.

### **NYSDA's 42nd Annual Meeting**

**will be held in Saratoga Springs,  
NY at the Gideon Putnam Resort**

**July 26-28, 2009**

Hotel reservations can be made by phone:  
**1-866-890-1171**

### Other Legislative Changes in the 2009-2010 Budget

In addition to the Rockefeller reforms, the budget brought a number of other changes related to criminal proceedings, early release, and public defense, including:

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- The SHOCK program has been expanded to inmates under 50; otherwise eligible inmates may be selected for SHOCK participation while in a general confinement facility once they are within three years of parole or conditional release eligibility; and judges may sentence defendants to the SHOCK program;
- Medical parole has been split into two statutory sections, one for terminally ill inmates and the other for inmates suffering from significant debilitating illnesses;
- Counties are authorized to create local conditional release commissions;
- A limited credit time allowance of six months is authorized for individuals serving a determinate or indeterminate sentence for a violent felony offense (sex offenses excluded), homicide (first-degree murder excluded), or A-1 non-drug offense who have significant programmatic accomplishments;
- Defendants who successfully serve interim probation may have that period deducted from a subsequently imposed probation sentence;
- The Division of Parole is urged to consider implementing graduated sanctions for parole violations; and
- The Chief Administrative Judge must develop case-load standards for attorneys providing public criminal defense representation in New York City, with a four-year phased plan for implementation beginning on April 1, 2010.

Attorneys who would like more information about legislative changes in the 2009-2010 budget should contact the Backup Center.

### **Legislature Again Provides Temporary Indigent Legal Services Fund Fix**

This year, five counties were at risk of losing Indigent Legal Services Fund money: Delaware, Herkimer, Nassau, Otsego, and Wayne. To ensure that these counties received ILSF funding, the Legislature enacted a one-time amendment to the MOE that, like last year, allowed counties to use a three-year averaging test to demonstrate compliance. See L 2009, ch 9. The bill also provided reduced funding for noncompliant counties. Nassau County was able to meet the averaging test, and thus received all of its ILSF funds. The remaining four counties received reduced funding.

Before the bill was passed, NYSDA released a report analyzing the Indigent Legal Services Fund Maintenance

of Effort Provisions. ([www.nysda.org/MOE\\_Analysis\\_Mar09.pdf](http://www.nysda.org/MOE_Analysis_Mar09.pdf).) The report concluded that the administration of the ILSF has provided no information on how funds are spent, little information on whether localities are maintaining, much less improving quality, and little to no evidence that the provisions are sufficient to guarantee that the state money is used to improve quality, as is statutorily required. Instead of piecemeal efforts to fix the ILSF, NYSDA urges the state to overhaul the entire public defense system by establishing an Independent Public Defense Commission.

### **Loan Forgiveness Program For Public Defenders and Legal Aid Attorneys**

The state loan forgiveness program previously restricted to district attorneys has been expanded to include public defenders and legal aid society attorneys who meet several eligibility criteria. Applications must be submitted by October 1, 2009, and the application package will be available on the Higher Education Services Corporation website in August. For more information about the loan forgiveness program, please contact Staff Attorney Susan Bryant at the Backup Center.

### **New York Court of Appeals Rules that Warrant is Required for GPS Monitoring**

The New York State Court of Appeals recently held that: "Under our State Constitution, in the absence of exigent circumstances, the installation and use of a GPS device to monitor an individual's whereabouts requires a

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

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warrant supported by probable cause.” *People v Weaver*, No. 53, 5/12/2009. In *Weaver*, the prosecution sought to introduce evidence of GPS readings taken from a battery-powered GPS device that was attached to the defendant’s van without a warrant; the device remained in place for 65 days. Chief Judge Lippman, writing for the majority, found that “[t]he massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy.” The Court declined to decide the issue on federal constitutional grounds.

Judge Smith, joined by Judges Read and Graffeo, dissented, concluding that although the attachment of the GPS device violated the defendant’s property rights, it did not invade his privacy, and thus, there was no search. Judge Smith argued that the state and federal constitutional prohibitions against unreasonable searches should be enforced not by limiting the technology the police may use, but by limiting the places and things that the police may observe with it. In a separate dissent, Judge Read concluded that “federal and New York precedents do not transmute GPS-assisted monitoring for information that could have been easily gotten by traditional physical surveillance into a constitutionally prohibited search” and argued that the issue was best left to the Legislature. A full summary of the decision will appear in the next issue of the *REPORT*.

## ***Supreme Court Limits Warrantless Auto Search Incident to Arrest***

In a 5-4 decision, the United States Supreme Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Arizona v Gant*, No. 07-542 (4/21/2009). If neither category applies, the police must get a search warrant or rely on another exception to the warrant requirement to justify the search. Justice Stevens, writing for the majority, noted that many courts have interpreted *New York v Belton* (453 US 454 [1981]) to mean that such a search is authorized even if there is no possibility that the person arrested could gain access to the vehicle during the search. The *Gant* Court rejected that interpretation and concluded that the “*Chimel [v California]* (395 US 752 [1969]) rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”

In a brief dissent, Justice Breyer argued that principles of *stare decisis* require the Court to follow the rule set out in *Belton*. In his dissent, Justice Alito agreed that the Court

should continue to follow *Belton* and argued that overruling *Belton* “will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law.”

## ***Reports and Studies on System Failures; Advocacy and Action Needed to Implement Recommended Reforms***

The first five months of 2009 featured several state and national studies and reports on serious failings within the criminal justice and family court systems, such as constitutional violations in public defense, the lack of science in forensic sciences, unnecessarily restrictive discovery rules, and wrongful convictions. These reports all provide recommendations for reducing wrongful convictions, providing zealous, well-trained advocates for public defense clients, and creating a better-functioning system. But the implementation of these and other recommendations has been slow and the system continues to fail all those involved.

## ***Justice Denied—The Constitution Project Shines Spotlight on the Nationwide Neglect of the Constitutional Right to Counsel***

Last month, the National Right to Counsel Committee of the Constitution Project released its report on the continuing failure of states and localities to provide constitutionally-required competent counsel (available at <http://tcpjusticedenied.org>). “It is no longer news that *Gideon*’s constitutional promise has not been fulfilled in many states and counties around the country. But the extent and persistence of the problems are greater than we realized.” The report includes various examples of inadequate funding of public defense, resulting in unacceptable levels of staffing, supervision, salaries, training, and oversight. After providing various examples of failures in public defense systems throughout the country, the committee set out twenty-two recommendations for reform. The recommendations include: the creation of independent, non-partisan public defense systems, organized at the state level, adequately funded by the state from general revenues, and overseen by a board or commission; federal government assistance in the delivery of public defense services; prompt assignment of counsel and eligibility determinations made by individuals independent of defense agencies; establishment and enforcement of qualifications and standards for representation and workload limits; fair compensation and adequate support and resources; and compliance with ethical standards.

### ***NYSBA Wrongful Conviction Report Approved; Chief Judge Lippman Creates New Wrongful Conviction Task Force***

The New York State Bar Association's House of Delegates voted to approve the report issued earlier this year by the Association's Wrongful Conviction Task Force. ([www.law.com](http://www.law.com), 4/7/2009.) The final report, available at <http://tinyurl.com/qvvk66>, includes a significant recommendation that was not in its preliminary report: "The Task Force endorses the recommendations of the Report of the Commission on the Future of Indigent Services, June 2006, specifically including the recommendation of an Independent Public Defense Commission to oversee the quality and delivery of public defense services." Information about the other task force recommendations appears in the January-February 2009 issue of the REPORT. ([http://www.nysda.org/09\\_Jan-FebREPORT.pdf](http://www.nysda.org/09_Jan-FebREPORT.pdf).)

Chief Judge Lippman has announced the creation of a permanent wrongful conviction task force, which will build on the work of the Innocence Project and the New York State Bar Association's wrongful conviction task force. The task force will be chaired by Court of Appeals Associate Judge Theodore T. Jones, Jr. and Westchester County District Attorney Janet DiFiore. Three others, Senate Codes Committee Chair Eric T. Schneiderman, Assembly Codes Committee Chair Joseph R. Lentol, and Denise O'Donnell, Deputy Secretary of Public Safety/Commissioner of the State Division of Criminal Justice Services, have been named to the task force, which is expected to have a total of 12 members. The task force will review cases where wrongful convictions have occurred to determine where the system failed; the panel will not investigate claims of innocence. An initial report is due on December 1. ([www.law.com](http://www.law.com), 5/1/2009.)

### ***The Fund for Modern Courts Declares New York's Family Courts in Crisis***

In a recently released report, *A Call to Action: The Crisis in Family Court*, the Fund for Modern Courts' Family Court Task Force examined the current state of New York State's Family Court system and provided recommendations for addressing some of the system's major problems. ([www.moderncourts.org/documents/family\\_court\\_report.pdf](http://www.moderncourts.org/documents/family_court_report.pdf).) The Task Force acknowledged that additional changes are necessary; specifically, the number of Family Court judges must be increased and the court system must be restructured through a constitutional amendment such as the one proposed by the Special Commission on the Future of the Courts in 2007. The report is based on interviews with 35 individuals who have been involved in the Family Court system, and focuses on the following areas: administrative leadership; allocation of judicial resources; courtroom control and case management; judi-

cial education and support; resources for litigants; and technology solutions.

Recommendations to improve court administration include creating a statewide Deputy Chief Administrative Judge for Family Court, mandating annual review of administrative and supervisory judges, and creating an advisory or review board of Family Court stakeholders to offer advice and guidance to the Deputy Chief. To deal with the pressing need for additional family court judges, the Task Force recommended reassignment of judges from other courts to the Family Court, assigning more functions and matters that do not involve issues of family violence to referees and judicial hearing officers, and supporting the increased use of Alternative Dispute Resolution. To reduce delays and scheduling problems, the Task Force recommended that judges be assigned to conduct preliminary discussions with litigants in an effort to settle disputes or streamline the issues for judicial resolution, establish standards and guidelines to inform all parties in advance of a court appearance what proceeding is scheduled to take place, and implement a zone approach to allow Family Court stakeholders to familiarize themselves with an identifiable set of colleagues and limit the number of judges before whom they must appear. Judicial education recommendations include more mandatory judicial training for new and experienced judges and other courtroom personnel and cross-training with other participants in the system. Noting the significant number of *pro se* litigants and the need for additional resources to permit these litigants to fully protect their rights and obtain substantial justice, the Task Force recommended creating self help centers in each county and instruction guides on preparing court submissions, devoting resources to recruiting, supporting, and collaborating with a dedicated *pro bono* counsel plan, and re-evaluating the mechanisms for selecting and assigning assigned counsel to cases. Finally, the Task Force recommended that the Office of Court Administration design and implement a comprehensive data-collection system for Family Court cases.

Soon after the report was released, Chief Judge Lippman and Chief Administrative Judge Ann Pfau announced new family court administrative appointments. ([www.nycourts.gov/press/pr2009\\_07.shtml](http://www.nycourts.gov/press/pr2009_07.shtml).) Hon. Sharon Townsend has been named Vice Dean for Family and Matrimonial Law of the New York State Judicial Institute, a new administrative position. Judge Townsend will coordinate training for judges who handle family court and matrimonial cases and will also provide advice, mentoring, and support to those judges. Hon. Edwina Richardson-Mendelson has been named the Administrative Judge of the New York City Family Court.

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## ***Legal Aid Society Releases Recommendations on Criminal Discovery Reform***

In April, the Legal Aid Society released its report, *Criminal Discovery Reform in New York: A Proposal to Repeal C.P.L. Article 240 and to Enact a New C.P.L. Article 245*. ([www.legal-aid.org](http://www.legal-aid.org).) This detailed report argues that New York's criminal discovery laws are severely inadequate and proposes a new statutory framework for criminal discovery, Criminal Procedure Law article 245. In its press release, the Legal Aid Society emphasizes that "because significant discovery from the prosecution occurs so belatedly—and critical materials like police reports that are routinely provided in other states are not ordinarily disclosed—New York's discovery rules systematically block innocent or over-charged defendants from meaningfully investigating the case; locating and using exculpatory evidence; and formulating a proper strategy of defense prior to the trial." According to the report, New York has been identified as one of fourteen states that provide criminal defendants with the least amount of discovery.

The proposed article 245 attempts to make the discovery process more efficient, fair, and consistent by requiring early and broad disclosure. Specific reforms include: requiring prosecutors to disclose all known information that tends to mitigate or negate the defendant's guilt; mandatory and automatic discovery, thereby eliminating written discovery demands; disclosure of witnesses' contact information, unless a showing of good cause to withhold it is made and the court issues a protective order; and disclosure of expert witness information. Article 245 would also require defendants to provide early disclosure of information that the defense plans to use at trial in presenting the defense.

## ***Misdemeanor Courts Throughout the Country are Broken***

The National Association of Criminal Defense Lawyers' report, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, ([www.nacdl.org/misdemeanor](http://www.nacdl.org/misdemeanor)), offers a comprehensive review of nation's misdemeanor courts. The report is based on site visits in seven states, a review of existing studies and materials, a survey of defenders, two conferences, and a webinar. Many of the problems with misdemeanor courts occur at the beginning of the case: absence of defense counsel, particularly at the first appearance; uninformed waivers of counsel; restrictive eligibility rules; pressure to plead at the first appearance; and requiring or encouraging defendants to confer directly with the prosecution. The report notes that misdemeanor caseloads in many jurisdictions far exceed the maximum national caseload standard, with some caseloads so high that defenders have just minutes to spend on each case. And many of those defenders are inexperienced, unsupervised, and

lack access to necessary support services.

The report includes numerous recommendations, including: decriminalizing offenses that do not involve a significant risk to public safety and expanding diversion programs; providing counsel at the first court appearance for any defendant facing the possibility of incarceration; reducing pressure on defendants to plead guilty, particularly at the first court appearance; establishing and enforcing caseload and practice standards; providing adequate funding for public defense counsel and support services; eliminating flat-fee contracts for public defense representation and application fees; and requiring judges and prosecutors to comply with ethical obligations.

As a modern aside, the problem of uninformed waiver of not only counsel but everything else was recently mentioned on the Facebook page of the Maine Indigent Defense Center: "Saw a judge ask a defendant if he 'waived his right to be informed of his rights'!!!!" The Maine Indigent Defense Center page is one good source for public defense news for Facebook users.

## ***Campaign for an Independent Public Defense Commission Hosts Vibrant Gideon Day***

This year, the Campaign for an Independent Public Defense Commission (CIPDC) took Gideon Day to new heights. Holding its lobby day on the anniversary of the US Supreme Court's right-to-counsel decision in *Gideon v. Wainwright* on March 18, 1963, the Campaign provided buses from Long Island, New York City, and Syracuse to bring supporters to Albany from across the state. Distinctive blue "Justice Now" tee shirts with the CIPDC logo—450 in all—were handed out as supporters arrived. Highly visible in halls, legislative offices, and the Well of the Legislative Office Building, the shirts reinforced the Campaign's message all day as Campaign supporters brought the message to their elected officials.

Activities in the Well also underscored the seriousness of the public defense crisis and the growing passion for reform. Individuals with first-hand experience—lawyers, clients, and client families—told stories about New York's current broken public defense system aloud on camera as part of a Speak-Out. Passers-by and participants examined a documentary exhibition—*INNOCENT: Inside Wrongful Conviction Cases in New York*—by Scott Christianson, author of the book by the same name.

Key Legislators spoke at a press conference, calling for IPDC now. They included: long-time supporter Assembly Codes Committee Chair Joseph R. Lentol (D-Brooklyn); Senate Codes Committee Chair Eric T. Schneiderman (D-Manhattan, Bronx); Assembly Judiciary Committee Chair Helene E. Weinstein (D-Brooklyn); Assembly Corrections Committee Chair Jeffrion L. Aubry

(D-Queens); and Assemblymember Darryl C. Towns (D-Brooklyn) and Senate Corrections Chair Ruth Hassell-Thompson (D-Bronx, Westchester)—the chair and secretary respectively of the Black, Puerto Rican, Hispanic, and Asian Legislative Caucus. The latter two had published an op-ed piece in the Albany *Times Union* two days before calling for the Independent Public Defense Commission at the press conference.

While the Independent Public Defense Commission was not included in the 2009 state budget, the need for public defense reform remains high. The Campaign urges all supporters to contact Governor Paterson and legislative leaders urging the creation of the Independent Public Defense Commission this session.

To see Gideon Day press conference clips and photos of the day's activities, visit the Campaign's website, [www.newyorkjusticefund.org](http://www.newyorkjusticefund.org).

### **More Voices in the Chorus for Reform**

Before and after Gideon Day, several op-eds and columns appeared supporting creation of an Independent Public Defense Commission in addition to the Towns/Hassell-Thompson piece noted above.

One appeared in *El Diario* (New York City), written by Roberto Ramirez (president-elect of the Puerto Rican Bar Association). Published on March 10, 2009 and entitled "El derecho a una defensa eficaz" [the right to an effective defense], the piece noted that the unfairness of the current system falls disproportionately on minority defendants. Ramirez said, "[c]reating the Independent Public Defense Commission will give meaning to the right of every defendant to consult with a lawyer, as recognized 46 years ago by the US Supreme Court in *Gideon v Wainwright*."

Ten days after Gideon Day, Senator Antoine Thompson wrote in the *Buffalo News*: "For reasons of justice and fiscal prudence, we can't turn back. . . . While county executives are concerned that the state will simply raise standards and leave local taxpayers to pick up the added costs, legislators are discussing capping county spending . . ." More recently, on April 19, Albany County resident Barbara DeMille, a member of the Campaign for an Independent Public Defense Commission, described public defense problems in an op-ed in the *Daily Gazette* (Schenectady). She ended her call for reform by saying: "As we in this country pride ourselves on living equitably under a rule of law, we need remind ourselves that the health of our democracy depends upon justice for all."

Columnist Errol Louis wrote in the *Daily News* on May 7, 2009: "New York desperately needs a politically independent, properly funded public defender commission - a statewide agency that would provide the funding, training and enforceable legal standards currently absent from so many . . . offices . . . . Justice demands that we stop looking away." And on May 14, former New

York City Mayor David N. Dinkins wrote in the *New York Amsterdam News*, "As a lawyer, I know that a right is only meaningful if it can be exercised effectively. That is why I am adding my voice to those calling on our state leaders to finally reform our broken system of public defense services . . ."

These and other opinion pieces and editorials can be found on the Campaign for an Independent Public Defense Commission website, [www.newyorkjusticefund.org/editorials.htm](http://www.newyorkjusticefund.org/editorials.htm).

### **Recent Responses to the National Research Council's Forensic Science Report**

As reported in the January-February 2009 issue of the *REPORT*, the National Research Council released a ground-breaking report on the serious deficiencies in forensic science, *Strengthening Forensic Science in the United States: A Path Forward*, in mid-February. The report has received significant attention from the legal and scientific communities over the past three months.

On May 11, 2009, the *National Law Journal* published an article on how criminal defense attorneys are using the report in trials, appeals, and post-conviction motions to discredit forensic evidence and testimony. ([www.law.com/jsp/article.jsp?id=1202430604696](http://www.law.com/jsp/article.jsp?id=1202430604696).) District attorneys from across the country have objected these efforts, arguing that the defense bar is trying to keep legitimate evidence out of the courtroom. It is too early to tell how judges will respond to these arguments, but defense counsel should use the report and other research to challenge the admission of forensic science evidence and testimony. In a May 12 article, the *New York Times* reported on forensic scientists' reactions to the report. (<http://tinyurl.com/ra7xny>.) The article, *Plugging Holes in the Science of Forensics*, also discusses ongoing scientific studies that are analyzing the accuracy of some forensic science disciplines and the impact of human error on forensic science.

On May 13, 2009, the United States House of Representatives' Judiciary Committee held a hearing on the report; witnesses were: Peter Neufeld, co-director of the Innocence Project; Kenneth Melson, Acting Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives; Peter Marone, Director of the Virginia Department of Forensic Science; and John Hicks, Director of the Northeast Regional Forensic Institute. In his written testimony, Peter Neufeld noted: "Although the conventional wisdom once stated that a sound defense and cross-examination would enable courts to properly assess the strength of forensic evidence, the NAS report unequivocally states and the post-conviction DNA exoneration cases clearly demonstrate that scientific understanding of judges, juries, defense lawyers and prosecutors is wholly

insufficient to substitute for true scientific evaluation and methodology. It is beyond the capability of judges and juries to accurately assess the minutiae of the fundamentals of science behind each of the various specific forensic assays in order to determine the truth in various cases, and it is an unfair and dangerous burden for us to place on their shoulders.” A webcast of the hearing and the witnesses’ written statements are available at [http://judiciary.house.gov/hearings/hear\\_090513.html](http://judiciary.house.gov/hearings/hear_090513.html).

On the same day as the hearing, a group of scientists, legal experts, criminal justice reform advocates, academics, law enforcement professionals, and forensic science practitioners who recognize the need for fundamental forensic science reforms launched the Just Science Coalition. ([www.just-science.org](http://www.just-science.org).) The Coalition’s mission is to “advocate for the governmental framework and resources necessary to ensure that forensic sciences in the United States are valid and reliable, and that their use in the criminal justice system promotes accurate justice: the protection of the innocence and the identification of the guilty.” The Coalition’s website includes information about the National Research Council’s report, news stories about forensic sciences, and the Coalition’s plan for reform.

### ***NYSDA Staff Attorney Testifies at Hearing on Jury Pool Diversity***

On April 30, 2009, Staff Attorney Mardi Crawford testified before the New York State Assembly Committees on Judiciary and Codes regarding proposed legislation aimed at improving diversity in the jury pool. She emphasized that New York State should ensure poor people a jury of their peers and that, given the link between race and poverty, such efforts would help ensure members of racial minorities a jury of their peers. A bill introduced earlier this session, A.2374, seeks to expand the source lists from which prospective jurors are selected, require more frequent updating of the lists, and require the recording of demographic data on jury pool participation. The bill would mandate use of lists of individuals who receive workers compensation, the senior citizen rent increase exemption, and telephone subscribers, which will likely increase the number of poor persons placed in jury pools. In addition to reforms in A.2374, Mardi encouraged the Legislature to consider removing the lifetime prohibition on jury service by someone who has been convicted of a felony, which appears in Judiciary Law 510(3). Although individuals previously convicted of a felony who have received a Certificate of Relief from Civil Disabilities or a Certificate of Good Conduct may be qualified to serve as jurors, it is unclear how many potential jurors avail themselves of this relief, and a statutory amendment lifting the lifetime ban should be adopted.

A week after the Assembly hearing, the *New York Law Journal* published an article about individuals with prior felony convictions improperly serving as jurors, what judges should do upon learning of a juror’s concealment of his/her criminal history, and the effect of such service on criminal convictions. ([www.law.com](http://www.law.com), 5/7/2009.) The article encourages judges to ask prospective jurors more questions about their criminal histories, including whether they have received a certificate of relief from disabilities or a certificate of good conduct, and invite jurors to answer these types of sensitive questions in private.

### ***New State Attorney Ethics Rules in Effect as of April 1***

As a reminder, the new New York State Attorney Rules of Professional Conduct became effective on April 1, 2009. The November-December 2008 issue of the *REPORT* contains details about the new rules and the full text of the rules is available at <http://tinyurl.com/os3f7r>. Michael S. Ross provided training on the impact of the new rules on criminal defense practice at NYSDA’s 23<sup>rd</sup> Annual Metropolitan Trainer; attorneys who would like a copy of the training materials should contact the Backup Center.

### ***NYSDA Offers Trainers Across New York***

In late February, NYSDA held its 23<sup>rd</sup> Annual Metropolitan Trainer at the New York University School of Law. The all-day seminar included five sessions: Michael Ross discussed the impact of the new state rules of professional conduct on criminal defense practice; Brendan Wells and Ken Strutin educated attendees about conducting investigations in a YouTube and MySpace Society; Nancy Ginsburg provided an overview of representing adolescents in adult criminal court and offered many great practice tips; Tom Klein provided guidance on preparing for and litigating *Wade* hearings; and Edward Nowak reviewed the Court of Appeals’ decisions from this term.

NYSDA’s Cutting Edge Criminal Defense seminar was held in Binghamton in mid-April. The half-day program featured training on recent developments in evidence by Brian Shiffrin, creative discovery and investigation by Don Thompson, how to position your client for the earliest possible release by Patricia Warth, and ethical issues surrounding preserving attorney-client privilege at the cost of another’s innocence by Ken Strutin.

The Director of NYSDA’s new Criminal Defense Immigration Project, Joanne Macri, has been providing training to defenders around the state about immigration issues in criminal cases. Criminal defense attorneys who have questions about immigration matters can reach

Joanne by calling the Backup Center.

Just days after Governor Paterson signed the Rockefeller Drug Law reforms into law, staff Attorney Al O'Connor began training criminal defense counsel about the changes. His expertise and active involvement in the drafting of this year's reforms make him the ideal lecturer on this topic.

NYSDA will be holding its Basic Trial Skills Program from June 7-13; over 40 new attorneys will participate in this year's training. The 42nd Annual Meeting and Conference will be held from July 26-28 at the Gideon Putnam Resort in Saratoga Springs, NY. For more information about the Annual Meeting, see p. 9.

### **Award Nominations Sought**

Nominations are sought for two awards to be presented at NYSDA's 42nd Annual Meeting and Conference.

#### **Kevin M. Andersen Memorial Award**

Kevin M. Andersen was a lifelong public defender. Those who worked with him knew him to have the ability to be angered to his core by injustice, the will to fight ferociously for his client, and the compassion to grant the client the dignity each deserved as a human being despite whatever human frailties they might present. Following his death in 2004, the Genesee County Public Defenders Office created the Kevin M. Andersen Memorial Award to remember and honor his dedication to public defense work. This award is presented to an attorney who has been in practice less than fifteen years, practices in the area of indigent defense, and exemplifies the sense of justice, determination, and compassion that were Kevin's hallmarks. Nominations with supporting materials should be forwarded to the Genesee County Public Defenders Office, One West Main Street, County Building, Batavia NY 14020.

#### **Wilfred R. O'Connor Award**

Wilfred R. O'Connor was a founding member and long-time President of the New York State Defenders Association. He served as a legal aid lawyer in Brooklyn and Queens, as director of the Queens Legal Aid office, as a member of Legal Aid's Attica Defense Team, as director of the Prison Legal Assistants Program, and as president of NYSDA from 1978 to 1989. He went on to complete his career as a judge in New York City. His beliefs were clear: every defendant, regardless of race, color, creed or economic status, deserves a day in court and zealous client-centered representation. The NYSDA Board of Directors created the Wilfred R. O'Connor Award to remember Bill and honor his sustained commitment to the client-centered representation of the poor. This award will be pre-

sent to an attorney who has been in practice fifteen or more years, practices in the area of public defense, and exemplifies the client-centered sense of justice, persistence, and compassion that characterized Bill's life. Nominations with supporting materials should be forwarded to the New York State Defenders Association, 194 Washington Avenue, Suite 500, Albany, NY 12210-2314.

### **Minnesota Supreme Court Grants Disclosure of Intoxilyzer 5000EN Source Code**

In *State v Underdahl*, (No. A07-2293, A07-2428, 4/30/2009) the Minnesota Supreme Court held that defendant Brunner was entitled to disclosure of the Intoxilyzer 5000EN source code, but defendant Underdahl was not entitled to disclosure. ([www.lawlibrary.state.mn.us/archive/supct/0904/OPA072293-0430.pdf](http://www.lawlibrary.state.mn.us/archive/supct/0904/OPA072293-0430.pdf).) In his request for the source code, Brunner provided a memorandum and nine exhibits, which supported his argument that analysis of the source code may reveal deficiencies that could challenge the reliability of the machine and thus, relates to his guilt or innocence. However, because Underdahl failed to show how the source code would help him to challenge the validity of the machine, he was not entitled to disclosure under state law. The Court concluded that the trial court did not abuse its discretion in concluding that the state had possession or control of the source code.

In a recent Second Department decision, *People v Robinson*, (53 AD3d 63 [2d Dept 2008]) the court held that the Intoxilyzer source code was discoverable under CPL 240.20(1)(c) and (1)(k), but that the machine is presumed reliable because it appears on the Department of Health's list of approved breath-testing instruments, the defendant failed to offer evidence that would make it reasonably likely that the source code contains material exculpatory evidence unavailable from other sources, and the source code was not the property of the state.

### **New Jersey Supreme Court Affirms Invalidation of Local Sex Offender Residency Restrictions**

In a brief per curiam opinion, the New Jersey Supreme Court affirmed an appellate court decision that held that two local sex offender residency laws were preempted by the state's Megan's Law, which was intended to be exclusive in the field. The Supreme Court decision, *G.H. v Township of Galloway*, (No. A-64/35-08, 5/7/2009) is available at <http://tinyurl.com/luteac>. In a recent New

*(continued on page 12)*

# Conferences & Seminars

**Sponsor:** New York State Bar Association  
**Theme:** Family Court Training for Attorneys Who Provide Mandated Representation  
**Date:** June 11, 2009  
**Place:** Albany, NY  
**Contact:** NYSBA: tel (518) 463-3200, email [probono@nysba.org](mailto:probono@nysba.org), website [www.nysba.org](http://www.nysba.org)

**Sponsor:** National Criminal Defense College  
**Theme:** Trial Practice Institute  
**Dates:** July 12-25, 2009  
**Place:** Macon, GA  
**Contact:** NCDC: tel (478) 746-4151; fax (478) 743-0160; email [Rosie@ncdc.net](mailto:Rosie@ncdc.net); website [www.ncdc.net](http://www.ncdc.net)

**Sponsor:** New York County Lawyers' Association (NYCLA)  
**Theme:** Confronting Ethical Issues in Criminal Practice  
**Date:** July 24, 2009  
**Place:** NYCLA, New York City  
**Contact:** NYCLA: tel (212) 267-6646; website [www.nycla.org](http://www.nycla.org)

**Sponsor:** The Bryan R. Shechmeister Death Penalty College  
**Theme:** Death Penalty College  
**Dates:** July 25-30, 2009  
**Place:** Santa Clara, CA

**Contact:** Santa Clara University School of Law (Ellen Kreitzberg): tel (408) 554-4724; email [ekreitzberg@scu.edu](mailto:ekreitzberg@scu.edu); website [www.scu.edu/law/dpc/index.cfm](http://www.scu.edu/law/dpc/index.cfm)

**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](mailto:dgeary@nysda.org); website [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** 2009 Annual Meeting & Seminar: Bring a Revolution Home! Trial Skills That Win  
**Dates:** August 5-8, 2009  
**Place:** Boston, MA  
**Contact:** NACDL: tel (202) 872-8600 x230 (Akvile Athanason); email [akvile@nacdl.org](mailto:akvile@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** DWI Means Defend With Ingenuity  
**Dates:** October 8-10, 2009  
**Place:** Las Vegas, NV  
**Contact:** NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email [gerald@nacdl.org](mailto:gerald@nacdl.org); website [www.nacdl.org/meetings](http://www.nacdl.org/meetings)



Key legislators call for a statewide Independent Public Defense Commission at the Gideon Day press conference. From left: Assemblymember Jeffrion L. Aubry, Senator Ruth Hassell-Thompson, Assemblymember Helene E. Weinstein, Assemblymember Darryl C. Towns, Assemblymember Joseph R. Lentol, Senator Eric T. Schneiderman, and Michael Whiteman, Chairman of the Committee for an Independent Public Defense Commission. (See story on p. 5.)

## Summary of the 2009 Rockefeller Drug Law Reform Legislation

By Al O'Connor\*

The Legislature has enacted historic revisions to the Rockefeller Drug Laws as part of the 2009-2010 budget. Governor Paterson signed the law (Chap. 56) on April 7<sup>th</sup>. Many of the changes are effective immediately, and apply to pending cases where sentence was not pronounced before April 7, 2009. Here is a summary of the highlights of the reform legislation.

### 1. New Sentencing Laws for Drug Crimes (Effective immediately)

#### First Felony Drug & Marijuana Offenses

**Class B:** Imprisonment is no longer mandatory—Probation, a split sentence, a definite jail term, and a state prison term between 1 and 9 years (with post-release supervision) are now authorized sentences. If imposing a state prison sentence, the court may order the defendant be directly placed in the Willard drug treatment program as part of a sentence of parole supervision (see CPL § 410.91). The court may also order the client directly placed in the SHOCK incarceration program. Note: a separate section of the bill (Part L) increases the maximum age for SHOCK placement to 50 (from 40).

**Class C, D and E:** Imprisonment will continue to be discretionary, not mandatory. All non-incarcerative dispositions are authorized (e.g., probation, split sentences) and local jail terms. The sentencing court may order the client directly placed in the SHOCK incarceration program. The legislation does *not* authorize a Willard parole supervision sentence for these clients because courts have many other sentencing options. (The Legislature has reserved Willard for first time Class B drug offenders, and certain second felony Class C, D and E offenders).

#### Second Felony Offenders (with non-violent prior felony conviction)

**Class B:** Imprisonment *is* required unless the client is diverted for drug or alcohol treatment pursuant to new section 216 of the Criminal Procedure Law, which authorizes diversion in the court's discretion (i.e., without D.A. consent) following an alcohol and substance abuse evaluation (see below). Although the judicial diversion option will be available for clients who committed crimes prior to the effective date of the legislation, it does not go into effect for six months. Therefore, adjournments will be necessary for current clients who wish to avail themselves of the diversion option. Interim probation supervision is one way to secure the necessary adjournment. A separate

section of the bill (Part O) authorizes sentence credit for time served on interim probation against a sentence of probation.

The minimum state prison sentence for Class B second felony drug offenders (with a prior non-violent felony) is reduced to 2 years (from 3½). The maximum is unchanged at 12. Therefore, Class B second felony offenders (prior non-violent) who are not judicially diverted to treatment and are eligible for release within 3 years are SHOCK eligible, and may be directly placed in the program by the court provided they otherwise meet eligibility requirements [age, no prior DOCS commitments, no exclusion convictions—see Corr. Law § 865(1)].

**Class C, D and E:** Imprisonment is not required—all non-incarcerative dispositions are authorized, including judicial diversion pursuant to CPL § 216. In addition, Willard placement (without DA consent), and judicial SHOCK placement are available sentencing options.

#### Rolling SHOCK admissions for longer sentences

A separate section of Chapter 56 (Part L) authorizes rolling admissions to SHOCK when otherwise eligible inmates serving longer terms of imprisonment are within 3 years of parole or conditional release eligibility. Rolling SHOCK admission is also available by direct judicial placement when a sentencing court, while imposing a longer sentence that precludes immediate SHOCK placement, directs DOCS to place the defendant in the program when he or she is within 3 years of conditional release eligibility.

#### Optional state prison sentences for second felony offenders (prior non-violent felony)

Class C: 1½ (reduced from 2) to 8 years — plus PRS  
Class D: 1½ to 4 years (unchanged) — plus PRS  
Class E: 1½–2 (unchanged) — plus PRS

#### Second Felony Offenders (with prior violent felony)

The ameliorative sentencing changes are unavailable to clients who are second felony offenders with a predicate violent felony conviction. They still face mandatory imprisonment, and will continue to be governed by Penal Law § 70.70(4):

Class B: 6–15 years — plus PRS (categorical ineligibility for SHOCK)  
Class C: 3½–9 years — plus PRS  
Class D: 2½–4 ½ years — plus PRS  
Class E: 2–2½ years — plus PRS

SHOCK eligibility for certain Class C, D and E offenses—including judicial placement—if the client otherwise meets eligibility requirements—i.e., release eligible within 3 years, no prior DOCS commitments, no exclusion convictions—see Corr. Law § 865(1)

\* Al O'Connor is a Backup Center Staff Attorney.

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2. DA consent eliminated for all Willard-eligible offenses  
(Effective immediately)

The bill repeals CPL § 410.91(4), which required D.A. consent to a Willard parole supervision sentence for certain Class D felony convictions. It also expands this sentencing option to Class B first felony drug offenders, and second felony Class C, D, and E offenders (prior non-violent).<sup>1</sup> Without consent of the D.A., courts may sentence clients convicted of the following crimes to Willard:

Criminal mischief in the second and third degrees  
Grand larceny in the fourth degree (P.L. § 155.30  
except subdivisions 7 and 11)  
Grand larceny in the third degree (except firearms)  
Unauthorized use of a vehicle in the second degree  
Criminal possession of a stolen property in the third  
and fourth degrees (except firearms)  
Forgery in the second degree  
Criminal possession of forged instrument in the second  
degree  
Unlawfully using slugs in the first degree  
Burglary in the third degree

First time Class B drug offenders, and second felony  
Class C, D and E drug & marijuana offenders (prior non-  
violent).

3. Judicial Diversion Program (Effective 6 months  
from date of enactment)

The centerpiece of the bill is authorization for a court to divert most drug and marijuana offenders with an identified alcohol or substance abuse problem to treatment. It provides that courts may divert drug offenders (Class B through E), *including second felony drug offenders*, to in-patient or out patient treatment programs in lieu of prison *without consent of the D.A.* Courts may also order judicial diversion for clients charged with Willard eligible crimes (*see* CPL § 410.91).

Excluded from diversion eligibility are: 1) second felony drug offenders with predicate violent felony offense convictions; 2) clients with a conviction for a merit time ineligible offense within the preceding 10 years (generally sex and homicide offenses, *see* Corr. Law § 803(1)(d) (ii)); 3) clients with a Class A felony drug conviction within the preceding 10 years; 4) clients who have ever been adjudicated a second violent felony offender or a persistent violent felony offender. Also ineligible for diversion are clients currently charged with a violent felony offense, or a merit time ineligible offense, for which imprisonment is mandatory upon conviction, while such charge is pend-

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<sup>1</sup> Also excluded from Willard eligibility are clients with prior violent felony convictions, whether or not qualifying as a predicate felony convictions, prior Class A felony convictions, and prior Class B non-drug convictions.

ing. However, the court may order diversion in any of the above situations with consent of the D.A.

After ordering and receiving an alcohol and substance abuse evaluation, the court must make findings with respect to whether:

- a. the defendant is statutorily eligible for diversion
- b. the defendant has a history of alcohol or substance abuse or dependence;
- c. such alcohol or substance abuse or dependence is a contributing factor to the defendant's criminal behavior;
- d. the defendant's participation in judicial diversion could effectively address such abuse or dependence; and
- e. institutional confinement of the defendant is or may not be necessary for the protection of the public.

Generally, a guilty plea will be required for judicial diversion, but the court may, in exceptional circumstances, where the plea is "likely to result in severe collateral consequences," order diversion without a guilty plea, and may do so in any case with consent of the D.A. The court will have a range of options upon the client's successful completion of the diversion program, including allowing the defendant to withdraw a guilty plea and dismissing the indictment, or substituting a misdemeanor conviction in lieu of the felony. The court will also have a range of options when a client is unsuccessful in the diversion program, including imposing a state prison sentence for the crime of conviction or a lesser offense. The legislation directs courts to consider that "persons who ultimately successfully complete a drug treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse" and to consider using a "system of graduated and appropriate responses or sanctions."

4. Conditional sealing of records upon completion of  
judicial diversion or similar drug treatment program  
(Effective: 60 days from enactment)

The legislation authorizes courts to conditionally seal records of drug, marijuana and Willard-eligible non-drug crimes (*see* CPL § 410.91) upon a defendant's successful completion of a judicial diversion program, DTAP or similar substance abuse treatment program. Sealing authority will also extend to up to three of the client's prior misdemeanor drug or marijuana convictions. A new arrest for a crime will effectively unseal these records unless the criminal action terminates in the defendant's favor pursuant to CPL § 160.50 or results in a non-criminal disposition pursuant to CPL § 160.55.

### 5. Resentencing of inmates convicted and sentenced to indeterminate terms under former law (Most provisions effective 6 months from enactment)

The bill authorizes discretionary resentencing of inmates who were convicted of Class B drug offenses committed prior to January 13, 2005, and sentenced to indeterminate terms under the old sentencing law. Inmates serving indeterminate terms with maximum terms of “more than 3 years” (e.g., 2–4 years) may petition the sentencing court for resentencing under the new determinate sentencing scheme. As part of the application, the inmate may also move for resentencing on any Class C, D, or E drug or marijuana convictions “which were imposed by the sentencing court at the same time or were included in the same order of commitment as such class B felony.” The resentencing procedure will be governed by the same rules included in the 2004 Drug Law Reform Act. Inmates will have the immediate right to appointed counsel to prepare and file the petition, and the right to appeal from adverse determinations.

Exclusions: Inmates who are serving time for or have been convicted within the preceding 10 years, as measured from the date of the resentencing application, of a violent felony, or a merit-time ineligible offense [see Corr. Law § 803(1)(d)(ii)], or who were ever adjudicated a second violent felony offender or a persistent violent felony offender, are ineligible for resentencing.

### 6. New Crimes (Effective November 1, 2009)

The legislation enacts new crimes and enhanced sentencing for sale of a controlled substance by an adult (over age 21) to a child (under age 17), and for so-called drug kingpins. The “kingpin” statute applies to directors and profiteers of controlled substance organizations. The monetary threshold for criminal liability is set at \$75,000 over the course of 6 months or one year, depending on the defendant’s role in the organization. (Bill sections 28 and 29). ☞

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### *Defender News* (continued from page 8)

York Law Journal article, *State Preemption of Local Sex-Offender Residency Laws*, NYSDA’s Al O’Connor discussed the *G.H.* appellate court decision and the relevance of the court’s preemption analysis in New York. (www.law.com, 11/24/2008.) Recent lower court decisions in New York finding that state law preempts local residency restrictions and proposed state residency restriction legislation were discussed in the January-February 2009 issue of the *REPORT*. (www.nysda.org/09\_Jan-FebREPORT.pdf.)

### ***NYS Division of Parole Offers Parolee Information Online***

The New York State Division of Parole is now providing information about parolees on its website, www.parole.state.ny.us. The “Lookup” feature is a database that includes all persons in New York currently on parole and those who have completed their supervision periods, except youthful offenders; approximately 323,000 names are in the database. The database offers information on the crime of conviction, county of the crime, date parole supervision started, status of the supervision, and contact information for the individual’s parole officer. Users can search for parolees using a NYSID or DIN number, name, or last name and date of birth. The database is updated on a regular basis.

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### ***Primer on Mental Health Court Released***

The Council of State Governments Justice Center recently released a new publication, *Mental Health Courts: A Primer for Policymakers and Practitioners*. (<http://consensusproject.org/mhcp/mhc-primer.pdf>.) The *Primer* provides an overview of mental health courts, including the types of individuals who participate in these courts, the goals of the courts, and distinctions between mental health courts and drug courts, presents issues that should be considered in developing a mental health court, and identifies resources available for such courts. As noted in the Council’s 2005 publication, *A Guide to Mental Health Court Design and Implementation*, discussions about launching a mental health court and design of such a court must include a number of key stakeholders, including defense counsel. (<http://consensusproject.org/mhcp/Guide-MHC-Design.pdf>.)

Another recent Justice Center publication, *Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court*, lists 10 elements that should be considered before a mental health court is established. (<http://consensusproject.org/mhcp/essential.elements.pdf>.) This publication notes that “[d]efense attorneys play an integral role in helping to ensure that defendants’ choices are informed throughout their involvement in the mental health court” and emphasizes that defense counsel, as with all other mental health court staff, should receive specialized training in mental health issues. The Criminal Justice/Mental Health Consensus Project, which is coordinated by the Justice Center, offers a variety of

*(continued on page 39)*

**2009 Rockefeller Drug Law Reform Sentencing Chart<sup>6</sup>**

Class Felony	Determinate Sentence Term	Post-Release Supervision	Probation Permitted	Alternative Definite Sentence Permitted	Y.O. Permitted	Parole Supervision Sentence	Shock Permitted <sup>4</sup>	Judicially Ordered Shock	CASAT Sentence Permitted	Judicial Diversion <sup>5, 8</sup>
A-I First Offense	8 - 20	5	No	No	No	No	No	No	Yes	No
A-I Major Trafficker	15/25-Life <sup>9</sup>	5 <sup>9</sup>	No	No	No	No	No	No	Yes	No
A-I Prior Non-Violent	12 - 24	5	No	No	No	No	No	No	Yes	No
A-I Prior Violent	15 - 30	5	No	No	No	No	No	No	Yes	No
A-II First Offense	3 - 10	5	Yes/life <sup>1</sup>	No	No	No	Yes	Yes <sup>3</sup>	Yes	No
A-II Prior Non-Violent	6 - 14	5	Yes/life <sup>1</sup>	No	No	No	Yes	Yes <sup>3</sup>	Yes	No
A-II Prior Violent	8 - 17	5	No	No	No	No	Yes	Yes <sup>3</sup>	Yes	No
B First Offense	1 - 9	1 - 2	Yes/5	Yes 1 yr. or less	Yes	Yes <sup>2</sup>	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
B Sale Near School	2 - 9	1 - 2	Yes/5	Yes 1 yr. or less	Yes	Yes <sup>2</sup>	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
B Sale to a Child	2 - 9	1 - 2	Yes/25 <sup>1</sup>	No	NA	No	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
B Prior Non-Violent	2 - 12	1 ½ - 3	Yes/life <sup>1</sup>	No	No	No	Yes	Yes <sup>3</sup>	Yes <sup>7</sup>	Yes <sup>5</sup>
B Prior Violent	6 - 15	1 ½ - 3	No	No	No	No	No	No	Yes <sup>7</sup>	No
C First Offense	1 - 5 ½	1 - 2	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
C Prior Non-Violent	1 ½ - 8	1 ½ - 3	Yes/5	Yes 1 yr. or less	No	Yes <sup>2</sup>	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
C Prior Violent	3 ½ - 9	1 ½ - 3	No	No	No	No	Yes	Yes <sup>3</sup>	Yes	No
D First Offense	1 - 2 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
D Prior Non-Violent	1 ½ - 4	1 - 2	Yes/5	Yes 1 yr. or less	No	Yes <sup>2</sup>	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
D Prior Violent	2 ½ - 4 ½	1 - 2	No	No	No	No	Yes	Yes <sup>3</sup>	Yes	No
E First Offense	1 - 1 ½	1	Yes/5	Yes 1 yr. or less	Yes	No	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
E Prior Non-Violent	1 ½ - 2	1 - 2	Yes/5	Yes 1 yr. or less	No	Yes <sup>2</sup>	Yes	Yes <sup>3</sup>	Yes	Yes <sup>5</sup>
E Prior Violent	2 - 2 ½	1 - 2	No	No	No	No	Yes	Yes <sup>3</sup>	Yes	No

<sup>1</sup> Requires recommendation of DA, material assistance in prosecution of drug offense, and court approval. (Penal Law §65.00(1)(b)).  
<sup>2</sup> Excluded if convicted of another felony offense, prior violent felony, a class A or B non-drug or subject to an undischarged term. CPL §410.91 (2).  
<sup>3</sup> No prior state prison. Less than 50 yrs old. Must be within 3 years to parole or conditional release. Excludes crimes listed in (Corr.L. §865(1)). For terms of more than 3 years must wait for rolling admissions.  
<sup>4</sup> Same as ft. note 3. For terms of more than 3 years must wait for rolling admission. (Corr.L. §865(2)).  
<sup>5</sup> See CPL §216.00(1)(a) for exclusions, but D.A. may consent to include exclusions.  
<sup>6</sup> Effective 4/7/09.  
<sup>7</sup> Must serve 9 months jail or prison time to be eligible.  
<sup>8</sup> Judicial Diversion effective 10/7/09. Applies to crimes committed prior to Act not yet sentenced.  
<sup>9</sup> Alternative determinate sentence possible (8-20).

**Center for Community Alternatives**

115 E. Jefferson St., Suite 300 • Syracuse, NY 13202 • ph 315/422-5638 • fax 315/471-4924 • 39 W. 19<sup>th</sup> St., 10<sup>th</sup> Fl. New York, NY 10011 • ph 212/691-1911 • fax 212/675-0825

**EARLY RELEASE CHECKLIST: DETERMINATE SENTENCES**

Program	Eligibility	Exclusions	Impact	Impact on Client
<b>Willard</b>	CPL § 410.91; specified 2d D & E property offenses; 2d C, D, & E drug offenses; 1st B drug offense (except CSCS to a Child)	No current conviction non-specified offense; no prior VFO, class A or B non-drug felony conviction; not subject to undischarged term of prison	Sentenced to parole supervision, with first 90 days spent at Willard	
<b>Shock</b>	Correction Law §§ 865-867; b/w 16 and 50 years old; within 3 years conditional release	Not convicted A-I, VFO, sex, homicide, escape or absconding, or second B drug felony w/ prior violent; cannot have previously done state bid. Must be screened by Shock screening committee (indications of violence, predatory behavior, or crimes of sophistication; medical or mental health problems)	Graduates of 6 month program earn EEC <sup>1</sup> and are immediately conditional release eligible	
<b>Judicial Shock</b>	PL § 60.04(7); same as above, but must also be convicted drug offense	Same as above, but screened only for medical/mental health problems; if exist, alternative-to-Shock program must be made available.	same as above	
<b>Temporary Release (includes CASAT)</b>	Correction Law §§ 851-861; within 24 months of earliest release (30 months for drug offenses) and requisite time in (generally 6 months; 9 months for second B felony drug offense)	Not convicted VFO, sex offense, homicide, escape, absconding, or aggravated harassment of DOCS employee; violent felony override avail where no use or possession of deadly weapon/dangerous or no serious injury.	Release to community for extended periods of time for work, education, etc.	
<b>Judicial CASAT</b>	PL § 60.04(6); conviction for drug offense	For CASAT annex and work release, must not have any of above exclusions. If above exclusions apply, will only get CASAT annex and only when 6-9 months from earliest release.	If TR eligible, will enter CASAT annex for 6 months and then work release.	
<b>Presumptive Release</b>	Correction Law § 806; have achieved an EEC (§ 805)	Not convicted A-I, VFO, specified homicide, sex offense, sex performance of child, hate crime, terrorism, or aggravated harassment of employee; no serious disciplinary infraction or frivolous lawsuit.	Released at earliest release opportunity	
<b>Merit Release</b>	Correction Law § 803; achieve EEC one of 4 program objectives.	Not convicted VFO, A-I non-drug felony, sex or incest offense, or aggravated harassment DOCS employee	1/7 off minimum <i>in addition to</i> the 1/7 off for conditional release.	
<b>Conditional Release</b>	all determinate sentences	poor institutional record	1/7 off determinate sentence	

**Post Release Supervision: 1-5 for non sex felonies (PL § 70.45(2)); 3 to 25 years for felony sex offenses (PL § 70.80).**

<sup>1</sup> Earned Eligibility Certificate. See Correction Law § 805; issued if individual achieves DOCS programming objectives.

**EARLY RELEASE CHECKLIST:  
INDETERMINATE SENTENCES**

Program	Eligibility	Exclusions	Impact	Impact on Client
<b>Willard</b>	CPL § 410.91; specified 2d D & E property offenses; 2d C, D, & E drug offenses; 1st B drug offense (except CSCS to Child)	No current conviction non-specified offense; no prior VFO, class A or B non-drug felony conviction; not subject to undischarged term of prison	Sentenced to parole supervision, with first 90 days spent at Willard	
<b>Shock</b>	Correction Law §§ 865-867; b/w 16 and 50 years old; within 3 years parole eligibility	Not convicted A-I, VFO, sex, homicide, escape, absconding, or second B drug felony w/ prior violent; cannot have previously done state bid. Must be screened by Shock screening committee (indications of violence, predatory behavior, or crimes of sophistication; medical or mental health problems)	Graduates of 6 month program earn EEC <sup>1</sup> and are immediately parole eligible	
<b>Judicial Shock</b>	PL§ 60.04(7); same as above, but must also be convicted drug offense	Same as above, but screened only for medical/ mental health problems; if exist, alternative-to-Shock program must be made available.	same as above	
<b>Temporary Release (includes CASAT)</b>	Correction Law §§ 851-861; within 24 months of earliest release (30 months for drug offenses) and requisite time in (generally 6 months; 9 months for second B felony drug offense)	Not convicted VFO, sex offense, homicide, escape, absconding, or aggravated harassment of DOCS employee; violent felony override avail where no possession of use deadly weapon/dangerous instrument or no serious injury.	release to community for extended periods of time for work, education, etc.	
<b>Judicial CASAT</b>	PL § 60.04(6); conviction for drug offense	For CASAT annex and work release, must not have any of above exclusions. If above exclusions apply, will only get CASAT annex and only when 6-9 months from earliest release.	If TR eligible, will enter CASAT annex for 6 months and then work release.	
<b>Presumptive Release</b>	Correction Law § 806; have achieved an EEC (§ 805)	Not convicted A-I, VFO, specified homicide, sex offense, sex performance of child, hate crime, terrorism, or aggravated harassment of employee; no serious disciplinary infraction or frivolous lawsuit.	Released at earliest release opportunity without having to appear before Parole Board.	
<b>Merit Release</b>	Correction Law § 803; achieve EEC one of 4 program objectives.	Not convicted VFO, A-I non-drug felony, sex or incest offense, or aggravated harassment DOCS employee	1/6 off minimum sentence (1/3 for A-I drug felonies)	
<b>Supplemental Merit Release</b>	L. 2005, Ch. 736, § 30; drug offense conviction prior to 2004; same as above, but must complete 2 of 4 program objectives.	same as above, but A-I felony drug offenses excluded.	an additional 1/6 off min.	
<b>Conditional Release</b>	all indeterminate sentences	poor institutional record	1/3 off maximum	

<sup>1</sup> Earned Eligibility Certificate. See Correction Law § 805; measures whether or not achieved DOCS programming objectives.

Prisoners' Legal Services of New York (PLS) is seeking applicants for a **Staff Attorney** position in our Plattsburg, New York regional office. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. We have regional offices in Albany, Buffalo, Ithaca, and Plattsburg. PLS handles a variety of advocacy as well as litigation in state and federal courts involving civil matters that include mental health and medical care, prison disciplinary proceedings, excessive use of force, conditions of confinement, sentence calculation, and jail time credit. We provide high quality legal services and have been successful in establishing important rights for our clients. We seek to hire an attorney who is committed to providing legal services to the disadvantaged. Applicants must be admitted to practice in New York State or be eligible for admission pro hac vice, and be willing to take the next available bar exam. Applicants must have between four (4) and six (6) years of legal practice experience, preferably in the areas of prisoners' rights, civil legal services, civil rights, poverty law, or federal litigation, and who are interested in litigating in state and federal court. Applicants also must be willing to travel to conduct prison visits throughout New York State. We have a need for staff who are fluent in Spanish. Upon hire, the Plattsburg office will be staffed by a managing attorney, two staff attorneys, a paralegal, and an administrative support person, all of whom collaborate with other PLS staff throughout the state. PLS offers a competitive salary in addition to an outstanding benefit package, including health, dental, long-term disability, and life insurance, as well as generous leave policies. We seek to be a well-balanced, diverse organization. We encourage women and minorities to apply. Plattsburg is located in the northeastern corner of the state, along the shore of Lake Champlain, near the heart of the Adirondack Park, and approximately one hour from both Montreal, Quebec, and Burlington, Vermont. To apply, please send a cover letter, résumé, writing sample, and list of three references by regular mail or email to Michael Cassidy, Managing Attorney, Prisoners' Legal Services of New York, 121 Bridge Street, Suite 202, Plattsburg, NY 12901, mcassidy@plsny.org. Deadline: June 12, 2009.

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. 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](http://www.oneidacounty.org).

The Urban Justice Center's Mental Health Project seeks a **Parent Advocacy Attorney** for its Parents with Psychiatric Disabilities Legal Advocacy Project (PPDLA). The PPDLA is funded by the Commission on Quality of Care and Advocacy for Persons with Disabilities. The mission of the PPDLA is to provide representation, information, and advice to parents with psychiatric disabilities in Family Court, particularly in abuse and neglect and termination proceedings, in New York City and Nassau, Suffolk, and Westchester counties. Candidates must have the creativity and drive to continue a burgeoning area of practice within our organization and the expertise to provide excellent advice and representation. The attorney will cooperate with an advisory council to help guide the PPDLA; establish online resources for parents with psychiatric disabilities in Family Court; publish a practitioner's guide specifically for Family Court attorneys and judges working with parents with psychiatric disabilities, and a Family Court handbook for parents; conduct trainings in New York City, Westchester, Suffolk, and

Nassau counties; and represent parents with psychiatric disabilities in Family Court. Requirements: J.D. and 5 years' experience, with at least 3 years' experience specifically litigating neglect and termination proceedings. Experience with the mental health system and fluency in Spanish are strong pluses. To apply, send a cover letter, résumé, brief writing sample, and contact information for three references to Charlyne Brumskine Peay, Acting Project Director, Mental Health Project, Urban Justice Center, 123 William Street, 16th Floor, New York, NY 10038 or [cpeay@urbanjustice.org](mailto:cpeay@urbanjustice.org). Applications will be reviewed on a rolling basis, so applicants are encouraged to apply as soon as possible; deadline 6/30/2009. Please do not contact us by fax or phone. Salary DOE, excellent benefits, vacation, and leave package. People of color, LGBT people, people who have personal experience with poverty, and people with disabilities are strongly encouraged to apply. For more information, visit [www.urbanjustice.org](http://www.urbanjustice.org).

Legal Assistance of Western New York, Inc. (LAWNY) is seeking applicants for up to two **Equal Justice Works AmeriCorps Legal Fellow** positions becoming available on or about August 1, 2009 through a Corporation for National and Community Service funded program administered by Equal Justice Works. LAWNY currently has three Equal Justice Works AmeriCorps Legal Fellows, one each in our Ithaca, Rochester, and Geneva offices. We are seeking to fill the Ithaca position, and the Rochester position may also be available. The three legal fellows will work together to address gaps in legal services through the recruitment and management of pro bono law students and attorneys, and through the provision of direct legal services. The goal is to develop quality pro bono opportunities for law students in order to expand the availability of legal resources to low-income and underserved communities throughout upstate New York. Fellows will spend approximately 50% of their time providing direct legal assistance to LAWNY clients. Applicants should be admitted to practice in New York or recent law school graduates who have sat for the last bar exam or are able to sit for the next available bar examination. Excellent inter-

*(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

Harmless and Reversible Error (Harmless Error) (General) HRE; 183.5(10) (20)

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

Hedgpath v Pulido, 555 US \_\_, 129 Sct 530 (2008)

The respondent was convicted of felony murder after a jury trial. On appeal, he challenged the jury instructions because they allowed a finding of felony murder if he formed the intent to aid and abet the underlying crime after the murder. The California Supreme Court held this theory was invalid, but found that the error did not prejudice the respondent and affirmed the conviction. The district court granted the respondent's habeas petition, holding that the error had a "substantial and injurious effect or influence in determining the jury's verdict." The Court of Appeals affirmed, concluding that instructing the jury on multiple theories of guilt, one of which is legally improper, was a structural error that did not require harmless-error analysis.

**Holding:** A conviction based on a general verdict can be challenged if the jury was instructed on alternative theories of guilt and may have relied on a legally invalid one. See *Stromberg v California*, 283 US 359 (1931); *Yates v United States*, 354 US 298 (1957). The parties agree that the Court of Appeals erred in treating the jury charge issue as structural. The proper inquiry was whether the flaw in the instructions had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v Abrahamson*, 507 US 619, 623 (1993); see *Chapman v California*, 386 US 18 (1967). "[V]arious forms of instructional error are not structural but instead trial errors subject to harmless-error review. See, e.g., *Neder v. United States*, 527 U.S. 1 (1999) . . . ; *California v. Roy*, 519 U.S. 2 (1996) . . ." Unless the invalid instruction vitiated all the jury's findings, harmless-error analysis applies. On remand, the Court of Appeals must apply the *Brecht*, harmless-error analysis. Judgment vacated and matter remanded.

**Dissent:** [Stevens, J] Although the Court of Appeals incorrectly used the term "structural," it applied the same correct analysis as the district court, which is set forth in *Kotteakos v United States* (328 US 750 [1946]), *Brecht*, and *O'Neal v McAninch* (513 US 432 [1995]). Since the district

court's analysis was correct and the appellate court's analysis was essentially the same, it is a waste of judicial resources to remand for another review.

Prior Convictions (Sentencing) PRC; 295(25)

Sentencing (Enhancement) SEN; 345(32)

Chambers v United States, 555 US \_\_, 129 Sct 687 (2009)

The petitioner pleaded guilty to being a felon unlawfully in possession of a firearm. The district court imposed a 15-year mandatory prison term under the Armed Career Criminal Act (ACCA) based on the defendant's three prior convictions, one of which was an Illinois state conviction for failing to report to a penal institution. See Illinois Comp Stat, ch. 720, §5/31-6(a). The court, concluding that the failure to report conviction was the equivalent of escape from a penal institution, held that it was a violent felony under the ACCA. The Court of Appeals affirmed.

**Holding:** The crime of failure to report is not a violent felony within the terms of the ACCA's residual clause. See 18 USC 924(e)(2)(B)(ii). In determining whether an offense is a violent felony, courts must examine the crime as generally committed. See *Taylor v United States*, 495 US 575, 602 (1990); see also *Shepard v United States*, 544 US 13, 16-17 (2005). The Illinois statute includes several different kinds of behavior, including escape from custody, failure to report, and failing to abide by the terms of home confinement. The failure to report is a separate crime that differs from escape. The failure to report is less likely to involve a risk of physical harm (see *Begay v United States*, 553 US \_\_, \_\_ [2008] (slip op. at 7)), and the statute separates the two categories of behavior into different felony classes. Failure to report does not have an element of use, attempted use, or threatened use of physical force against another (see 18 USC 924(e)(2)(B)(i)), nor does it involve conduct that presents a serious potential risk of physical injury to another. See 18 USC 924(e)(2)(B)(ii). A person who commits a failure to report offense is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical injury.'" See Sentencing Guideline, "Escape, Instigating or Assisting Escape," 1 *United States Sentencing Commission, Guidelines Manual* § 2P1.1 (Nov. 2008); *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007*, p. 7 (Nov. 2008). Judgment reversed and matter remanded.

**Concurrence:** [Alito, J] While the analysis and result are correct under *Begay* and *Taylor*, it is clear that it is nearly impossible to apply the ACCA's residual clause consistently. "[T]he only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement."

US Supreme Court *continued*

Habeas Corpus (Federal) (General) HAB; 182.5(15) (20)

Jimenez v Quarterman, 555 US \_\_, 129 Sct 681 (2009)

In a direct appeal of the petitioner’s 1995 conviction, his attorney filed an *Anders* brief (*Anders v California*, 386 US 738 [1967]); the petitioner did not receive a copy of the brief. The appeal was dismissed on September 11, 1996, but the petitioner did not receive a copy of it. When the petitioner eventually learned of the dismissal, he filed a state habeas corpus petition claiming that he was denied his meaningful right to appeal. On September 25, 2002, the Texas Court of Criminal Appeals granted the petitioner the right to file an out-of-time appeal. The petitioner’s conviction was affirmed and the time for seeking certiorari review with the US Supreme Court expired on January 4, 2004. On December 6, 2004, the petitioner filed a second habeas corpus petition in state court, which was denied on June 29, 2005. The petitioner filed his federal habeas corpus petition on July 19, 2005. The district court dismissed the petition as time-barred and the Court of Appeals denied his request for a certificate of appealability.

**Holding:** The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a one-year time limitation for a state prisoner to file a federal habeas corpus petition, which runs from the latest of four dates. *See* 28 USC 2244(d)(1). The relevant date in this case is “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 USC 2244(d)(1)(A). Under the plain language of the statute, direct review of the petitioner’s conviction became final on January 6, 2004, and the time during which the petitioner’s properly filed application for state post-conviction relief was pending is excluded from the one-year period. *See* 28 USC 2244(d)(2). Direct review cannot end until the availability of direct appeal to the state courts and to this Court is exhausted. *See Caspari v Bohlen*, 510 US 383, 390 (1994); *Lawrence v Florida*, 549 US 327, 332-333 (2007). When the state court reopened direct review of the petitioner’s conviction, the conviction was no longer final because it was capable of being modified through direct appeal to the state courts and to this Court. When a federal court is presented with an individual’s first habeas petition, the statute requires the court to use the “date on which the entirety of the state direct appellate review process was completed.” Judgment reversed and matter remanded.

Arrest (Police Officers) (Records) (Warrants) ARR; 35(30) (40) (55)

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause (Official Sources)]) SEA; 335(10[a] [g(v)])

Herring v United States, 555 US \_\_, 129 Sct 695 (2009)

The petitioner went to the police station to retrieve something from his impounded truck. A sheriff’s investigator, prompted by his visit, asked the warrant clerk to check for outstanding warrants. When no warrants were discovered, the investigator asked the clerk to contact the clerk in a neighboring county. That county’s database showed an open bench warrant. Police officers stopped the petitioner’s car near the station and a search revealed methamphetamine and a gun. When the clerk in the other county realized the warrant had been recalled five months earlier, she contacted the warrant clerk, who passed the information to the officers. Although this occurred within 10 or 15 minutes, the petitioner had already been arrested. The district court denied the petitioner’s motion to suppress the evidence, and he was convicted of federal drug and gun possession offenses. The Court of Appeals affirmed.

**Holding:** The good faith exception to the exclusionary rule applies because the arrest and search resulted from a negligent act, an isolated police warrant database error. *See United States v Leon*, 468 US 897 (1984). For the exclusionary rule to apply, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” Analysis of culpability and deterrence is objective and does not depend on the subjective awareness of the arresting officers. Exclusion would be justified if the police were reckless in maintaining a warrant system or knowingly made false entries. However, there was no evidence that errors in the database at issue here are routine or widespread and the investigator’s reliance on the database was objectively reasonable. *See Arizona v Evans*, 514 US 1, 15 (1995). Judgment affirmed.

**Dissent:** [Ginsburg, J] “Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule.”

**Dissent:** [Breyer, J] There must be a clear line between judicial recordkeeping errors, which do not usually trigger the exclusionary rule, and police recordkeeping errors, to which the exclusionary rule should always apply.

Juries and Jury Trials (Constitution—right to) (Findings) JRY; 225(20) (35)

US Supreme Court *continued*

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

Oregon v Ice, 555 US \_\_, 129 Sct 711 (2009)

The respondent was convicted of two counts of burglary and four counts of sexual assault stemming from two separate incidents. The sentencing judge, following Oregon's sentencing law, made statutorily mandated factual findings to support consecutive sentences for the burglary counts and two of the assault counts, for a total sentence of 340 months. *See Ore Rev Stat 137.123*. The sentence would have been 90 months if the sentences were concurrent. The appellate court affirmed, but the Oregon Supreme Court reversed.

**Holding:** The *Apprendi/Blakely* rule does not apply to the Oregon consecutive sentencing statute. *See Apprendi v New Jersey*, 530 US 466 (2000); *Blakely v Washington*, 542 US 296 (2004). *Apprendi* held that the Sixth Amendment jury-trial right requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." A review of historical practice and respect for state sovereignty show that *Apprendi's* rule should not be extended to the imposition of sentences for discrete crimes. Historically, the jury did not play a role in deciding between consecutive and concurrent sentences and most courts imposed consecutive sentences. Because state legislative reforms regarding imposition of multiple sentences do not involve judicial encroachment on facts historically found by the jury, the reforms to not implicate core concerns underlying *Apprendi*. States' interest in developing their penal systems and their dominion over this area counsel against extending *Apprendi* to Oregon's consecutive sentencing law and similar laws in other states. And such an extension would be difficult for states to administer. Judgment reversed and matter remanded.

**Dissent:** [Scalia, J] Consecutive sentences are a greater punishment, and the facts underlying that determination must be decided by a jury beyond a reasonable doubt. *See Ring v Arizona*, 536 US 584, 602 (2002). The Court relies on a distinction without a difference and its arguments against applying *Apprendi* are the same arguments that this Court rejected in *Apprendi*.

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Scope]) (Stop and Frisk Suppression) (Weapons-frisks)

Arizona v Johnson, 555 US \_\_, 129 Sct 781 (2009)

The defendant was a backseat passenger in a car that

was pulled over for an insurance-related violation. The defendant, the driver, and the front-seat passenger all denied that there were weapons in the car. The driver was instructed to get out of the car. The officer who was watching the defendant noticed that he had looked back and kept his eyes on the officers when they approached the car. She also noticed that he was wearing clothing that she thought was consistent with gang membership and saw a scanner in his jacket pocket. The officer, wanting to question the defendant privately about the gang he might be in, asked him to get out of the car. Because the officer suspected that he might have a weapon, she patted him down. During the patdown, she felt the butt of a gun near the defendant's waist. The defendant was convicted of a weapon possession offense. The Arizona Court of Appeals reversed the conviction and the Arizona Supreme Court denied review.

**Holding:** When a car is lawfully detained for a traffic violation, the police may order the driver and any passengers out of the car. *See Pennsylvania v Mimms*, 434 US 106 (1977); *Maryland v Wilson*, 519 US 408 (1997). During a lawful traffic stop, the driver and any passengers are seized until the officers inform them that they are free to go. *See Brendlin v California*, 551 US 249 (2007). Once out of the car, an officer may pat down a passenger for weapons if that officer reasonably suspects that the person might be armed and presently dangerous. It is irrelevant that the officer sought to ask the defendant about matters that were unrelated to the traffic stop, as long as the inquiry does not measurably extend the duration of the stop. *See Muehler v Mena*, 544 US 93, 100-101 (2005). Nothing that occurred prior to the frisk conveyed to the defendant that the stop had ended or that he was otherwise free to depart without police permission, so the issue of consent is also irrelevant. Judgment reversed and matter remanded.

Federal Law (General) (Procedure) FDL; 166(20) (30)

Sentencing (Appellate Review) SEN; 345(8) (39)  
(Guidelines)

Nelson v United States, 555 US \_\_, 129 Sct 890 (2009)

The district court sentenced the petitioner to 360 months in prison, the bottom of the United States Sentencing Guidelines range, and noted that circuit precedent establishes that the Guidelines are presumptively reasonable. The Court of Appeals affirmed. The Supreme Court vacated that judgment and remanded for further consideration in light of *Rita v United States*, 551 US 338 (2007). The Court of Appeals again affirmed.

**Holding:** Court precedent establishes that sentencing judges may not presume that a sentence within the Guideline range is reasonable. *See Gall v United States*, 552 US \_\_ (2007). In *Rita*, the Court held that the reasonableness presumption is an appellate court presumption. The

US Supreme Court *continued*

district court’s comments at sentencing make clear that it applied a presumption of reasonableness to the Guidelines range, which is an error. Judgment reversed and matter remanded.

**Concurrence:** [Breyer, J] Because the Solicitor General conceded the Court of Appeals’ error, the certiorari petition should be granted and the judgment vacated.

New York State Court of Appeals

Appeals and Writs (Scope and Extent of Review) APP; 25(90)

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

People v Dorm, 12 NY3d 16, 874 NYS2d 866 (2009)

The relationship between the defendant and the complainant ended after they had a physical altercation. A few weeks later, the defendant went to the complainant’s place of employment, and while they talked at a nearby cafe, the defendant grabbed the complainant’s hand to keep her from leaving. When he showed up there the next day, he was arrested. At his first trial, the court denied the prosecution’s request to introduce evidence of the defendant’s prior conduct toward the complainant and similar conduct against other women for which he was arrested. The jury acquitted the defendant of third-degree assault and stalking, but deadlocked on the remaining charges. The judge who presided over the second trial allowed evidence about the defendant’s other conduct toward the complainant, but not other women, and gave limiting instructions to the jury. The jury convicted the defendant of unlawful imprisonment and second-degree assault. The Appellate Division affirmed.

**Holding:** The evidence of the defendant’s conduct was admissible because it was not propensity evidence. See *People v Molineux*, 168 NY 264. It was probative of his motive and intent to assault the complainant, it provided necessary background information about the relationship, and it put the charges in context. See *People v Resek*, 3 NY3d 385, 389. That the two judges reached opposite conclusions about the evidence does not suggest an abuse of discretion. The judges both properly exercised their discretion, and the analysis of whether the court properly exercised its discretion is not influenced by the outcomes of the trials. Order affirmed.

Sentencing (Concurrent/Consecutive) (Pronouncement) (Second Felony Offender) SEN; 345(10) (70) (72)

People ex rel Gill v Greene, 12 NY3d 1, 875 NY2d 826 (2009)

The petitioner was sentenced as a second felony offender to an indeterminate prison term. The court did not state whether the sentence would run consecutively to the petitioner’s prior, undischarged sentences. The Department of Correctional Services (DOCS) calculated the petitioner’s release date on the assumption that the sentences were consecutive to each other. The petitioner filed a habeas corpus petition alleging that the sentence was concurrent. The court dismissed the petition, concluding that even if he was correct, the petitioner was not entitled to habeas relief. The Appellate Division converted the habeas petition to an Article 78 petition and reversed.

**Holding:** When consecutive sentences are required by statute and the court does not state whether the sentences are concurrent or consecutive, the court is deemed to have imposed the legally required consecutive sentences. Because the petitioner was sentenced as a second felony offender, Penal Law 70.25(2-a) required the court to impose a consecutive prison term. The court’s omission related to the characterization of the sentence as either concurrent or consecutive, and not to a part of the sentence, such as post-release supervision. See *Matter of Garner v New York State Dept of Correctional Servs*, 10 NY3d 358; *Earley v Murray*, 451 F3d 71 (2d Cir 2006). Neither the statute nor the Constitution requires the court to state, orally or in writing, that the sentence is consecutive. And the court does not need to be notified of prior, undischarged sentences. Although the court had no choice but to impose a consecutive sentence, its silence was not an error and DOCS properly interpreted the 1994 sentence as consecutive to the prior sentences. Order reversed.

Search and Seizure (Arrest/Scene of the Crime Searches [Scope]) (Warrantless Searches) SEA; 335(10[m]) (80)

People v Maye, 12 NY3d 731, \_\_ NYS2d \_\_ (2009)

**Holding:** “Defendant seeks suppression of evidence including cocaine found in a ‘baggie’ during a manual body cavity search performed at a police station, without a warrant. The officer who carried out the search testified that he saw the ‘baggie’ protruding from the defendant’s rectum, and removed it. Since no exigent circumstances prevented the police from seeking prior judicial authorization for the search, defendant’s motion to suppress should be granted to the extent of suppressing the cocaine recovered (see *People v Hall*, 10 NY3d 303, 311 [2008]).” Order modified and matter remanded.

## NY Court of Appeals *continued*

Arrest (Identification) (Warrantless) ARR; 35(15) (54)

Confessions (Illegal Arrest) CNF; 70(35)

Search and Seizure (Detention) SEA; 335(25)

*People v Ryan*, 12 NY3d 28, \_\_ NYS2d \_\_ (2009)

A police officer asked the defendant to sit in a marked police car; the request was based on descriptions of the perpetrator of a car-jacking that occurred five hours earlier and the police officer's prior encounters with the defendant. The defendant was locked in the car until another officer arrived; the officer did not tell the defendant why he was being detained. He was then moved to another locked police car and was told he was a possible suspect in a car-jacking. The police photographed the defendant; the photo showed the defendant with his hands behind his back. The complainant failed to identify the defendant from a photo array, but another witness did identify him. The defendant was held for 13 minutes before the officers informed him that he was under arrest. Upon arriving at the police station, he was placed in a locked room. He waived his *Miranda* rights, confessed, and later signed a written statement.

**Holding:** The defendant's detention was not justified by any special law enforcement need. *See People v Hicks*, 68 NY2d 234. Unlike a show-up, the defendant did not need to be present while the police conducted the photo array, and there were no other exigent circumstances that might have justified the detention. *Cf People v Allen*, 73 NY2d 378, 379-380. The police did not even know that the witness would be available when they first detained the defendant. It must be inferred that the defendant was detained to make it convenient to arrest him if there was a positive identification. *See People v Robinson*, 282 AD2d 75, 81. Thus, the photographs taken during the detention must be suppressed. The question of whether the defendant's confessions and the evidence derived therefrom was not addressed by the lower courts. This is a mixed question of law and fact which should be presented to the trial court. Order modified by remitting to the trial court for further proceedings.

Evidence (Instructions) (Uncharged Crimes) EVI; 155(80) (132)

*People v Small*, 12 NY3d 732, 876 NYS2d 675 (2009)

**Holding:** The court properly exercised its discretion in granting the prosecution's application to present *Molineux* evidence mid-trial. The prosecution's application was made after the defendant raised an agency defense. The court gave appropriate limiting instructions, telling the jury that the evidence could not be considered

as proof of propensity, but was solely offered to rebut the agency defense on the issue of intent.

The defendant is not entitled as a matter of law to pre-trial notice of or a pretrial hearing regarding the prosecution's intent to offer *Molineux* evidence. *See People v Molineux*, 168 NY 264. In order to avoid unfairness to the defendant, the prosecutor must ask for a ruling outside the presence of the jury, and a hearing on the admissibility of such evidence should take place before trial or, at the latest, before the witness testifies. *See People v Ventimiglia*, 52 NY2d 350, 362. Order affirmed.

## First Department

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

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

Motions (Suppression) MOT; 255(40)

*People v Lopez*, 56 AD3d 280, 867 NYS2d 83 (1st Dept 2008)

**Holding:** "The plea was involuntary because, at the plea allocution, once again there was no mention of any of the rights defendant would be waiving by pleading guilty, including his right to a jury trial, his right of confrontation and his right against self-incrimination (*see People v Colon*, 42 AD3d 411 [2007]). Since defendant's plea was invalid, his waiver of the right to appeal is also invalid." The court erred by unduly restricting the defendant's opportunity to test the validity of the prosecution's case by cross-examining the arresting officer during the suppression hearing. The officer testified that a person who was present when he interviewed the complainant provided information about the incident. While the prosecution made a prima facie showing of probable cause for the arrest based on the complainant's information, this was not a proper basis for cutting off all questioning about the information provided by the other person. The defendant was entitled to ask about that person's account of the incident and description of the perpetrator. *See People v Misuis*, 47 NY2d 979. Judgment reversed, plea vacated, and matter remanded for further proceedings including a new suppression hearing. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Hearings) (Visitation) JUV; 230(60) (145)

*Matter of Robert C. v Katherine D.*, 56 AD3d 297, 867 NYS2d 404 (1st Dept 2008)

**Holding:** The court properly dismissed the petition for modification of a prior visitation order without prejudice due to the petitioner's nonappearance at a scheduled

First Department *continued*

hearing. The petitioner, who was incarcerated, refused to complete a form that would have allowed him to testify electronically and he did not appear on the date of the hearing. The court did not have to produce the petitioner since an alternative means for his participation was available. Contrary to the petitioner’s argument, his failure to appear was not due to the court’s statements about service of the summons. Although the court initially indicated that the petitioner had to personally serve the summons and petition upon the respondent, it later acknowledged that requirement would be relaxed if personal service was impossible. *See Matter of Cruz v Cruz*, 48 AD3d 804, 806 *lv den* 10 NY3d 712. The respondent did not appear at the hearing and there is no indication that she was served with the petition or given notice of the hearing. *See Matter of Church v Church*, 294 AD2d 625. Order affirmed. (Family Ct, Bronx Co [Levy, Ref])

Accomplices (Instructions)	ACC; 10(25)
Grand Jury (General) (Procedure) (Witnesses)	GRJ; 180(3) (5) (15)
People v Pacheco, 56 AD3d 381, 868 NYS2d 625 (1st Dept 2008)	

**Holding:** The court erred in dismissing the indictment. The defendant and three others were charged with burglarizing a truck. The grand jury first indicted the two men who took a bag from the truck. In his grand jury testimony, the defendant stated that he told the two men not to steal from the truck. The grand jury delayed its vote on the defendant’s charges until it heard testimony from the driver of the van the men were in before the burglary, because his testimony was potentially relevant to its decision. After the driver testified, the grand jury indicted the defendant, but not the driver. The court dismissed the indictment because the prosecution did not instruct the grand jury that the driver’s testimony could only be considered if there was corroborating evidence. The court’s decision on corroboration is correct; CPL 60.22 applies because CPL 190.65(1) provides that a grand jury may not indict when the evidence is not legally sufficient because corroboration that is required as a matter of law to sustain a conviction is absent. However, because this error did not impair the integrity of the grand jury (*see People v Darby*, 75 NY2d 449, 455), the indictment must be reinstated. There was sufficient evidence to connect the defendant to the crimes with which he was charged. *See People v Johnson*, 32 AD3d 761 *lv den* 7 NY3d 902. Order reversed, indictment reinstated, and matter remanded. (Supreme Ct, New York Co [Scherer, J])

**Concurrence:** [Catterson, J] The lower court erred in ruling that an accomplice corroboration instruction must

be provided to the grand jury for codefendant testimony. CPL 190.65(1) “merely stands for the proposition that a defendant may not be indicted for an offense which requires corroboration without such evidence being presented to the grand jury. To transmogrify this section into a requirement that the People charge accomplice liability flies in the face of [*People v*] *Calbud* [49 NY2d 389] and its progeny.”

Instructions to Jury (General)	ISJ; 205(35)
Weapons (General) (Possession)	WEA; 385(22) (30)
People v Wood, 58 AD3d 242, 869 NYS2d 401 (1st Dept 2008)	

The defendant was charged with possession of a switchblade knife that was disguised as a cigarette lighter. The defendant moved for a trial order of dismissal, arguing that there was no evidence that he knowingly possessed a switchblade; the court reserved decision. The court denied defense counsel’s request that the jury be instructed that it must find that the defendant knew the object he possessed was a weapon and not merely a lighter, stating that Penal Law 265.01(1) was a strict liability statute. The court instructed the jury that the offense had two elements, possession of a weapon and that the weapon was a switchblade, and that while the defendant had to know he had the item, he did not have to know the precise nature of it.

**Holding:** The court erred in failing to instruct the jury that the prosecution must prove beyond a reasonable doubt that the defendant knowingly and voluntarily possessed a knife. Penal Law article 15 requires that a defendant be aware of physically possessing a prohibited object to be convicted. Case law interpreting Penal Law 265.01(1) and the legislative history of that section and its predecessor statute (former Penal Law 1897) show that possession of a weapon must be knowing and voluntary. *See People v Persce*, 204 NY 397, 402; *People v Saunders*, 85 NY2d 339, 341-342. “Where the nature of the object possessed fails to provide notice to the possessor that the object may be subject to government regulation or prohibition, it would violate principles of due process to allow a conviction without proof of mental culpability . . . .” An element of knowing possession of a weapon must be read into the statute. *See People v Small*, 157 Misc 2d 673, 681. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [McLaughlin, J])

Family Court (General)	FAM; 164(20)
Jurisdiction (Personal)	JSD; 227(5)
Matter of Kiesha G.-S. v Alphonso S., 57 AD3d 289, 870 NYS2d 240 (1st Dept 2008)	

**First Department** *continued*

The court denied the respondent's motion to vacate a five-year order of protection on behalf of the petitioner and the parties' children, which was entered on default.

**Holding:** The record does not include documentation showing that the respondent, who is incarcerated, was served with the summons to appear at the family offense proceeding. *See Chase Manhattan Bank v Carlson*, 113 AD2d 734, 735. While the record contains an order to produce, there is no evidence that the order was served or that the respondent was told that he had to request to be produced. *See Matter of Jung*, 11 NY3d 365. Even if service and notice were properly given, the motion should be granted. The respondent's attempt to respond to the proceeding when he was made aware of it shows that his failure to appear was not willful and provides a reasonable excuse to vacate the default. *See Matter of Precyse T.*, 13 AD3d 1113. The respondent also raised viable arguments challenging the sufficiency of the petitioner's contentions and there is no indication that the petitioner would be prejudiced should the respondent be relieved of the default. Order reversed, motion granted, and matter remanded for a hearing to determine whether the court has personal jurisdiction over the respondent. (Family Ct, Bronx Co [Cordova, J])

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Trial (Confrontation of Witnesses) TRI; 375(5) (15)  
(General)

Witnesses (Confrontation of Witnessess) (Cross Examination) WIT; 390(7) (11)

*People v Wrotten*, 60 AD3d 165, 871 NYS2d 28  
(1st Dept 2008)

The defendant was charged with assaulting the complainant. The defendant had briefly cared for the complainant's wife as a home health aide. Over the defendant's objection, the court granted the prosecution's motion to present the complainant's testimony by television because the complainant could not travel from his current home in California to New York without seriously endangering his health. During his testimony, the complainant was able to see the courtroom and could hear the courtroom proceedings, and people in the courtroom could see and hear the complainant.

**Holding:** "[T]he admission of the two-way, televised testimony is not only unauthorized by either the Legislature or the inherent powers of the Judiciary, it is clearly, albeit implicitly, prohibited by the relevant provisions of the Criminal Procedure Law." Judiciary Law 2-b(3) allows courts to adopt new process and forms of proceedings to those that are necessary to carry into effect the powers and jurisdiction possessed by them; this does not include the power to make substantive policy decisions

about when to permit the receipt of live, two-way, televised testimony of witnesses in criminal cases. Such a decision is properly determined by the Legislature. Even assuming that the inherent powers of the judiciary would have authorized such televised testimony, by enacting CPL article 65, the Legislature precluded courts from exercising that authority. Article 65 is a comprehensive legislative scheme based on crucial policy judgments and the judiciary is bound to conclude that legislative policy judgments are considered ones. The comprehensive legislative scheme is also seen in CPL articles 680 and 660, which provide further restrictions on the presentation of testimony at trial of a witness who is not physically present in the courtroom. This purely legal issue merits review by the Court of Appeals. Judgment reversed and matter remanded for a new trial. (Supreme Ct, Bronx Co [Barrett, J (application for televised testimony); Silverman, J (witness availability hearing, jury trial, and sentence)])

**Dissent:** [Friedman, J] Because the prosecution satisfied the standard in *Maryland v Craig* (497 US 836 [1990]), the complainant's testimony did not violate the defendant's right of confrontation. The court properly exercised its discretion, pursuant to Judiciary Law 2-b(3) and its inherent powers, to determine what steps, if any, could be taken to permit the prosecution to proceed despite the complainant's inability to be physically present in the courtroom. CPL articles 65, 660, and 680 do not reflect any policy determination about the propriety of allowing televised testimony by a witness whose physical condition renders him unable to testify in person.

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

*People v Fleming*, 58 AD3d 527, 872 NYS2d 21  
(1st Dept 2009)

**Holding:** "Defendant did not receive effective assistance of counsel. The existing record establishes that trial counsel's overall performance was prejudicially deficient (*see People v Droz*, 39 NY2d 457 [1976]). Counsel demonstrated her lack of basic comprehension of criminal law and procedure through her persistent frivolous conduct at multiple stages of the proceeding, including, among other things, pretrial motion practice, a purported interlocutory appeal, the suppression hearing, requests for jury instructions, posttrial motions and sentencing. Counsel's woeful lack of knowledge approached the traditional 'farce and a mockery of justice' standard (*see People v Tomaselli*, 7 NY2d 350, 353-354 [1960]). This case presented an issue of whether defendant was aware of the illicit contents of a package he accepted in a controlled postal delivery. Counsel completely and prejudicially misunderstood and mishandled this issue, and defendant was deprived of a fair trial as a result. We find counsel's unfamiliarity with the sentencing parameters for defendant's crime particu-

**First Department** *continued*

larly troubling in view of the fact that before trial defendant received a beneficial plea offer of three to nine years.” Judgment reversed and matter remanded for a new trial. (Supreme Ct, Bronx Co [Globerman, JJ])

**Sentencing (Pronouncement) (Resentencing)** SEN; 345(70) (70.5)

*People v Hernandez*, 59 AD3d 180, 872 NYS2d 455 (1st Dept 2009)

**Holding:** The court properly resentenced the defendant to a seven-year determinate prison term with five years of post-release supervision (PRS). The defendant was originally sentenced to a seven-year determinate term. After six years, he was granted conditional release and began serving an administratively-imposed five-year term of PRS. In *People v Sparber* (10 NY3d 457, 469, 471-472), and *Matter of Garner v New York State Dept of Correctional Servs* (10 NY3d 358, 363 n4), the Court of Appeals emphasized that sentencing courts retain authority to correct procedural sentencing errors even after the one year following conviction afforded the prosecution to seek resentencing under CPL 440.40. And the Legislature enacted a procedural framework for resentencing defendants whose convictions required a mandatory term of PRS that had not been properly imposed (*see* Correction Law 601-d), which the court followed. The resentencing did not violate double jeopardy or due process. The defendant had no legitimate expectation of finality with regard to a determinate prison term without a term of PRS. *See United States v DiFrancesco*, 449 US 117, 138-139 (1980). The defendant understood that his sentence included a term of PRS because he actually served three years of PRS before he was resentenced and he could not have a legitimate expectation of finality of a sentence that is contrary to law. His resentencing did not offend notions of fundamental fairness because he was resentenced to the original seven-year determinate term and the required term of PRS. Judgment affirmed. (Supreme Ct, New York Co [Obus, JJ])

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

*People v James*, 59 AD3d 217, 874 NYS2d 24 (1st Dept 2009)

**Holding:** “The court properly denied defendant’s application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Immediately after the court mentioned the location of the crime, the panelist at issue spontaneously volunteered that she lived in that area. Although the panelist then assured the court that this would not be a problem,

the prosecutor later explained that he challenged this panelist because she had initially volunteered her concern about her proximity to the crime and had been particularly vocal on the subject. The record supports the court’s finding that the nondiscriminatory reason provided by the prosecutor was not pretextual. This finding, which essentially involved an assessment of the prosecutor’s credibility, is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).” Judgment affirmed. (Supreme Ct, New York Co [Stone, JJ])

**Admissions (Interrogation) (Spontaneous Declaration)** ADM; 15(22) (37)

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

*People v Ramirez*, 59 AD3d 206, 873 NYS2d 56 (1st Dept 2009)

**Holding:** The court properly denied the defendant’s motion to suppress the statements he made to a police receptionist. The defendant approached the receptionist as she was taking a break outside the police station and told her in Spanish that he “wanted” and “needed” a lawyer. The Spanish-speaking receptionist told the defendant that he was at a police station, not a law office, and asked if she could help him. The defendant then said that he had just shot the decedent in the eye. When the receptionist asked where the gun was, the defendant told her where he had discarded it. The defendant’s statement is admissible because he did not make an unequivocal request for counsel; it was not clear why he wanted a lawyer until he made the statement. Even if the defendant had invoked his right to counsel, the admission was spontaneous (*see People v Campney*, 94 NY2d 307), and the surrounding circumstances show that it was not made in an interrogation environment. The receptionist’s question about the location of the gun was proper under the public safety exception. *See New York v Quarles*, 467 US 649, 655-656 (1984). After his arrest, one officer asked another “Has this guy been tossed for a gun” and the defendant responded in English that he discarded the gun. This statement, which was not introduced at trial, was also spontaneous and the recovery of the gun was not the fruit of the statement. Judgments affirmed. (Supreme Ct, New York Co [Yates, JJ])

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

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

**First Department** *continued*

**People v Branham**, 59 AD3d 244, 873 NYS2d 280  
(1st Dept 2009)

**Holding:** The court erred in denying the defendant's request for new counsel without giving him an opportunity to explain the request. At the suppression hearing, the court denied the defendant's request to address the court. When the defendant stated that he and his attorney had a conflict of interest, the court stated that it was "not taking that application." It is clear that the court understood that the defendant was asking for new counsel, but denied the request without allowing the defendant to provide information about the conflict. Even if the defendant's request was a delay tactic or the conflict related to dissatisfaction with his attorney, the court may not deny the application without hearing an explanation. *See People v Sides*, 75 NY2d 822. The court improperly denied the defendant's pro se motion to withdraw his plea at sentencing without making further inquiry. The motion alleged that the plea was involuntary because the defendant did not know he had a valid defense to the charges. Under the circumstances, the defendant's allegation warranted an inquiry. *Compare People v Frederick*, 45 NY2d 520. The plea allocation raised an affirmative defense to the first-degree robbery charges when the defendant stated that he had simulated a firearm (*see People v Pariente*, 283 AD2d 345), and based on the suppression hearing testimony, it appears that the use of a simulated firearm was the prosecution's theory of the case. "[W]e also note that defense counsel inappropriately disparaged defendant's plea withdrawal motion (*People v Vasquez*, 70 NY2d 1 [1987])." Judgment reversed, plea vacated, and matter remanded for further proceedings. (Supreme Ct, New York Co [White, J])

**Juries and Jury Trials** JRY; 225(10) (37) (55)  
(Challenges) (General)  
(Selection)

**People v Gordon**, 59 AD3d 268, 873 NYS2d 578  
(1st Dept 2009)

**Holding:** The court erred in allowing the prosecution, after defense counsel exercised his peremptory challenges, to exercise a peremptory challenge to a panelist who had been accepted by the defendant and seated as a juror. Criminal Procedure Law 270.15(2) precludes the prosecution from challenging a prospective juror who remained in the jury box after the defendant exercised his or her peremptory challenges. Because the defendant was deprived of a juror he wanted to be seated and the court did not give him a remedy, such as allowing him to re-exercise his peremptory challenges, the defendant was significantly prejudiced and must receive a new trial. *See*

*People v McQuade*, 110 NY 284; *compare eg People v Levy*, 194 AD2d 319, 320-321 *app dism* 82 NY2d 890. Judgment reversed and matter remanded for a new trial. (Supreme Ct, New York Co [McLaughlin, JJ])

**Narcotics (Cocaine) (Possession)** NAR; 265(5) (57)

**Search and Seizure (Warrantless Searches [Moveable Objects] [Plain-view Objects])** SEA; 335(80[f] [k])

**People v Mayo**, 59 AD3d 250, 873 NYS2d 584  
(1st Dept 2009)

The police followed a male suspect into an apartment. They saw a woman come out of the back bedroom and when they entered that room, the defendant was putting on his pants and his father was sitting on the bed. A clear bag holding 47 small green ziploc bags containing a white, rocky substance was in plain view on a dresser. There were empty ziploc bags in several rooms. After the defendant and his father were removed, the police talked about having the children who were present removed by the Administration for Children's Services. One of the two women present, the legal tenant and girlfriend of the defendant's father, told the police that she knew why they were there and pointed to a spot on the bedroom floor. Out of sight under a pair of men's jeans were two plastic bags that held the same type of green ziploc bags as those on the dresser, also containing a white, rocky substance. The court granted the defendant's motion to dismiss counts two and three of the indictment, which related to the cocaine found under the jeans.

**Holding:** The court erred in granting the defendant's motion to dismiss. Based on the room presumption, the grand jury could have reasonably concluded that the defendant possessed the bag on the dresser and that he possessed the contents of the bags under the jeans. The ziploc bags under the jeans were the same color as those on the dresser, the defendant was close to all three bags, the room was small and in the rear of the apartment, and there were only four people in there who could have dominion and control over the bags. The grand jury could reasonably infer that the tenant who led the police to the other bags did not exercise dominion and control over them. Although the defendant and his father did not live in the apartment, his connection to the apartment was not tenuous. Order reversed, motion to dismiss denied, and counts two and three reinstated. (Supreme Ct, New York Co [Ward, JJ])

**Dissent:** [Acosta, J] "[T]he majority extends the room presumption to drugs not in plain view. Given the absence of evidence that respondent exercised dominion and control over the apartment, this extension dangerously casts too wide a net of criminality."

First Department *continued*

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

People v Taveras, 59 AD3d 264, 873 NYS2d 296  
(1st Dept 2009)

**Holding:** The court correctly granted the defendant’s CPL 440.20 motion to set aside the sentence on his bribery conviction and properly exercised its discretion when it imposed the minimum lawful sentence for that conviction directing that it be served consecutively to the defendant’s other sentences. The procedure that the court used to determine that the defendant was eligible for consecutive sentences did not violate *Apprendi v New Jersey* (530 US 466 [2000]). In resentencing the defendant, the court did not engage in fact-finding; it “made, implicitly, a legal determination based upon facts already found by the jury (see *People v Lloyd*, 23 AD3d 296 [2005], *lv denied* 6 NY3d 755 . . .). Under Penal Law § 70.25, a jury’s finding that a defendant committed more than one offense is sufficient to permit the court to impose consecutive sentences, unless the court either makes (where permitted) a discretionary determination to impose concurrent sentences or a legal determination that concurrent sentences are required.” Judgment affirmed. (Supreme Ct, New York Co [Wetzel, J])

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

Traffic Infractions (General) TFI; 372(15)

People v Tolentino, 59 AD3d 298, 873 NYS2d 602  
(1st Dept 2009)

**Holding:** The court correctly denied the defendant’s motion to suppress Department of Motor Vehicle (DMV) records regarding the suspension of his driver’s license without a hearing. The police obtained the records after they obtained the defendant’s pedigree information during an unlawful vehicular stop. “Although a defendant need not establish a privacy interest in an alleged fruit of a preexisting violation of his or her Fourth Amendment rights, we agree with those courts (see e.g. *People v Cobb*, 182 Misc 2d 808 [Crim Ct, Kings County 1997]) that have concluded that DMV records are not suppressible fruits. ‘The . . . identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest . . .’ (*Immigration & Naturalization Serv. v Lopez-Mendoza*, 468 US 1032, 1039 [1984]). Thus, ‘there is no sanction to be applied when an illegal arrest only leads to discovery of [a person’s] identity and that merely leads to the official file’ (*United States v Guzman-Bruno*, 27 F3d 420, 422 [9th Cir 1994], *cert denied*

513 US 975 [1994] [internal quotation marks omitted]). Furthermore, the DMV records were compiled independently of defendant’s arrest (see *People v Pleasant*, 54 NY2d 972, 973-974 [1981], *cert denied* 455 US 924 [1982] . . .).” Judgment affirmed. (Supreme Ct, New York Co [Uviller, J])

Appeals and Writs (General  
(Judgments and Orders  
Appealable) APP; 25(35) (45)

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

People v Williams, 59 AD3d 339, 874 NYS2d 63  
(1st Dept 2009)

**Holding:** The defendant’s purported waiver of his right to appeal was invalid because the court conflated the right to appeal with those rights automatically forfeited by pleading guilty. “Although our independent review establishes that the search warrant was supported by probable cause, we write simply to focus attention on the recurrent fusing, during allocution, of the defendant’s right to appeal (in this case, his right to appeal the order denying his suppression motion) with those rights waived by a guilty plea in cases where waiving the right to appeal is a condition of the plea bargain.” The court must inform the defendant of the right to appeal and elicit on the record that the defendant is voluntarily, knowingly, and intelligently waiving that right as a condition of taking the plea. “The record must establish, for example, that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty . . .” The court should have told the defendant that a guilty plea does not, by itself, waive or prevent review of an order denying a motion to suppress evidence. See CPL 710.70(2). The court failed to ask the defendant if he spoke to his attorney about the appeal waiver, and the defendant did not sign a written waiver. And, at sentencing, the court informed the defendant of his right to appeal and the prosecution and defense counsel did not mention that the defendant waived that right. Judgment affirmed. (Supreme Ct, Bronx Co [Cirigliano, J])

Housing (General) HOS; 186(15)

Prosecutors (General) PSC; 310(20)

Perdomo v Morgenthau, 60 AD3d 435, 874 NYS2d 443  
(1st Dept 2009)

**Holding:** The court properly granted the plaintiff’s motion for a declaration that the defendant district attorney does not have the authority to require his approval of a settlement agreement between a landlord and tenant in

**First Department** *continued*

an illegal use eviction proceeding that was brought pursuant to Real Property and Proceedings Law (RPAPL) 715 at the direction of the district attorney. “Although the District Attorney, when acting under RPAPL 715, is serving the public welfare, he may not do so in a manner that exceeds his statutory grant of authority. The plain meaning of RPAPL 715 does not provide the District Attorney the authority to supervise or veto settlements between the parties to an illegal use holdover proceeding brought under the statute. Nor is such authority granted by implication, as it is not necessary to the performance of those acts by the District Attorney which the statute does sanction . . . .” If the district attorney believes that a landlord or owner is not diligently prosecuting the proceeding in good faith, the district attorney may commence a holdover proceeding. *See* RPAPL 715(1). Judgment affirmed. (Supreme Ct, New York Co [Goodman, JJ])

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

*People v Sanchez*, 60 AD3d 442, 874 NYS2d 461  
(1st Dept 2009)

**Holding:** The court erred in denying the defendant’s challenge for cause to a prospective juror. The defendant was charged with the sale of drugs to an undercover narcotics officer, and the only police testimony came from the undercover officer, his ghost, and the arresting officer. The juror, whose son is a retired undercover narcotics officer who was shot in the line of duty, repeatedly expressed a predisposition to credit police testimony. She expressed doubt that an undercover officer could lie or be mistaken and she discussed her concerns about drugs and violence in her building and neighborhood. The juror never gave unequivocal assurance that she would put aside her beliefs and render an impartial verdict based on the evidence. *See People v Johnson*, 94 NY2d 600, 614. “[T]he trial court should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve. . . .” (*People v Branch*, 46 NY2d 645, 651-652 [1979]).” Judgment reversed, conviction vacated, and matter remanded for a new trial. (Supreme Ct, New York Co [Goldberg, JJ])

**Second Department**

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

Counsel (*Anders* Brief)      COU; 95(7) (15)  
(Competence/Effective  
Assistance/Adequacy)

Juveniles (Neglect)

JUV; 230(80)

*Matter of Kathleen K.*, 56 AD3d 673, 871 NYS2d 156  
(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 finding of neglect was supported by a preponderance of the evidence, including evidence that the children’s emotional health had been impaired or was in imminent danger of becoming impaired (*see* Family Ct Act §§ 1012[f][i], 1046[b][1]), whether the Family Court improvidently exercised its discretion in denying the appellant’s request for substitution of counsel without conducting any inquiry into the basis for his dissatisfaction with assigned counsel, and whether the appellant was afforded effective assistance of counsel.” Counsel relieved and directed to turn over all papers to new counsel and briefing schedule set. (Family Ct, Suffolk Co [Tarantino, Jr, JJ])

Homicide (Negligent Homicide)      HMC; 185(45)

Motor Vehicles (Reckless Driving)      MVH; 260(20)

*People v McGrantham*, 56 AD3d 685, 868 NYS2d 219  
(2nd Dept 2008)

The defendant drove the wrong way on an exit ramp leading to a parkway, passing “do not enter” and “one way” warning signs. After realizing his mistake, he made a slow right turn across the parkway to loop around and face the correct direction of traffic. When his car was perpendicular to the direction of traffic, he collided with a motorcyclist, causing the motorcyclist’s death. The defendant had not been drinking or speeding.

**Holding:** The court erred in granting the defendant’s motion to dismiss the criminally negligent homicide and reckless driving counts. The grand jury evidence, if accepted as true, was sufficient to show that the defendant acted with criminal negligence. Although a traffic violation alone cannot constitute an act of criminal negligence (*see People v Senisi*, 196 AD2d 376, 379), a violation combined with additional relevant factors may establish criminal negligence. *See People v LaFantana*, 277 AD2d 395. The defendant chose to drive perpendicular and across three lanes of traffic on a busy highway at a very slow speed instead of using the available paved and grassy shoulder areas to correct his direction; this constitutes a gross deviation from the standard of care that a reasonable person would use in the situation. *See* Penal Law 15.05(4); *People v Fuentes*, 27 AD3d 481. The grand jury evidence was also sufficient to support the reckless driving count. The defendant’s conduct demonstrated that he unreasonably endangered users of the public highway. *See* Vehicle and

Second Department *continued*

Traffic Law 1212. Order reversed, motion to dismiss counts one and two denied, and those counts are reinstated. (Supreme Ct, Kings Co [Murphy, J])

**Dissent:** [Belen, J] The defendant's failure to perceive the risk cannot be seen as morally blameworthy (see *People v Cabrera*, 10 NY3d 370); it is not clear that the defendant, having mistakenly entered the parkway via the exit ramp due to concededly confusing signs, had another intelligent or prudent option.

Sentencing (Hearing) (Second Felony Offender) SEN; 345(42) (72)

*People v Smith*, 56 AD3d 695, 871 NYS2d 159 (2nd Dept 2008)

**Holding:** The court erred in adjudicating the defendant a second felony offender. The prosecution filed a CPL 400.21 statement alleging that the defendant had a predicate felony conviction in federal court. The defendant argued that the conviction was unconstitutionally obtained because, at the time of his plea, he was under the influence of drugs and told the federal judge of this in open court. The defendant requested a copy of the plea minutes and the court adjourned the matter for eight days. On the adjourned date, the defendant stated that he had not received the minutes yet. The court revealed that its chambers contacted the defendant's federal court attorney and the federal judge who took the plea. Both reported that, to the best of their recollection, the defendant was not under the influence of drugs, alcohol, or anything else at the time of the plea. The court, finding the attorney and the judge credible and the defendant incredible, rejected the defendant's claim and adjudicated him a second felony offender. The court improperly rejected the defendant's claim based on the information it obtained privately from the attorney and the federal judge. The defendant had no opportunity to confront them and to the extent that the court used their statements to prove the truth of the assertion that the defendant was not under the influence of drugs, the statements were hearsay and not admissible under CPL 400.21(7)(a). Sentence reversed, second felony offender adjudication vacated, and matter remitted for resentencing before a different justice. (Supreme Ct, Kings Co [Collini, J])

Counsel (Conflict of Interest) (Right to Counsel) COU; 95(10) (30)

*People v Kirkorov*, 57 AD3d 568, 870 NYS2d 47 (2nd Dept 2008)

**Holding:** The court did not deny the defendant his right to the counsel of his choice by disqualifying one of

his attorneys. See *People v Hall*, 46 NY2d 873, 874-875 *cert den* 444 US 848 (1979). The disqualified attorney previously defended another attorney who had represented a prosecution witness. The disqualified attorney told the court that he believed he could use information he learned about the substance of conversations between the prosecution witness and his former attorney in the defendant's defense. The court, in granting the prosecution's application to disqualify the attorney, properly concluded that the representation posed a conflict of interest. Judgment affirmed. (Supreme Ct, Queens Co [McGann, J])

Juveniles (Visitation) JUV; 230(145)

*Matter of Hermanowski v Hermanowski*, 57 AD3d 777, 869 NYS2d 587 (2nd Dept 2008)

**Holding:** The court properly granted the father's petition to modify the parties' judgment of divorce to award him four consecutive weeks of summer visitation and visitation during alternate school recesses, and to permit him to travel with the child outside of the country. The parties' judgment of divorce incorporated their stipulation of settlement in which the mother was given custody of then three-year old daughter and the father was given a visitation schedule. The father met his burden of showing that there was a subsequent change of circumstances and that the modifications sought were in the child's best interest. See Family Court Act 467(b), 652(b); *Matter of Wilson v McGlinchey*, 2 NY3d 375, 380-381. The father moved to Ohio for work and could not take full advantage of the original visitation schedule. And the child, 11 years old when the father filed the petition, was in favor of increased visitation with him. The hearing evidence demonstrated that the modifications sought were in the child's best interest and there is no basis for disturbing the determination that the father should be permitted to travel with the child out of the country. See *Matter of Puran v Murray*, 37 AD3d 472. Order affirmed. (Family Ct, Suffolk Co [Boggio, R])

Juveniles (Hearings) (Paternity) JUV; 230(60) (100)

*Matter of Philip K. v Thervey B.*, 57 AD3d 781, 870 NYS2d 388 (2nd Dept 2008)

**Holding:** The court erred in dismissing the paternity petition solely on the basis of the genetic test report. See *Matter of Donald I. v Teresa K.*, 221 AD2d 862. The petitioner commenced a paternity proceeding alleging that he was the father of the respondent's child. According to the court-ordered genetic test report, the petitioner was excluded as the father. The support magistrate dismissed the petition with prejudice, rejecting the petitioner's claim that the report was not complete. The following month, the court denied his objections to the support magistrate's

**Second Department** *continued*

order. The genetic test report was not admitted into evidence (*compare Matter of Liduvina F. v Orlando A.M.*, 295 AD2d 234), and because Family Court Act 531 provides for a non-jury trial in paternity proceedings, the court should have given the petitioner the opportunity to present evidence at a trial, including any evidence related to the report. Order denying objections reversed, objections sustained to the extent that the order dismissing the petition is vacated, petition reinstated, and matter remitted. (Family Ct, Richmond Co [McElrath, J (order denying objections)]; Weir-Reeves, SM (order dismissing petition))

Self-Incrimination (General) SLF; 340(13)

Witnesses (Confrontation of Witnesses) (Cross Examination) WIT; 390(7) (11)

*People v Visich*, 57 AD3d 804, 870 NYS2d 376 (2nd Dept 2008)

The defendant was convicted of second-degree murder for hiring Thon to murder his wife. The defendant contacted Thon through Cassatt. Thon testified pursuant to a cooperation agreement and admitted to the murder. Cassatt admitted that he put the defendant in contact with Thon, but denied knowledge of or involvement in the murder. On cross-examination of Thon and Cassatt, defense counsel asked whether they had been involved, either separately or together, in prior crimes, including murder, for which they had not been tried or convicted. The witnesses refused to answer the questions and invoked their privilege against self-incrimination. The court denied the defendant's request to strike the witnesses' direct testimony, but did charge the jury that the invocation of the privilege could be considered in determining credibility.

**Holding:** The court did not err by refusing to strike the witnesses' direct testimony. In determining whether the defendant's right to confrontation has been denied, the ultimate question is whether the defendant's inability to test the accuracy of the witness' direct testimony has created a substantial risk of prejudice. This depends, at least in part, on the defendant's ability to make the impeachment argument without the excluded evidence. *See People v Chin*, 67 NY2d 22, 28. The court has wide discretion in crafting a corrective response when a witness invokes the self-incrimination privilege. *See People v Siegel*, 87 NY2d 536. The court properly exercised its discretion and there was no risk of substantial prejudice because the defendant was able to cross-examine the witnesses about the crimes at issue, argue on summation the inferences to be drawn from the invocation of the privilege, and explore, using other evidence, each witness' bias and motivation to testify falsely. Judgment affirmed. (County Ct, Rockland Co [Kelly, J])

Juveniles (Support Proceedings)

JUV; 230(135)

*Matter of Gravenese v Marchese*, 57 AD3d 992, 870 NYS2d 444 (2nd Dept 2008)

**Holding:** The support magistrate erred in granting the mother's petition for an upward modification of the father's child support obligation. When seeking to modify a prior support order, the petitioner bears the burden of demonstrating that there has been a substantial change in circumstances, which is measured by comparing the payor's financial situation at the time of the modification petition to the situation at the time of the existing order or judgment. *See Matter of Talty v Talty*, 42 AD3d 546, 547. To find a substantial change in circumstances, the support magistrate would have had to impute income or financial ability to the respondent. While support magistrates have discretion in determining whether to impute income (*see Matter of Genender v Genender*, 51 AD2d 669), the record must clearly indicate the source from which the income is imputed and the reasons for imputation. *See Matter of Barnett v Ruotolo*, 49 AD3d 640, 640. The support magistrate failed to specify the amount of income imputed to the respondent, the source from which the income might have been derived, and the reason for imputing income. Because of other errors made in determining the petition, the matter cannot be remitted to the support magistrate. The father's assertion in a visitation proceeding that he was ready to resume parental responsibilities did not establish his ability to pay the increased child support. Order denying respondent's objections reversed, objections sustained, support magistrate's order vacated, and matter remitted. (Family Ct, Nassau Co [Dane, J (order sustaining objections)]; Watson, SM (order granting petition))

Attorney/Client Relationship (Confidences) (General) ACR; 51(10) (20)

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

Speech, Freedom Of (General) SFO; 353(10)

*Matter of Vinluan v Doyle*, 60 AD3d 237, 873 NYS2d 72 (2nd Dept 2009)

The petitioner nurses were indicted after they simultaneously resigned from positions at a nursing home, and the petitioner attorney who provided them with legal advice was indicted. The supreme court denied the petitioners' motions to dismiss. This CPLR article 78 proceeding in the nature of prohibition was brought against the District Attorney and the judge, who elected not to appear.

**Holding:** The prosecutions are an impermissible infringement on the petitioners' constitutional rights. The

Second Department *continued*

prosecution of the nurses violates the Thirteenth Amendment’s proscription against involuntary servitude because it seeks to impose criminal sanctions on them for resigning their positions. *See eg Pollock v Williams*, 322 US 4 (1944). And the prosecution of the attorney violates his constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments. “[A]n attorney has a constitutional right to provide legal advice to his clients within the bounds of the law (*see Matter of Primus*, 436 US 412, 432 [1979] . . .).” By placing the attorney in the position of defending the advice provided, the state compels revelation of confidential attorney-client communications. Therefore, the act of prosecuting the petitioners is an excess in power for which prohibition is an available remedy. *See Matter of Rush v Mordue*, 68 NY2d 348, 352. Prohibition is an appropriate because the petitioners are threatened with prosecution for crimes for which they cannot be constitutionally tried and the potential harm is so great and the ordinary appellate process is so inadequate to redress that harm. Petition granted, respondent District Attorney prohibited from prosecuting the petitioners, and respondent judge is prohibited from presiding over the matter.

Impeachment (General) IMP; 192(15)

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

*People v Brewer*, 58 AD3d 748, 871 NYS2d 672 (2nd Dept 2009)

**Holding:** The defendant is entitled to a new trial because the court improperly denied the defendant’s application to recall the complainant. The defendant sought to impeach the complainant’s credibility on a material issue in the case, not a purely collateral matter. *See People v Perez*, 40 AD3d 1131. Under the circumstances, the error cannot be deemed harmless. *See People v Crimmins*, 36 NY2d 230, 241-242. Judgment reversed and new trial ordered. (County Ct, Westchester Co [Walker, JJ])

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

*People v Damato*, 58 AD3d 819, 873 NYS2d 116 (2nd Dept 2009)

The defendant was originally designated a level one sex offender. After he was reincarcerated for violating certain probation conditions, the prosecution moved for an upward modification of his risk level to level three.

**Holding:** The court erred in granting the prosecution’s motion and designating the defendant a level three offender. The prosecution failed to file a petition setting

forth the level of notification sought, together with the reasons for seeking such determination, as required by Correction Law 168-o(3). The court failed to seek the involvement of the Board of Examiners of Sex Offenders, in violation of Correction Law 168-o(4). And the court did not hold the statutorily required hearing. Because of these errors, the defendant must be designated a level one offender. The prosecution is not barred from seeking an upward modification by filing a petition pursuant to Correction Law 168-o(3). Order reversed, motion for upward modification denied, and the defendant is designated a level one sex offender. (County Ct, Suffolk Co [Braslow, JJ])

Assault (Defenses) (Evidence) (General) ASS; 45(20) (25) (27)

*People v Valencia*, 58 AD3d 879, 873 NYS2d 97 (2nd Dept 2009)

**Holding:** The trial evidence was legally insufficient to establish that the defendant acted with depraved indifference to human life when he collided with the complainants’ cars, and therefore did not support the first-degree assault conviction. *See Penal Law 120.10(3); People v Feingold*, 7 NY3d 288. The prosecution’s argument that the mens rea element of depraved indifference assault can be satisfied by considering the defendant’s state of mind at a point much earlier than the accident, when the defendant allegedly made the conscious decision to drink an excessive amount of alcohol with the understanding that he would later operate a car, is unpersuasive. Even assuming that the evidence would support such a finding and that this state of mind would satisfy the culpable mental state of depraved indifference to human life, the defendant’s state of mind when he consumed the alcohol was too temporally remote from when he drove the car to support the conviction. Judgment modified by vacating first-degree assault conviction, vacating the sentence on that count, and dismissing that count of the indictment, and judgment affirmed as modified. (Supreme Ct, Nassau Co [Peck, JJ])

**Concurrence in Part, Dissent in Part:** [Dillon, JJ] In a depraved indifference case, the mens rea and the actus reus do not need to be simultaneous. *See gen People v Kibbe*, 35 NY2d 407; *People v Wells*, 53 AD3d 181. Under the circumstances, the defendant’s voluntary intoxication did not negate the element of depraved indifference to human life. *Cf People v Castellano*, 41 AD3d 184, 185.

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

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

**Second Department** *continued*

**Matter of Knight v Knight**, 59 AD3d 445, 873 NYS2d 324 (2nd Dept 2009)

In a family offense proceeding, the court found that the respondent husband violated the terms of an order of protection three times and incarcerated him for three consecutive six-month terms.

**Holding:** Parties in a Family Court Act article 8 proceeding have the right to be represented by counsel. See Family Court Act 262(a)(ii). To ensure that a party has knowingly, voluntarily, and intelligently waived the right to counsel, the court must conduct a searching inquiry of the party. See *People v Slaughter*, 78 NY2d 485, 491. The inquiry must show that the party knew of the dangers and disadvantages of proceeding without counsel. See *People v Providence*, 2 NY3d 579, 582. The court failed to conduct the necessary searching inquiry of the respondent and failed to advise him of the risks of self-representation. Therefore, the respondent's waiver of counsel was not knowing, voluntary, and intelligent. See *Matter of Guzzo v Guzzo*, 50 AD3d 687, 688. Order reversed and matter remitted for a new hearing and determination of the petition. (Family Ct, Rockland Co [Warren, J])

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Juveniles (Support Proceedings) JUV; 230(135)

**Matter of Martinez v Torres**, 59 AD3d 449, 871 NYS2d 916 (2nd Dept 2009)

**Holding:** The court properly denied the petitioner father's petition for a downward modification of his support obligation to \$0 per month and for a reduction in the amount of accrued arrears. "Contrary to the father's contention, Family Court Act § 413(1)(a) does not mandate the issuance of minimum orders of child support against indigent noncustodial parents, and as such does not violate 42 USC § 667(b)(2) (see *Matter of Jennifer R. v Michael C.*, 49 AD3d 443; *Aregano v Aregano*, 289 AD2d 1081)." Order affirmed. (Family Ct, Kings Co [Grosvenor, J (order denying objections); Shamahs, SM (order denying petition)])

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

**People v Price**, 61 AD3d 127, 873 NYS2d 327 (2nd Dept 2009)

The defendant was charged in a felony complaint with attempted first-degree disseminating indecent material to a minor. About six months later, this Court held in *People v Kozlow* (31 AD3d 788 rev'd 8 NY3d 554), that evidence of that offense is legally insufficient where the defendant's communications with an undercover police officer whom

he believed was a minor did not contain any visual sexual images. Because the defendant's case also did not involve the communication of visual sexual images, the prosecution took no further action in his case; they did not seek to adjourn it, withdraw the charge, or dismiss the complaint. After the Court of Appeals reversed in *Kozlow*, the prosecution obtained an indictment, and more than 16 months after the felony complaint arraignment, the defendant was arraigned on the indictment.

**Holding:** The court properly granted the defendant's motion to dismiss on speedy trial grounds. The prosecution cannot avoid dismissal by invoking the "exceptional circumstances" exclusion in CPL 30.30(4)(g) to exclude the time during which an appeal is pending in an unrelated prosecution involving similar legal issues. The prosecution never asked for an adjournment, and the exceptional circumstances exclusion relates to situations where the prosecutor has difficulty obtaining evidence or in otherwise preparing for trial in the particular case. See *gen People v Washington*, 43 NY2d 772. Once they determined that continued prosecution was impossible, the prosecution had an obligation to terminate the prosecution. "[T]he term 'exceptional circumstances,' as used in that section and as interpreted by our courts, cannot be deemed to encompass a situation where the prosecution indefinitely holds open a pending criminal matter, which is ripe for dismissal, in anticipation of the possible establishment of case law more favorable to its position in the future." Order affirmed. (Supreme Ct, Suffolk Co [Doyle, J])

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

Juveniles (Neglect) (Right to Counsel) JUV; 230(80) (130)

**Matter of Casey N.**, 59 AD3d 625, 873 NYS2d 343 (2nd Dept 2009)

**Holding:** The court failed to conduct a searching inquiry of the respondent mother to determine whether she understood the dangers and disadvantages of waiving her fundamental right to counsel. See *People v Smith*, 92 NY2d 516, 521. A party in a Family Court Act article 10 proceeding has a constitutional right and a statutory right to be represented by counsel. See US Const Amend 6; NY Const Art 1, § 6; Family Court Act 262(a)(i). The court asked the mother twice whether she wanted the assigned attorney to represent her, and made a statement generally cautioning the mother against self-representation, but did not detail the dangers and disadvantages of doing so. The court also failed to evaluate the mother's competency to waive counsel and her understanding of the consequences of self-representation. See *People v Arroyo*, 98 NY2d 101, 104. To the extent that the court delegated its duty to conduct a searching inquiry to the mother's

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assigned counsel, there is no authority for such action. *Cf People v Delaron*, 184 AD2d 653, 654. And there is no evidence that the attorney conducted a searching inquiry. Order of disposition related to the mother reversed and matter remitted for a new hearing and determination after a proper inquiry into the mother’s understanding of the consequences of self-representation. (Family Ct, Orange Co [Currier Woods, J])

Counsel (Competence/Effective Assistance/Adequacy)	COU; 95(15)
Family Court (Violation of Family Court Orders)	FAM; 164(60)
Juveniles (Hearings) (Support Proceedings)	JUV; 230(60) (135)

Matter of DeVries v DeVries, 59 AD3d 619, 875 NYS2d 488 (2nd Dept 2009)

**Holding:** “Although the Family Court has the discretion to suspend an order of commitment upon the condition of continued compliance with a prior order of support (see Family Court Act § 455[1]; *Matter of Russo v Goldbaum*, 215 AD2d 763), the Family Court may not direct that the suspension be automatically revoked without notice and without a hearing upon failure to abide by the condition (see *Matter of Wolski v Carlson*, 309 AD2d 759; *Matter of Rogers v Rogers*, 77 AD2d 818; *Matter of Bailey v Bailey*, 34 AD2d 984).” The court did not err in denying the father’s motion for a new hearing based on ineffective assistance of counsel at the contempt hearing. The father’s attorney was authorized to practice law at the time of the contempt hearing; the attorney’s resignation from the practice of law was not effective until months later. Therefore, the representation was permissible. See 22 NYCRR 691.10. Order directing automatic revocation of suspension of commitment without a hearing upon future noncompliance reversed. (Family Ct, Orange Co [Bivona, J])

Bail and Recognizance (General) (Pre- and Post-conviction) (Revocation)	BAR; 55(27) (30) (45)
Guilty Pleas (General [Including Procedure and Sufficiency of Colloquy]) (Vacatur)	GYP; 181(25) (55)

People v Grant, \_\_ AD3d \_\_, 873 NYS2d 355 (2nd Dept 2009)

**Holding:** The defendant’s plea was not voluntary because he entered it only after the court told him that if he did not plead guilty, he would be remanded until his

next court appearance. Bail status has “no legitimate connection to the mutuality of advantage underlying a plea bargaining . . . .” The defendant must not be forced to admit guilt and remain free or maintain innocence and go to jail. See *People v Sung Min*, 249 AD2d 130, 132. “[W]hen the court threatens to increase bail or remand the defendant unless a guilty plea is entered, any resulting plea cannot be deemed voluntary because the defendant’s decision to plead guilty would no longer represent a free choice among legitimate alternatives.” Although the court may have been justified in changing the defendant’s bail status because of his failure to comply with the conditions of release, it did not change his status. It instead threatened to do so for no discernible reason other than to encourage him to plead guilty, which renders the plea involuntary. “We think that the better practice when, during plea negotiations, a defendant inquires about bail is for the court to remind the defendant that the parties are engaged in plea bargaining, not ‘bail bargaining,’ and that the question of bail will be addressed only after plea negotiations are completed.” Judgment reversed, guilty plea vacated, and matter remitted. (Supreme Ct, Nassau Co [Peck, J])

Counsel (Competence/Effective Assistance/Adequacy)	COU; 95(15)
People v Jeannot, 59 AD3d 737, 875 NYS2d 114 (2nd Dept 2009)	

**Holding:** The defendant received ineffective assistance of counsel. During the cross-examination of an investigating officer at trial, defense counsel offered into evidence a statement that implicated the defendant, which was made to the police by another alleged participant in the crime. The defendant satisfied the standard for ineffective assistance of counsel by showing that there was no strategic or other legitimate explanation for defense counsel’s introduction of that statement into evidence, which would not otherwise have been admissible. See *Cruz v New York*, 481 US 186 (1987); *Bruton v United States*, 391 US 123 (1968); *People v Eastman*, 85 NY2d 265. Judgment reversed and matter remitted for a new trial. (County Ct, Nassau Co [Berkowitz, J])

Counsel (Competence/Effective Assistance/Adequacy) (Duties)	COU; 95(15) (20)
Post-Judgment Relief (CPL § 440 Motion)	PJR; 289(15)
People v Mobley, 59 AD3d 741, 873 NYS2d 736 (2nd Dept 2009)	

**Holding:** The court erred in denying, without a hearing, the portion of the defendant’s CPL 440.10 motion that sought to vacate his conviction on the ground that he was denied effective assistance of counsel because his trial

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attorney allegedly failed to accurately inform him of the maximum sentence he faced if he rejected a plea offer and was convicted after trial. This issue is properly raised in a CPL 440.10 motion and the defendant submitted an affidavit alleging facts, which, if true would be sufficient to prevail on that claim. *See United States v Gordon*, 156 F3d 376, 379-381 (2d Cir 1998); *People v Reynolds*, 309 AD2d 976, 976-977. In opposing the motion, the prosecution did not address this claim. Under the circumstances, a hearing was warranted. The court properly denied the defendant's other ineffective assistance of counsel argument, which was based on his counsel's failure to ensure that all portions of the voir dire were recorded. The record contains sufficient facts to have permitted adequate appellate review and the defendant failed to raise the issue in his direct appeal. *See CPL 440.10(2)(c); People v Mobley*, 270 AD2d 504. Order modified by deleting the provision denying that part of the motion which was to vacate the judgment on ineffective assistance of counsel grounds based on counsel's alleged failure to accurately inform him of the maximum possible sentence, order affirmed as modified, and matter remitted for a hearing. (County Ct, Nassau Co [Ayres, J (motion); Kowtna, J (trial and sentence)])

Assault (Evidence) (General)	ASS; 45(25) (27)
Driving While Intoxicated (Evidence) (General)	DWI; 130(15) (17)
Due Process (General) (Vagueness)	DUP; 135(7) (35)
<p><i>People v Mojica</i>, __ AD3d __, 874 NYS2d 195 (2nd Dept 2009)</p>	

The defendant was convicted of second-degree vehicular assault. The defendant's truck hit a police car and the officer driving the car suffered head injuries.

**Holding:** The rebuttable presumption in Penal Law 120.03 does not violate due process and is not void for vagueness. If there is sufficient proof that the defendant caused serious physical injury to another person while operating a motor vehicle while impaired or intoxicated, a rebuttable presumption is raised that the serious physical injury is the result of such intoxication. The presumption was added to the statute to eliminate criminal negligence as a required element of the offense. *See L 2005, ch 39, Assembly Bill 6285B*, at 3. Even assuming that the statute would deny due process to a hypothetical defendant who drives while intoxicated, but whose driving cannot be deemed a proximate cause of an accident, the issue is not reached since the defendant cannot assert a due process challenge alleging the statute is vague as applied to the conduct of others. *See Broadrick v Oklahoma*, 413 US 601,

608 (1973). The trial evidence was sufficient to give rise to the rebuttable presumption; it established that the defendant was driving while intoxicated and that his operation of his vehicle caused serious physical injury to the officer. The statute is not void for vagueness because "the language conveys sufficiently definite warning as to the proscribed conduct 'when measured by common understanding and practices' (*People v Shack*, 86 NY2d [529] at 538)." And it gives clear guidance to law enforcement that a person may be arrested for violating the statute if there is "probable cause to believe that the defendant was DWI and in doing so, operated a vehicle in a manner that caused serious physical injury (*see People v Foley*, 94 NY2d 668, 680-681)." The court properly denied the defendant's argument that the officer's failure to wear a seat belt was an intervening cause of his injuries since it was speculative and the defendant did not have an expert witness available who could specify which of the officer's injuries would have been mitigated had he worn a seat belt. *See People v Del Duco*, 247 AD2d 487, 488. Even if the officer was not exempt from wearing a seat belt, it is reasonably foreseeable that other drivers might not be wearing seat belts, and that a broadside collision would cause serious physical injuries. Judgment affirmed. (County Ct, Dutchess Co [Hayes, JJ])

Search and Seizure ("Poisoned Fruit" Doctrine) (Warrantless Searches [Plain-view Objects])

*People v Pearson*, 59 AD3d 743, 875 NYS2d 109 (2nd Dept 2009)

**Holding:** The court properly granted the defendant's motion to suppress physical evidence and his statement to the police. The officer approached the defendant on the street because he was concerned that the defendant was the victim of a car accident. Since he did not have founded suspicion that criminal activity was afoot, the officer could not do more than ask for information from the defendant. *See People v Hollman*, 79 AD2d 181, 184, 191-192; *People v De Bour*, 40 NY2d 210, 213, 219. And neither the initial inquiry nor the circumstances surrounding the encounter provided any indication of criminal behavior. Therefore, the officer did not have a legitimate basis for asking the defendant to get off of the bicycle on which he was seated. The discovery of the knife after the defendant complied with the request cannot validate the initially unjustified encounter. *See People v Moore*, 6 NY3d 496, 498. Suppression of the defendant's statement to the police was required because it was the fruit of the illegal search and seizure. *See Wong Sun v United States*, 371 US 471, 484 (1963). Order denying reconsideration affirmed. (Supreme Ct, Queens Co [Kron, JJ])

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Contempt (General) CNT; 85(8)

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

Matter of Rubackin v Rubackin, \_\_ AD3d \_\_,  
875 NYS2d 90 (2nd Dept 2009)

**Holding:** The court erred in applying the clear and convincing evidence standard when determining whether the appellant willfully failed to obey an order of protection and imposing incarceration of 30 days. Although the term of incarceration has expired, the appeal is not academic. *See Matter of Er-Mei Y.*, 29 AD3d 1013. Family Court Act 846-a lists the steps a court may take after it is satisfied by competent proof that the respondent willfully failed to obey an order issued under article 8. “Competent proof” refers to the nature and quality of the proof, not the quantum of proof. “When an individual is incarcerated as a punitive remedy for violating an order of protection issued under Family Court Act article 8, the proceeding is one involving criminal contempt. The standard of proof that must be met to establish that the individual willfully violated the court’s order is beyond a reasonable doubt. . . . The prior decisions of this Court, in cases where the respondent has been committed to a term in jail pursuant to Family Court Act § 846-a, holding that the standard of proof is one of the lesser standards, should no longer be followed.” Because the petition alleging that a respondent has failed to follow a lawful court order may result in a finding of civil contempt, criminal contempt, or both (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583), the parties should be told the potential findings and applicable standards of proof. *See Yacht Shares v Knutson’s Marina*, 112 AD2d 419. A review of the record shows that the proof was sufficient to establish beyond a reasonable doubt that the appellant willfully failed to obey the order of protection. Appeal from the part of the order that directed incarceration dismissed as academic, order modified by deleting the clear and convincing evidence finding and replacing it with a finding, beyond a reasonable doubt, that the appellant violated the order of protection, and order affirmed as modified. (Family Ct, Rockland Co [Warren, JJ])

Due Process (Fair Trial) (General) DUP; 135(5) (7)

Harmless and Reversible Error (Harmless Error) (Reversible Error) HRE; 183.5(10) (30)

People v Bournes, 60 AD3d 687, 874 NYS2d 556  
(2nd Dept 2009)

**Holding:** The defendant’s due process rights were violated when the prosecution failed to correct the police

detective’s erroneous testimony that the defendant confessed to committing a forcible offense, and the error was not harmless with regard to the first-degree rape conviction. *See People v Steadman*, 82 NY2d 1, 7-9. Because the evidence, when viewed in the light most favorable to the prosecution, was legally sufficient to establish the defendant’s guilt, the appropriate remedy is a new trial on that count. *See People v Shelton*, 307 AD2d 370 *aff’d* 1 NY3d 614. The defendant’s statements to the police may not be introduced at the new trial for any purpose, including impeachment. The error was harmless, however, with regard to the second-degree rape conviction; the evidence of the defendant’s guilt of that offense, without reference to the improper testimony, was overwhelming and there is no reasonable possibility that the error contributed to that conviction. *See People v Crimmins*, 36 NY2d 230, 237. Judgment modified, first-degree rape conviction and sentence vacated, judgment affirmed as modified, and new trial ordered on first-degree rape count. (Supreme Ct, Kings Co [Marrus, JJ])

Family Court (General) FAM; 164(20)

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

Matter of Donohue v MacIsaac, 60 AD3d 674,  
875 NYS2d 152 (2nd Dept 2009)

**Holding:** In a Family Court Act article 6 proceeding, the court ordered the petitioner father to pay \$1,200 for court-ordered forensic evaluations of the parties and directed the issuance of a money judgment in favor of the agency and against the father in that amount. The court had the jurisdiction to direct the issuance of a money judgment. *See Family Court Act 651(b); Domestic Relations Law 240, 237(b), 244.* However, the money judgment must be reversed because the court erred in directing the issuance of it in the absence of an application for such relief by the agency and notice to the parties. *See Domestic Relations Law 244.* Money judgment reversed and the order directing the father to pay the cost of the evaluations is vacated. (Family Ct, Dutchess Co [Forman, JJ])

Sentencing (Concurrent/ Consecutive) (Excessiveness) (Persistent Felony Offender) (Resentencing) SEN; 345(10) (33) (58) (70.5)

People v Rivera, 60 AD3d 788, 875 NYS2d 173  
(2nd Dept 2009)

The court sentenced the defendant to consecutive terms of 25 years to life on each of the three first-degree robbery counts, to run concurrently with the terms of 25 years to life for first-degree burglary, third-degree burglary, and third-degree criminal possession of a weapon.

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**Holding:** The third-degree burglary sentence must be vacated because the court failed to comply with the procedural requirements of Penal Law 70.10(2) when it sentenced the defendant as a persistent felony offender on that count. With regard to that offense, the court failed to set forth on the record why it was of the opinion that the defendant's history and character and the nature and circumstances of the criminal conduct indicate that extended incarceration and lifetime supervision would best serve the public interest. *See People v Murdaugh*, 39 AD3d 918, 920. Although there was no legal bar to imposing consecutive terms for the first-degree robbery convictions because the robberies involved distinct acts against separate people (*see People v Ramirez*, 89 NY2d 444, 454), the sentence imposed was excessive. Judgment modified, third-degree burglary sentence vacated, remaining sentences shall run concurrently, judgment affirmed as modified, and matter remitted for resentencing on the burglary count with that sentence to run concurrently with the sentences imposed on the other counts. (Supreme Ct, Kings Co [Gerges, J])

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

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

*People v Barnes*, 60 AD3d 861, 875 NYS2d 545 (2nd Dept 2009)

**Holding:** The court erred in denying the defendant's CPL 440.20 motion to vacate his sentence. After a jury trial, the defendant was found guilty of second-degree murder for the death of a man in the apartment building where he and his family lived. The court granted the defendant's motion for a trial order of dismissal and the prosecution appealed. While the appeal was pending, the defendant was convicted of a controlled substance offense in Pennsylvania and was sentenced to a term of incarceration. A month after he was paroled, this Court reversed the trial order of dismissal, reinstated the verdict, and remitted for sentencing. The presentence report stated that the defendant had no felony convictions prior to the murder. At sentencing, the court noted that the murder was drug-related and that the defendant had a drug conviction for sale of drugs where his family lived prior to the murder. However, there was no such conviction. The court sentenced the defendant to 20 years to life, which was midway between the minimum and maximum authorized sentences. The defendant appealed, arguing that there was no credible evidence that the murder was drug-related, which this Court denied. In the defendant's later CPL 440.20 motion, he argued that sentence was

based, in part, on the sentencing court's erroneous belief that he had a drug felony conviction in addition to the Pennsylvania conviction. Because this argument is distinct from the one raised in the direct appeal, the court erred in concluding that the defendant was procedurally barred under CPL 440.20(2). To establish a due process violation, it is sufficient that the court considered a non-existent conviction when making its determination. *See United States v McDavid*, 41 F3d 841, 844. The sentence was illegally imposed because the factors relied on by the court included materially untrue assumptions or misinformation. *See People v Naranjo*, 89 NY2d 1047, 1049. Order reversed, motion granted, sentence vacated, and matter remitted for resentencing. (Supreme Ct, Kings Co [Collini, J (motion); Beldock, J (sentence)])

Homicide (Mental Condition) (Murder [Defenses] [Evidence]) HMC; 185(35) (40[a] [j])

Insanity (Psychiatrists and Psychologists) ISY; 200(50)

Self-Incrimination (General) (Waiver) SLF; 340(13) (25)

*People v Diaz*, \_\_ AD3d \_\_, 876 NYS2d 69 (2nd Dept 2009)

Immediately prior to jury selection, in the context of a *Molineux* application, defense counsel stated that the defendant was not denying that he murdered or intended to murder the decedent, but that he committed the murder under circumstances evincing extreme emotional disturbance. The prosecution argued that the defendant was barred from presenting evidence of that defense because he failed to comply with CPL 250.10(2). The court, concluding that the defendant's failure to comply was not willful, granted him leave to serve a late notice of intent and granted the prosecution's application for a psychiatric examination of the defendant.

**Holding:** The court properly concluded that the defendant was required, under CPL 250.10, to serve and file a notice of intent to proffer psychiatric evidence, even though he only intended to present lay testimony in support of the defense. *See People v Rivers*, 281 AD2d 348. The notice requirement is meant to ensure that the prosecution has sufficient opportunity to obtain the psychiatric and other evidence necessary to refute a mental infirmity defense. *See People v Berk*, 88 NY2d 257, 263, 264. Since lay testimony alone can be sufficient to establish the defense (*see People v Smith*, 1 NY3d 610, 612), the prosecution must be given an opportunity to counter the defense with relevant information from any source. The court did not err in ordering the defendant to submit to a psychiatric examination by the prosecution's expert. The term "psychiatric evidence" in CPL 250.10 is not limited to evidence

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obtained pursuant to a psychiatric examination. Therefore, whenever the defendant intends to offer any psychiatric evidence in connection with the affirmative defense of extreme emotional disturbance, even if it is limited to lay testimony, the court may require an examination under CPL 250.10(3). The court did not violate the defendant's Fifth Amendment right against self-incrimination because its order directing the examination limited the use of it to the prosecution's case on rebuttal. *See eg Buchanan v Kentucky*, 483 US 402, 422-424 (1987). Judgment affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

Evidence (General) (Relevancy) EVI; 155(60) (125)

Witnesses (Credibility) WIT; 390(10)

*People v Grant*, 60 AD3d 865, 875 NYS2d 532 (2nd Dept 2009)

**Holding:** The court erred in excluding evidence, including testimony as to statements the complainant allegedly made threatening to "get" the defendant, which went directly to the complainant's credibility. *See People v Ocampo*, 28 AD3d 684, 686. The court's discretion in making evidentiary rulings precluding or admitting evidence on collateral issues is restricted by the rules of evidence and the defendant's constitutional right to present a defense. *See People v Carroll*, 95 NY2d 375, 385. Proof that goes to show a motive to fabricate is never collateral and may not be excluded as such. Under the circumstances, the error was not harmless. *See People v Crimmins*, 36 NY2d 230, 241. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Orange Co [Kiedaisch, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Hearings) (Neglect) (Removal) JUV; 230(60) (80) (120)

*Matter of Amanda Lynn B.*, 60 AD3d 939, 877 NYS2d 104 (2nd Dept 2009)

**Holding:** The court improperly exercised its discretion in removing the child from the respondent grandmother's custody. The grandmother had custody of the child for 12 years before the removal. The petitioner failed to establish imminent risk to the child's life or health by remaining with the grandmother that outweighed the harm posed by removal. *See Matter of Alexander B.*, 28 AD3d 547, 549. There were no reasonable efforts made before the removal hearing to prevent or eliminate the need for removal. *See Family Court Act 1027(b)(ii)*. Therefore, the court erred in finding that it was in the child's best interest to be paroled to her natural mother. The child must be returned to the grandmother's care

pending a determination of the educational neglect petition. *See Matter of Vanessa B.*, 38 AD3d 768, 769. The court correctly admitted the mental health evaluations of the grandmother and the child. Although they were hearsay, they were admissible in the Family Court Act 1027 preliminary hearing because they were material and relevant to the determination, and it was not a fact-finding hearing. *See Family Court Act 1046(c)*. Order reversed, child paroled to the care of her grandmother, and matter remitted for further proceedings on the neglect petition to be conducted expeditiously. (Family Ct, Kings Co [Grosvenor, JJ])

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

Sex Offenses (General) (Psychiatric Exam) (Sentencing) SEX; 350(4) (20) (25)

*Matter of Charles S.*, 60 AD3d 954, 875 NYS2d 263 (2nd Dept 2009)

**Holding:** The court erred in granting the state's motion for leave to attend and videotape the court-ordered evaluation of the appellant, an alleged sex offender requiring civil management, to be conducted by a psychiatric examiner of his choosing and to videotape any court-ordered evaluation that may be conducted by a psychiatric examiner of its choosing. Mental Hygiene Law article 10 is silent on both issues. The court may not amend a statute to insert words that are not there, nor may it read into a statute a provision that the Legislature did not choose to enact. *See Matter of Chemical Specialties Mfrs Assn v Jorling*, 85 NY2d 382, 394. No provision of article 10 expressly permits the relief sought by the state and such language will not be read into the statute. Order reversed and motion denied. (Supreme Ct, Kings Co [Dowling, JJ])

Counsel (Conflict of Interest) COU; 95(10) (15) (39)

(Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel)

*People v McClam*, 60 AD3d 968, 875 NYS2d 568 (2nd Dept 2009)

**Holding:** The defendant's right to counsel was not adequately protected. Although a defendant does not have the right to appointment of successive court-appointed lawyers at the defendant's option, a defendant may be entitled to new counsel if there is good cause for the substitution, such as a conflict of interest or an irreconcilable conflict. The court must carefully evaluate seemingly serious requests for substitution to determine if there is good cause, considering the timing of the request, the effect on the progress of the case, and whether the defendant's current counsel will likely provide meaning-

## Second Department *continued*

ful assistance. See *People v Linares*, 2 NY3d 507, 510. The conflict between the defendant and his assigned counsel started before the pretrial suppression hearings, and the defendant requested new counsel. The court conducted a limited inquiry and denied the request. The defendant made a series of requests for new counsel, and there were contentious exchanges between the defendant and the court. Just prior to jury selection, the defendant renewed his request, which the court denied. During jury selection, defense counsel admitted to threatening to punch the defendant, and stated that the defendant was his absolute worst client ever, he could not in good faith represent him, and he would seek the intervention of the administrative judge if the court denied his request to be relieved. The court denied the request. The next day the defendant pleaded guilty. Defense counsel told the court that they had reconciled, but the defendant did not confirm it. The defendant insisted on pleading guilty to the resisting arrest charge, even though it was not required by the plea bargain. And the court did not ask whether the defendant was satisfied with the performance of his attorney. The court failed to meet its ongoing duty to make inquiries sufficient to determine whether there was good cause for the substitution. See *People v Brown*, 305 AD2d 422. Judgment reversed, plea vacated, denial of motion to suppress statements and identification testimony vacated, and matter remitted. (Supreme Ct, Nassau Co [Calabrese, JJ])

Narcotics (Penalties) NAR; 265(55)

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

*People v Vaughan*, \_\_ AD3d \_\_, 876 NYS2d 82  
(2nd Dept 2009)

The defendant was convicted of first-degree criminal possession of a controlled substance, second-degree criminal possession of a weapon, and second-degree assault. He was sentenced to consecutive indeterminate terms of 15 years to life on the controlled substance count, 9 years to life on the weapon count, and 6 years to life on the assault count. The defendant moved for resentencing under the 2004 Drug Law Reform Act (DLRA) (L 2004, ch 738), seeking a determinate term of 15 years with a five-year period of post-release supervision on the drug count and for an order directing that the determinate term run concurrently with the two other indeterminate terms.

**Holding:** The court correctly denied the defendant's motion for resentencing. The DLRA authorizes the resentencing court to resentence a person convicted of a class A-I drug felony who is serving an indeterminate term with a minimum period of 15 years to a determinate term in accordance with Penal Law 70.71. The statute does not

give the court the power to determine how the sentence should be served in relation to sentences for other violent felony offenses. The only defect in the defendant's original sentence is that the indeterminate term imposed on the drug count does not conform to the sentencing structure in the DLRA; this can be cured by replacing the indeterminate term with a determinate term. Since there are no other defects, altering the defendant's already-commenced sentence to make the terms run concurrently is beyond the court's power. See *People v Romain*, 288 AD2d 242, 243. Because the court did not have the authority to grant the defendant's requested relief, the defendant's presence was not required when the court issued its decision. Cf *People v McCurdy*, 11 Misc 3d 757, 760 *affd on other grounds* 46 AD3d 843. Order affirmed. (Supreme Ct, Kings Co [Del Giudice, JJ])

Evidence (Weight) EVI; 155(135)

Identification (Eyewitnesses) IDE; 190(10) (24) (35) (45)  
(In-court) (Photographs)  
(Sufficiency of Evidence)

*People v Chase*, 60 AD3d 1077, 876 NYS2d 485  
(2nd Dept 2009)

**Holding:** The verdict was against the weight of the credible evidence. The defendant was convicted of second-degree robbery and third-degree assault. The evidence of identity was equivocal and unconvincing. Of the six eyewitnesses who testified for the prosecution, only one made an affirmative in-court identification of the defendant, and he testified that he was not totally positive. The out-of-court identifications did not prove the defendant's identity as the perpetrator beyond a reasonable doubt. Two witnesses were presented with a photo array with six photos. One witness did not select any of the photos; the other witness selected two photos of people who "kind of" looked like the perpetrator, one of which the defendant's photo, but the witness said that the perpetrator might be the person in the other photo. Two other witnesses were asked to identify the perpetrator using a high school yearbook. One of them identified the defendant and the other witness, the only one to identify the defendant in court, did not recognize anyone. The police focused their investigation on the defendant because the car involved was traced to his address. The defendant admitted being in the car, but claimed that his cousin, who had a similar appearance, was the perpetrator. Another defense witness, whose physical description matched witness descriptions of a person at the scene of the incident, corroborated the defendant's testimony. Judgment reversed, indictment dismissed, and matter remitted. (County Ct, Orange Co [Freehill, JJ])

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Identification (Eyewitnesses) IDE; 190(10) (35) (50) (57)  
 (Photographs) (Suggestive  
 Procedures) (*Wade*  
 Hearing)

People v Coleman, 60 AD3d 1079, 876 NYS2d 158  
 (2nd Dept 2009)

**Holding:** The court erred in denying, without a hearing, the defendant's motion to suppress the complaining witness's identification testimony. The complainant made two photographic identifications of the defendant prior to trial. The defendant moved to suppress, arguing that they were made under impermissibly suggestive circumstances. In response, the prosecution alleged that the identifications were confirmatory; in support, they provided a portion of the witness's grand jury testimony. The witness had testified that about three months before the incident, he began seeing the defendant "regularly," meaning that, every other day, he saw the defendant walk up and down the block where the witness lived. By relying on testimony that was not tested by cross-examination, the prosecution failed to meet its burden of proving that the complainant knew the defendant so well that he was impervious to police suggestion. *See People v Rodriguez*, 79 NY2d 445, 452. The matter must be remitted for a hearing and determination of whether the identifications were merely confirmatory, and, if not, whether the identification procedures were unduly suggestive. Appeal held in abeyance and matter remitted for hearing and report on defendant's motion to suppress identification testimony. (Supreme Ct, Kings Co [McKay, JJ])

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

Counsel (*Anders* Brief) COU; 95(7) (15)  
 (Competence/Effective  
 Assistance/Adequacy)

People v El Machiah, 60 AD3d 1081, 875 NYS2d 803  
 (2nd Dept 2009)

**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 certain aspects of the testimony of Lieutenant Wiseman regarding his opinion that the subject fire was incendiary invaded the jury's exclusive province of determining an ultimate fact in the case (*see People v Smith*, 289 AD2d 597 . . .)." Counsel relieved and directed to turn over all papers to new counsel and briefing schedule set. (County Ct, Orange Co [DeRosa, JJ])

Juveniles (Abuse) (Custody) JUV; 230(3) (10) (80) (145)  
 (Neglect) (Visitation)

Matter of Gabriel James Mc., 60 AD3d 1066,  
 877 NYS2d 126 (2nd Dept 2009)

**Holding:** The court properly denied the mother's motion to dismiss the maternal grandparents' petition for custody. The child was removed from the mother's custody pursuant to Family Court Act 1028. "Family Court Act § 1017(2)(a)(i) provides that, upon removal of a child pursuant to Family Court Act § 1028, the child may be placed with a nonrespondent parent, relative, or other suitable person, pending further investigation, and custody may be awarded to such a nonrespondent under Family Court Act article 6. The effect of recent amendments to Family Court Act § 1017(2)(a)(i) (*see* L 2005, ch 3, § 10; L 2008, ch 519, § 1) was to overrule prior case law, which imbued a parent charged with abuse and/or neglect with veto power over the placement of a child with the noncustodial parent or other relative (*see Matter of Seth Z.*, 45 AD3d 1208; *Matter of Tristram K.*, 36 AD3d 147, 152). We note that the record reflects that 'conditions exist [in] which equity would see fit to intervene' (Domestic Relations Law § 72[1]), and which are sufficient to award the maternal grandparents visitation in the best interests of the child." Notice of appeal deemed an application for leave to appeal, leave to appeal granted, and order affirmed. (Family Ct, Kings Co [Danoff, JJ])

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

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

People v Jefferson, 60 AD3d 1085, 876 NYS2d 153  
 (2nd Dept 2009)

**Holding:** It cannot be determined from the record whether the defendant was competent at her plea allocution and sentencing. At the plea, the court asked the defendant whether she was under the influence of drugs, to which she replied that she had just come from the psychiatric ward. Instead of following up on this, the court asked whether she understood all the questions it asked, and she responded, "Yeah." When the court asked her if it was clear what was happening, the defendant said that she was confused, and when asked what she was confused about, she said, "I don't know. I'm depressed." However, when the court asked whether her depression prevented her from understanding the proceedings, she said, "No." The court did not ask defense counsel any questions about the defendant's mental state, and proceeded to accept the defendant's plea. The defendant's responses raised a serious question as to her competency. Therefore, the matter must be remitted for a hearing and

**Second Department** *continued*

report on whether the defendant was competent at the plea allocution and sentencing. *See* CPL 730.30; *People v Hussari*, 17 AD3d 483. Appeal held in abeyance and matter remitted for hearing and report. (Supreme Ct, Richmond Co [Rienzi, JJ])

Evidence (Business Records)                      EVI; 155(15) (85)  
(Judicial Notice)

*People v Ramos*, 60 AD3d 1091, 876 NYS2d 127  
(2nd Dept 2009)

**Holding:** The court properly admitted the bank records of the complainant. The court may take judicial notice of business records when they “are ‘so patently trustworthy as to be self-authenticating’ (*People v Kennedy*, 68 NY2d 569, 577 n 4 . . .).” The defendant did not allege that the records were not authentic or accurate, and there is no reason for the records to be viewed as other than reliable and trustworthy. *See Elkaim v Elkaim*, 176 AD2d 116, 117. Judgment affirmed. (Supreme Ct, Queens Co [Wong, JJ])

**Dissent:** [Carni, J] The prosecution failed to lay a proper foundation for the admission of the alleged bank records, as required by CPLR 4518(a) and CPL 60.10 and 470.05(2). The records consisted of a faxed document received at the prosecution’s office while the complaining witness was there. The prosecution did not present testimony from a bank employee or representative. The com-

plaining witness testified that the alleged records were not the bank statements she received at her home and did not look like the statements she customarily receives at home. The witness denied knowledge of the bank’s record-keeping practices and did not know whether the document was made or kept by the bank in the ordinary course of business. ⚖

**Defender News** *(continued from page 12)*

resources, including research reports, fact sheets, and publications, on its website [consensusproject.org](http://consensusproject.org).

**John Kennedy, Ontario County Assigned Counsel Program Administrator, is Mourned**

NYSDA was saddened by news just as the *REPORT* went to press of the death on May 26 of John Kennedy, Administrator of the Assigned Counsel Program in Ontario County. John practiced law in Canandaigua for over 30 years. During the 13 years he was the Assigned Counsel Administrator, John regularly attended NYSDA’s Chief Defender Convenings, and he was a long-time NYSDA member. He also played a key role in discussions about Ontario County’s planned creation of a Public Defender Office. We at NYSDA will miss him, and extend our sympathies to his family and colleagues. ⚖

**Job Opportunities**

*(continued from page 16)*

personal skills and ability to work both collaboratively and independently are necessary. Consideration will be given to prior experience working with low-income people. Demonstrated strong writing skills are required. Applications will be accepted until the positions are filled. To apply, send a letter of interest, résumé, writing sample, and the names, addresses, and phone numbers of 3 professional references to Keith McCafferty, Managing Attorney, Legal Assistance of Western New York, Inc., 361 South Main Street, Geneva, New York 14456. LAWNY is an equal opportunity employer. Applications from minorities, women, and people with disabilities are especially encouraged. For more information, visit [www.lawny.org](http://www.lawny.org).

The American Civil Liberties Union Foundation of Connecticut (ACLUF-CT) seeks a **Legal Director**. Under the direction of the Executive Director, the Legal

Director manages and coordinates the organization’s statewide legal program and participates in non-litigation advocacy activities. Although the primary litigation function in the ACLUF-CT’s wide range of civil liberties cases will be recruiting and managing cooperating counsel (generally attorneys in private practice who volunteer to handle litigation under the direction of the ACLUF-CT), the Legal Director may also directly handle cases—or supervise the ACLUF-CT’s other staff attorney in handling cases—especially in connection with pleading, discovery and emergency hearings and presenting oral arguments in state and federal courts at both the trial and appellate levels. Other duties include: working with the National ACLU litigation team in investigating and developing cases; non-litigation advocacy responsibilities, including public speaking, media interviews and outreach work, researching legal issues related to proposed legislation, and writing press releases, op-eds and newsletter articles and reports; and working with a

local legal committee and reporting periodically to the Board of Directors. Qualifications: JD with at least 5 year’s experience as a litigator, preferably with federal appellate experience and in complex litigation of constitutional issues; experience in non-profit advocacy or community-based groups is valuable; membership in the Connecticut State Bar (or must pass the next bar examination); strong analytical, writing, and speaking skills; firm commitment to the mission and principles of the ACLU; demonstrated ability to lead, manage, and motivate others; superb organizational skills; commitment to diversity; willingness to work beyond the 9 to 5 hours of the normal work day; and proficiency with computers. Salary DOE; competitive benefits. To apply, submit in digital form, by email, a detailed letter of interest, résumé, writing sample and contact information for three references to [ASchneider@acluct.org](mailto:ASchneider@acluct.org). The ACLUF-CT is an equal opportunity/affirmative action employer. For more information, visit [www.acluct.org/aboutus/employment/](http://www.acluct.org/aboutus/employment/). ⚖

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

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