NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

Volume XXIV Number 4 September–November 2009

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Court of Appeals Offers Further Guidance on Admission of Expert Testimony on Eyewitness Identification

On October 27, the Court of Appeals decided two cases in which the defendants sought to introduce expert testimony on eyewitness identification. *See People v Abney* (No. 139) & *People v Allen* (No. 140). The court reiterated its prior holding in *People v Lee* (96 NY2d 157): trial courts have discretion regarding the admission of such testimony, but courts should be guided by whether the testimony would aid the jury and whether it is generally accepted in the relevant scientific community.

The Court reversed the First Department's decision in *Abney*, concluding that the court abused its discretion in denying the admission of expert testimony on witness confidence. Regarding the proposed testimony on the effect of event stress, exposure time, event violence, weapon focus, and cross-racial identification, the trial court should have conducted a *Frye* hearing before ruling on its admissibility. The Court noted that when Abney renewed his motion to present expert testimony, it was clear that there was no evidence other than the eyewitness's identification to connect the defendant to the crime and that the eyewitness did not describe the perpetrator as having any unusual or distinctive features or physical characteristics. The trial court's error was not harmless; while the defendant's muddled alibi defense was unhelpful to his case, it was not overwhelmingly inculpatory, and "it is possible that defendant would not have pursued an alibi defense in the first place if Dr. Fulero had testified."

The Court reached the opposite conclusion in *People v Allen*. In *Allen*, the Court agreed with the Second Department's conclusion that the trial court did not abuse its discretion in refusing to allow the expert testimony because the case did not depend exclusively on eyewitness testimony. The Court likened *Allen* to the facts in *Lee* and *People v Young* (7 NY3d 40), and distinguished it from *People v LeGrand* (8 NY3d 449). A full summary of the decision is available on page 12.

INSIDE AT CENTER INSERT:

Table of Lesser Included Offenses (July 2009)

Courtesy of the *NY Defender Digest*

(Available in Printed Copies Only, Not on the Web)

Forensic Science Reforms

Campaign for National Forensic Science Standards Established

On October 19, 2009, the Innocence Project and organizations in 23 states joined together to create the Campaign for National Forensic Standards. (www.justscience.org/101909_outreach_network.html.) The Campaign will advocate with federal policymakers for forensic science reform. Stephen Saloom, the Innocence Project's Policy Director, explained the importance of the Campaign: "This is an issue with urgent national importance, and these local leaders have come together to strengthen the U.S. criminal justice system." Organizations interested in joining the Campaign are encouraged to contact Innocence Project's Forensic Policy Associate, Sarah Chu, at schu@innocenceproject.org.

Meanwhile, defense attorneys must determine how best to confront supposed forensic science evidence whenever the prosecution seeks to use it. The January-February 2009 issue of the *REPORT* discussed the report of the National Research Council (of the National Academy of Sciences [NAS]) on the deficiencies in forensic

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science. NYSDA has also offered training on the NAS report this fall in Buffalo and Poughkeepsie and this past summer at the Annual Conference (see p. 5).

Dog Scent Lineups Under Attack

In September, the Innocence Project of Texas issued a report, *Dog Scent Lineups: A Junk Science Injustice*, summarizing its investigation of dog scent lineups used in Texas criminal cases. (http://ipoftexas.org/ipot-releases-dog-scent-lineup-report/.) The report concludes that scent lineups are not founded on a reliable scientific methodology. "Scent lineups, even if done correctly, are of only marginal value. Scent lineups done incorrectly or relied upon as conclusive proof result in disaster." The Innocence Project urges police and prosecutors to stop using these lineups, demands that the Governor's Office stop giving grant money to police agencies using scent lineups and issue an executive order banning law enforcement from using these lineups, and calls on the Texas state legislature to enact laws that prohibit the use of junk science in criminal cases.

Two cases that were highlighted in the report have also received media attention. *Picked from a Lineup, on a Whiff of Evidence* examined the cases against Curvis Bickham and Michael Buchanek. Curvis Bickham was held in jail for eight months on homicide charges after a dog scent lineup. The case was later dismissed after another man confessed. (www.nytimes.com, 11/4/2009.) Michael Buchanek's case was also reviewed in a CNN.com article, *Dogs sniff out wrong suspect; scent lineups questioned*. Buchanek, a retired sheriff's office commander, was charged with the murder of his neighbor after a dog scent lineup. His case was eventually dismissed after DNA evidence implicated another man. Buchanek is now suing the dog handler and the local police department. Steve Nicely, a professional dog trainer and expert witness in Buchanek's case was quoted as saying: "There are no national standards" and "Our standards are so lacking, it's pathetic. We should be ashamed of ourselves." (www.cnn.com, 10/5/2009.)

Attorneys who would like more information about dog scent lineups and other dog detection evidence should contact the Backup Center and visit NLADA's forensics library at www.nlada.org/Defender/forensics/for_lib.

Senate Report Urges Immediate Increase in the Number of Family Court Judges

In early November, the Senate Judiciary Committee released its report, *Kids & Families Still Can't Wait: The Urgent Case for New Family Court Judgeships.* (www.nysenate.gov/report/familycourt.) The Committee found that family court dockets are larger and growing faster than other state trial courts and that, as a result of increasing dockets and the lack of new judgeships, the quality of justice for families and children is in jeopardy. "[T]he state systematically has discriminated against Family Court in the creation of judgeships and, by extension, against at-risk New York families—and especially children—who often have nowhere else to turn for justice, support, and protection." The report contains little discussion about the impact on public defense programs of the current situation or of adding judges without addressing the need for other additional professionals in these courts.

The Committee recommended that an additional 21 judgeships be added immediately to the family court system: seven in New York City and one each in Albany, Broome, Chautauqua, Chemung, Chenango, Erie, Fulton, Oneida, Oswego, Rensselaer, St. Lawrence, Schenectady, Steuben, and Westchester counties. Another 18 judgeships should be added in future years. The report also recommended periodic review of the family court system.

Senator John L. Sampson, chair of the Judiciary Committee, has urged the Assembly to pass A.8957, which would implement the recommendation to add 21 Family Court judgeships. The Senate passed a companion bill, S.5968, in September. (www.law.com, 11/5/2009.)

Report on Two-Year Study of Drug Courts Released; Advocates Treating Drug Addiction as Public Health Issue

In September, the National Association of Criminal Defense Lawyers released a report, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case*

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for Reform. (www.nacdl.org/public.nsf/freeform/News Releases?OpenDocument.) The report advocates for the treatment of substance abuse as a public health issue, not a criminal justice issue. "Although decriminalization remains the smartest, fairest, and most economical solution, significant reforms must be made to these courts until that occurs. These courts cannot continue to be conviction mills that require defendants to abandon fundamental constitutional rights and lawyers and judges to modify or disregard longstanding ethical obligations."

Recommendations include: eliminating the requirement that defendants plead guilty before accessing treatment; creating objective and fair criteria for admission; ensuring that the drug court framework accommodates existing ethical rules; focusing drug courts on high-risk defendants facing lengthy jail terms and using less onerous and expensive alternatives to drug court for low-risk defendants and those who commit low-level offenses; and ensuring that drug courts are available to all people, regardless of race, economic status, and immigration status.

The report proposes best practices for defense counsel that are rooted in this basic principle: "Counsel can and must remain a zealous advocate for clients from the beginning to the end of the process. This need not be inconsistent with the drug court approach. Where zealous advocacy and the drug court approach or judge's instructions conflict, counsel must be a zealous advocate."

The report also includes a brief discussion of mental health courts. The report recommends treatment for persons with mental illness outside the criminal justice system, but also includes proposals for improving mental health courts, such as devoting sufficient and appropriate resources to treatment, ensuring that the defendant's participation is voluntary, expanding access to include persons charged with felonies and offenses involving violence, and maintaining defense counsel's ethical responsibilities to clients.

NAMI-NYS Also Addresses Reform

Mental health courts are among issues of interest to NAMI-NYS, the state organization of the National Alliance on Mental Illness. The group offers services to family members of persons with mental illness, including individuals who come into contact with the criminal justice system. NAMI-NYS has a Criminal Justice Program that seeks, among other things, to teach affiliates how to "advocate for the kind of reform that will provide the necessary treatment and service needs of persons with mental illness." The program now has a Criminal Justice Family Advocacy Training Program in place. For more information, visit http://www.naminys. org/criminaljustice.html or call the NAMI-NYS office at (800) 950-3228.

Updates on Rockefeller Drug Reform

All of the 2009 Rockefeller Drug Law reforms are now in effect. As of October 7, 2009, judges are now authorized to divert most drug and marijuana offenders with an identified alcohol or substance abuse problem to inpatient or outpatient treatment. Prosecution consent is not required. Judicial diversion is available for individuals charged with class B through E felony drug offenses, including second felony drug offenders who do not have a predicate violent felony offense conviction, and Willard eligible offenses. The entire list of requirements for diversion is available in Criminal Procedure Law article 216. More information about judicial diversion can be found in the March-May 2009 issue of the *REPORT* (www.nysda. org/09_MarchMayREPORT.pdf), as well as on the Center for Community Alternatives' website at www.communityalternatives.org/publications/tools.html. Resentencing of certain class B drug offenders also started on October 7.

The new conditional sealing statute, CPL 160.58, took effect on June 6, 2009. The statute allows a court to conditionally seal records of drug, marijuana, and Willard-eligible non-drug crimes after the defendant successfully completes the imposed sentence and a judicial diversion or similar substance abuse treatment program. The court may also conditionally seal up to three prior misdemeanor drug or marijuana convictions. A sample conditional sealing motion is available from the Center for Community Alternatives at www.communityalternatives.org/publications/tools.html.

As of November 1, 2009, there are two new drug offenses: Criminal Sale of a Controlled Substance to a Child (Penal Law 220.48; class B felony); and Operating as a Major Trafficker (Penal Law 220.77; class A-I felony).

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[Saratoga Racing Season Starting Early in 2010 (Friday, July 23)]

Proposed Legislation to Add Actual Innocence to Post-Conviction Law

Senator Eric T. Schneiderman and Assemblymember Hakeem Jeffries proposed legislation that would establish actual innocence as an explicit basis for vacating a conviction under Criminal Procedure Law 440.10. The *Actual Innocence Justice Act of 2009* (S.6234) provides that "a defendant is actually innocent where there exist sufficient evidentiary facts and inferences, presented by sworn affidavit or other reliable and relevant proof, that, when viewed in light of the record as a whole, conclusively establish the defendant did not commit such crime or crimes." The current provisions in 440.10(2)(c) and (3) that require or permit the court to deny a post-conviction motion would not apply to actual innocence claims unless the court determines, based on record evidence, that the defendant's failure to act or lack of due diligence was intentional.

According to the sponsor's memo, "[e]xperts observe that the percentage of exonerations based on non-DNA evidence in New York State is only increasing. For these individuals, the Criminal Procedure Law currently offers only limited hope for collateral relief by establishing a series of roadblocks that, taken together, can deprive an innocent person from having his or her innocence claim fully and fairly aired. The tragic result—as graphically demonstrated in hundreds of wrongful conviction cases throughout the country—is that an innocent person can spend years or even decades behind bars while the real perpetrator remains free to commit more crimes and terrorize additional victims." The bill and sponsor's memo are available at http://public.leginfo.state.ny.us/menu getf.cgi (select Bill No. and 2009 and use S6234 as search term).

Proposed Rules Establishing Graduated Sanctions and Violations of Probation

The Division of Probation and Correctional Alternatives has proposed a new 9 NYCRR Part 352 that would create graduated sanctions for probation violations. (www.dos.state.ny.us/info/register/2009/sep16/pdfs/rules.pdf.) The rules would require local probation directors to establish written policies and procedures for addressing non-compliance with probation conditions. The policies must be designed to ensure that they are applied fairly, consistently, promptly, in proportion to the severity of the non-compliant behavior, and in a predictable manner. If a violation of probation report will be filed, the probation department must consider the possible outcomes, including continuing the probation sentence with or without modification, extending the probation term as authorized by law, or revoking the probation sentence and resentencing the defendant. The proposed rules also include procedures for handling absconders, arrests and convictions for new offenses, and issuance of notices to appear and warrants for arrest.

Department of Correctional Services Issues Memo on the Limited Credit Time Allowance

In October, the New York State Department of Correctional Services (DOCS) distributed a memo regarding the criteria for the new limited credit time allowance available pursuant to Correction Law 803-b. Certain eligible inmates may receive the six-month time allowance if they successfully complete a significant programmatic accomplishment during their current term of incarceration. The memo summarizes the requirements for the five programmatic accomplishments listed in the statute, as well as a sixth program that does not appear in the statute.

DOCS has defined the minimum of two years successful participation in college programming as two years cumulative participation in an institution of higher education that is accredited, provides transcriptable, credit-bearing courses that can lead to a degree or certificate and are transferrable to other institutions of higher learning; inmates must complete at least 6 credits per semester, for a minimum total of 24 credits. The Masters of Professional Studies degree must be earned through the New York Theological Seminary at Sing Sing Correctional Facility. Successful participation as an Inmate Program Associate requires completion of the IPA training and service for at least two years at one module a day consecutively in one of eight different titles. The fourth significant programmatic accomplishment is attainment of a New York State Labor Department Human Services Vocational apprenticeship certification. Hospice aides that complete the training program and serve as hospice aides for two consecutive years are also considered to have a significant programmatic accomplishment. The sixth program, not mentioned in the statute, is two years of successful participation in the Puppies Behind Bars Program, which requires participation for at least 16 months as a puppy handler or alternate puppy handler and completion of one or more of the following Penn Foster certificates: dog obedience trainer/instructor, pet groomer, or veterinary assistant.

New Telephone Contract Brings Reduced Rates for Inmate Calls

The New York State Department of Correctional Services (DOCS) announced that it has signed a contract with Unysis Corporation for inmate telephone service at all of its correctional facilities. Installation of the new

phone system starts this month and will continue until January. Once installation is complete at a particular facility, the new rates will take effect. The connection fee of $1.28 has been eliminated and the per minute rate will drop from 6.8 cents to 4.8 cents for collect and pre-paid local and long distance calls. Information about the new contract is available in the Autumn 2009 issue of *DOCS Today*. (www.docs.state.ny.us/PressRel/DOCSToday/Autumn2009edition.pdf.)

In October, the Court of Appeals heard arguments in an appeal of the Third Department's decision in *Matter of Walton v New York State Department of Correctional Services* (57 AD3d 1180 [3d Dept 2008]). The petitioners, recipients of collect phone calls from inmates at DOCS facilities, are seeking a refund of the 57.5% commission that MCI, the prior telephone service provider, paid to DOCS.

Review of the First Five Years of the New Bronx Criminal Division

The Unified Court System issued a report in October that examines the first five years of the new criminal court system in the Bronx. (http://courts.state.ny.us/press/pr2009_16.shtml.) In 2004, the court system merged the County's Criminal Court and Supreme Court Criminal Term to deal with the backlog of felony cases and the increasing number of misdemeanor cases. While the new court has been able to adjudicate misdemeanor cases more efficiently and effectively than the other New York City counties, the felony backlog has increased, the number of felony trials has decreased, and the average age of pending felony cases has grown older. The report identified factors that have contributed to these failures, including: "the steady decline in superior court informations (SCIs) whereby defendants plead guilty early in the proceedings and waive the much lengthier grand jury indictment process"; the steep increase in criminal court arraignments, which has reduced court's trial capacity; and the design of the court building, which does not allow for timely admission of a high volume of court users and the timely production of over 300 prisoners a day.

The report recommended a number of changes to the court: establishing court parts to handle the oldest pending misdemeanor and felony cases; assigning additional judges to the Criminal Division and assigning more judicial hearing officers to try class B misdemeanor cases; and using video conferencing to reduce the number of prisoners that must be brought to the court and finding ways to streamline the process of prisoner production. The report also recommended that judges actively promote video court appearances for routine proceedings and that judges "consider dispensing with the requirement that defendants (both incarcerated defendants and 'out' defendants) appear in court for routine appearances."

Fall Featured Record Number of NYSDA Training Programs

This fall, the New York State Defenders Association offered a record number of training programs in locations throughout the State. The yearly Fourth Department Assigned Counsel programs for Criminal and Family Court Appeals were held in Rochester in September and October. SUNY Brockport was the setting for a program on evidentiary foundations, which was cosponsored by the Monroe County Public Defender's Office and the law firm of Easton Thompson Kasperek Shiffrin LLP.

Programs on criminal law updates and winning criminal defense techniques were offered in Poughkeepsie and Rochester. NYSDA and the Cayuga County Criminal Defenders cosponsored a program on prosecutorial misconduct in Auburn. And the Erie County Bar Association Aid to Indigent Prisoners Society and NYSDA cosponsored a training on the National Academy of Sciences' report on the deficiencies in the forensic science system this month in Buffalo.

The yearly federal criminal law update, cosponsored by the Federal Public Defender's Office, NDNY, was held in Albany. A seminar on defending drunk driving cases, held in New York City, was cosponsored by the National College for DUI Defense and The Legal Aid Society. Two trainings on the immigration consequences of criminal convictions were also offered this fall, one in Batavia and one in New York City; the New York City program was cosponsored by the National Immigration Project of the National Lawyers Guild, the Immigrant Defense Project, the Law Offices of Norton Tooby, and the NYU School of Law Immigrant Rights Clinic.

Information on upcoming NYSDA trainers, including the 24th Annual Metropolitan Trainer and the 43rd Annual Meeting can be found on pages 3 and 7, as well as on the Association's website, www.nysda.org/html/training_calendars.html.

NYSDA Client Advisory Board Offers Assistance to Chiefs

The NYSDA Client Advisory Board has a new project. It is designing and implementing a training process to use in assisting Chief Defenders who want to develop or reinvigorate a local client advisory board. A letter and flyer describing the project and soliciting input and interest from Chief Defenders has been sent to all public defense programs statewide.

The NYSDA Client Advisory Board is mandated by the Association's By-Laws. It advises the Executive Director and assists in the design, execution, and evaluation of NYSDA's community program activities. Perhaps

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Job Opportunities

Staten Island Legal Services (SILS) seeks a **Supervising Attorney** for its Family Law Unit. The successful candidate will supervise the family law unit and build litigation capacity in our new, dynamic 15 person office. Opportunity also exists to work with immigration and government benefit units. Family law practice involves representation of domestic violence survivors in proceedings in Family Court, Supreme Court, and the Integrated Domestic Violence Court; community education and outreach to immigrants, and to teens and young people about dating violence; and policy advocacy on issues affecting our clients. Immigration practice includes helping eligible survivors apply for U-Visas or file self petitions under the Violence Against Women Act. In both areas of practice, lawyers work collaboratively with a licensed social worker to address a wide range of client needs including housing, benefits, job training, and language access. We are looking for someone who is interested in both supervising ongoing case work and exploring opportunities for broad impact work-both through policy advocacy and litigation. Requirements: admission to NY Bar or eligibility for admission; minimum of 5 years of family law experience; excellent litigation and oral advocacy, legal writing, organizational and interpersonal, and supervisory skills; bi-lingual Spanish or other language spoken by legal services client communities desirable, but not required. To apply, mail or email a résumé, cover letter, and writing sample to: Nancy Goldhill, Project Director, Staten Island Legal Services, 36 Richmond Terrace, Suite 205, Staten Island, NY 10301, ngoldhill@silsnyc.org. Only candidates selected for interviews will be contacted. No telephone calls. EEO. People of color, women, people with disabilities, gay, lesbian, bisexual, and transgender people are welcome and encouraged to apply. For more information, visit www.legalservicesnyc.org.

Cortland County seeks a full-time **Conflict Attorney** for its Conflict Attorney's Office. Applicants must possess a license to practice law in New York State and have three (3) years of experience as a practicing attorney in the field of criminal and/or family law. Approved applications will be forwarded to the County Administrator's office until the position is filled. Salary: $57,599-70,078. EEO. For more information about the position and the application process, visit www.cortland-co.org/personnel/index.html or contact the Cortland County Personnel Department at 607-753-5076.

Job Listings are also available at www.nysda.org Job Opportunities (under NYSDA Resources)

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

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The Public Defender Service for the District of Columbia (PDS) seeks a **Mental Health Attorney** for its Mental Health Division. PDS is a federally funded, independent organization that provides legal representation to the indigent citizens of the District of Columbia who are charged with criminal offenses and are facing a loss of liberty. The Mental Health staff attorney will represent indigent persons facing civil commitment to Saint Elizabeth's Hospital and insanity acquittees seeking conditional or unconditional release from the Hospital; take lead responsibility for all stages of representation, including probable cause hearings, motions, jury trials, and disposition before the DC Superior Court, and hearings before the DC Commission on Mental Health, a quasi-judicial branch of the Superior Court; advocate for clients in various ancillary matters that arise in connection with hospitalization, and work closely with the Appellate Division to litigate and resolve novel issues of mental health law, and perform other duties as assigned. Qualifications: J.D. or equivalent degree from an accredited law school; member of the DC Bar or eligibility for reciprocity for admission to the DC Bar; significant trial/courtroom experience or trial practice courses or clinical education in law school; excellent research and writing skills; demonstrated desire to serve persons with disabilities as well as capacity to emphasize with and understand the plight of persons from disadvantaged backgrounds; and demonstrated ability to communicate effectively with a broad spectrum of people. Preferred qualifications: experience representing people who are faced with involuntary psychiatric hospitalization; knowledge of laws pertaining to civil and criminal commitment of mentally ill persons in DC; and knowledge of laws generally pertaining to civil rights and liberties of persons detained because of mental illness, including familiarity with involuntary medication issues. EOE. Applications must be submitted online through the PDS website. For more information on the position and the application process, visit www.pdsdc.org/Employment/JobDetails.aspx?JobID=221.

The Minnesota Board of Public Defense seeks a **Chief Appellate Defender**. The Chief Appellate Defender is responsible for the administration of public defender appellate services, consistent with standards adopted by the State Board of Public Defense and the policies and procedures adopted by the State Public Defender. The Chief Appellate Defender shall be a full-time qualified attorney, licensed to practice law in Minnesota; shall serve in the unclassified service of the State; shall be removed only for cause by the Board of Public Defense; and shall devote full time to performance of duties and shall not engage in the general practice of law. Applicants must have considerable knowledge of: appellate law and policy issues affecting public defenders and their clients, on both state and national levels; management and operations of public defense programs; and legislative processes that affect criminal law and juvenile law and affect public defense agencies in Minnesota. Applicants must be able to supervise attorneys and support staff; establish effective working relationships with appellate court personnel; and work well with people from diverse racial, cultural, and socio-economic backgrounds. Salary: $96,247-125,580. EOE. Applications may be submitted between November 13 and December 11 (noon). For more information and to apply, visit www.pubdef.state.mn.us and click on Employment. ⚖

Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers
Theme: 30th Annual Advanced Criminal Law Seminar
Dates: January 10–15, 2010
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association
Theme: Appellate Defender Skills Training
Dates: January 21–24, 2010
Place: New Orleans, LA
Contact: NLADA: tel (202) 452-0620; email registration@nlada.org; website www.nlada.org/adt.htm

Sponsor: National Association of Criminal Defense Lawyers
Theme: Not Guilty! Making It Happen With Cutting-Edge Defenses
Dates: February 24–27, 2010
Place: Austin, TX
Contact: NACDL: tel (202) 872-8600 x232 (Viviana Sejas); email viviana@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Legal Aid & Defender Association
Theme: Life in the Balance 2010
Dates: March 6–9, 2010
Place: Nashville, TN
Contact: NLADA: tel (202) 452-0620; website www.nlada.org/Training

Sponsor: New York State Defenders Association
Theme: 24th Annual Metropolitan Trainer
Dates: March 13, 2010
Place: NYU Law School, New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: Making Sense of Science III: Forensic Science & the Law
Dates: March 26–27, 2010
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: National Association of Criminal Defense Lawyers
Theme: Litigating Non-DNA Post-Conviction Innocence Cases
Date: April 15, 2010
Place: Atlanta, GA
Contact: NACDL: tel (202) 872-8600 x236 (Gerald Lippert); email gerald@nacdl.org; website www.nacdl.org/meetings

Sponsor: New York State Defenders Association
Theme: Defender Institute Basic Trial Skills Program
Dates: June 13–19, 2010
Place: Troy, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Sponsor: New York State Defenders Association
Theme: 43rd Annual Meeting & Conference
Dates: July 25–27, 2010
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; email dgeary@nysda.org; website www.nysda.org

Defender News *(continued from page 5)*

its best-known project is the creation of the Client-Centered Representation Standards developed at the Executive Director's request. Those standards were adopted in 2005 and endorsed by the Association's Board of Directors the same year. They can be found at: www.nysda.org/05_ClientCenteredStandards.pdf.

Changes in Upstate Public Defense Systems

The second half of 2009 has seen numerous changes in public defense offices and assigned counsel programs. Thomas J. Kidera has been appointed to head the newly created Ontario County Public Defender office. Ontario County previously provided all public defense services through its assigned counsel program. Kidera will spend the first year setting up the office, including determining the number of full time attorneys and support staff that will be needed to handle the expected case load. The assigned counsel program will continue to handle family court and conflict cases. John R. Kennedy, the long-time assigned counsel program administrator passed away earlier this year. Robert L. Gosper is now the administrator of the program.

Scott N. Fierro has been appointed as the Chemung County Public Defender, Patrick J. Brophy is now the Chief Attorney of the Putnam Legal Aid Society, Paul J. Hewitt is the new Administrator of the Ulster County Assigned Counsel Program, and Raymond W. Bulson has been

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Questions About the Accuracy of Fingerprint Evidence

By Michael Cherry and Edward J. Imwinkelreid*

The combination of preexisting unresolved fingerprint issues and the widespread use of electronic imaging has brought us to a point where we can no longer assume the fingerprint evidence produced in court is accurate.

Even before the advent of the digital age, there were many nagging, unresolved questions in forensic science. For example, how much of the complete image of a crime scene latent fingerprint does the examiner need to reach a correct conclusion—95 percent, 90 percent, 80 percent? Unfortunately, there is no consensus. Moreover, again even before the arrival of digital technology, it was difficult to determine whether a photograph had been altered. The recent introduction of digital evidence has exacerbated these issues. How can you tell whether you are listening to a MP3 recording, which is an imprecise digital copy, or an original analog version? The same question arises with respect to digital versions of photographs.

This article discusses some of the troublesome issues currently surrounding fingerprint analysis. Virtually all exemplar fingerprints are now digital images, and to conserve computer resources most fingerprint repositories, such as the FBI's Integrated Automated Fingerprint Information System (IAFIS), store fingerprints as LOSSY images, which lack full detail.[1] The use of a LOSSY image calls into question any and all comparisons, since a LOSSY image is, by definition, a partial image. The FBI's false identification of Brandon Mayfield as the Madrid Bomber was based on the viewing of LOSSY partial digital images.

In addition to the problems noted above, many police departments have computer operators "touch-up" fingerprint images even before a prosecutor or fingerprint examiner is assigned to the case. They may improve contrast or they alter minutia when they attempt to electronically exclude the fingerprint from the weave of a bed sheet. Finally, most computerized fingerprint scanners are designed for fingers of average width. Narrow fingers offer fewer digitized measurements per inch. Inking and rolling a narrow finger onto paper in the traditional fashion can capture the lost data and produce a different, more accurate image.

Consider the case of *People of the State of California v. Gerald F. Mason*.[2] Two fingerprint examiners from the Los Angeles Police Department and Sheriff's Office used image alteration software to build a thumb print by "blending" two separate partial thumb prints. The case involved a murder committed 45 years before in El Segundo, California. The police had found latent impressions on the steering wheel of a stolen vehicle involved in the case, but until the advent of computerized fingerprint technology they could not use the impression. The prints were partials. The police assumed that they belonged to the same person, but none of the prints was complete enough to permit identification.

All that changed when the technology became available. Initially, the police enlarged the partials. They then placed the enlargements on plastic transparency paper. Next, they used the transparency papers to in effect place one partial on top of the other to create a thumbprint that could be run through a database. The El Segundo Police Department lacked the technology to do so, but they persuaded the Los Angeles Sheriff's Department to enter the thumbprint into its computer and execute an Automated Fingerprint Information System (AFIS) search for matches.

The computer identified a number of potential candidates. Candidate number ten was Gerald F. Mason, a South Carolinian. Mason was the right age to have committed the murder, and he matched the physical description of the killer. The subsequent investigation uncovered other evidence incriminating Mason. Mason was eventually extradited to California where he confessed to the killing. Given the confession, the police probably got the right man.†

However, the noteworthy aspect of the case is that the fingerprint image that was compared to the AFIS database was one the El Segundo police literally manufactured.

As this example illustrates, today when the prosecution offers an image of a fingerprint or toolmark as an exhibit, the exhibit is only one of many possible versions that could be produced by the use of different equipment and settings. Different scanners, printers, screens, compressions, and settings will present such details as colors, lines, and edges differently.[3] The possible multiplicity of

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† ***Ed. Note:*** Defense attorneys need to be aware of the existence of false confessions. Since the 1980s, a number of researchers, including Saul Kassin, PhD, Lawrence S. Wrightsman, PhD, Richard A. Leo, PhD, and Richard J. Ofshe, PhD, have been documenting and analyzing false confessions. And the Innocence Project reports that approximately 25% of the wrongful convictions overturned by DNA evidence in the United States involved false confessions. (www.innocenceproject.org/fix/False-Confessions.php.) Attorneys interested in learning more about false confessions may contact the Backup Center.

images of the same item of physical evidence raises grave concerns about the accuracy of the image that the prosecution selects to offer at trial.

Related Problems

Even if there were thorough pretrial discovery, the prosecution would still enjoy many advantages at trial. The following are some examples:

- The prosecution has the resources to "improve" an image until the exhibit suits their needs. However, the defense is not allowed to "improve" an image until the image no longer matches.
- Shockingly, sometimes even fingerprint examiners are not told that the image they are asked to analyze was "corrected" before their evaluation.
- The prosecution is allowed to review all the candidates in a database of potential matches and then select the one they want. Supposedly to protect the privacy of the other candidates, the defense is often denied the opportunity to review candidates that the prosecution expert eliminated. Often, trial judges have denied that opportunity to the defense even when the defense made it clear that they were content to have any sources' names redacted.
- While the prosecution controls the population of the candidate search, the defense is not permitted to expand the population and search for additional candidates.

Fortunately, there is a growing appreciation of this imbalance. In an effort to level the playing field, the FBI sponsors Scientific Working Groups that attempt to develop more even-handed standards. Their Scientific Working Group on Imaging Technologies (SWGIT) drafts recommendations and guidelines for the fair use of digital image processing in the criminal justice system.

These proposals are steps in the right direction. However, they do not eliminate the problem. SWGIT is open only to active law enforcement personnel, and few of its members have a sophisticated understanding of image theory—for example, LOSSY v. LOSSLESS images. Much of the imaging group's knowledge comes from imaging solutions vendors who, at least at a subconscious level, may be tempted to overstate their product's capabilities and accuracy.

Harsh Reality

There are many common, comforting myths about electronic evidence. However, we must come to grips with the harsh realities: Electronic evidence lacks permanency, it can be modified, it is vulnerable to hackers, the alteration of electronic evidence is almost always visually undetectable, and our analysts need new training in its use. Further, even without the use of LOSSY compression digital images have less detail than the original impressions. Less detail means less exclusionary information.

Worldwide, there are already varying fingerprint standards. Some countries require a minimum number of points of similarity. In contrast, in other countries the examiner is permitted to find a match when the details within a small area of the latent correspond to details in the same area of the exemplar. The advent of digital technology in the courtroom necessitates that we revisit the question of a proper standard for declaring a fingerprint match and that we must also discontinue all forensic use of LOSSY compression. ⚖

Endnotes

1. Images of fingerprints, scars, tattoos, crime scenes, and mug shots are often mathematically reduced in size by law enforcement agencies to conserve computer resources. The method used is called "LOSSY" compression and it produces smaller images, but some information is lost in the process. There is an alternative technique called "LOSSLESS" file compression. That method creates larger, slower files, but it does not entail any loss of detail.

2. Edward Imwinkelried & Michael Cherry, *The Myth of Fingerprints*, 27 THE CHAMPION 36 (Sep./Oct. 2003).

3. http://abcnews.go.com/Technology/wireStory?id=4336613. [***Ed. Note:*** This issue is also discussed in *Effort made to restore photography's credibility: Researchers developing techniques to help spot photo hoaxes.* (www.msnbc.msn.com/id/23342630/, 2/25/2008.)]

Defender News *(continued from page 7)*

appointed as the Allegany County Conflict Defender. Kristin F. Splain became the Monroe County Conflict Defender in June; that position had been vacant since Richard W. Youngman retired at the end of October 2008.

In St. Lawrence County, Mary E. Rain was appointed as the Public Defender. In October, after only five days as St. Lawrence County Conflict Defender, Michael Mansion, an Albany area attorney, resigned and the County is in the process of hiring a new Conflict Defender. The position had been vacant since Brian D. Pilatzke's resignation in June. For at least part of the time the position has been vacant, assistant conflict defender Jane S. Garland has been the acting Conflict Defender.

Upon the resignation of Patrick Barber, Michael J. Mercure was appointed the interim Washington County Public Defender and will serve until the end of 2009. The County is conducting a search for a new Public Defender.

Cortland County is currently seeking a Conflict Defender after Thomas Miller resigned in September. Also in September, the Third Department heard arguments in *Goehler v Cortland County* (No. 506086), a case that challenges the legality of the County's conflict defender office.

(continued on page 35)

Book Review

Do No Wrong: Ethics for Prosecutors and Defenders

By Peter A. Joy and Kevin C. McMunigal

American Bar Association (2008)

by Brian Shiffrin, Esq.*

There are two basic criteria for judging a book on ethics for criminal defense attorneys.

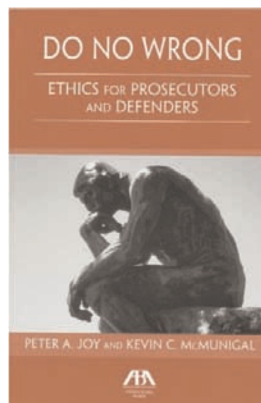
First, does it address the difficult issues that defense attorneys encounter. Examples abound. Who decides whether to ask for a lesser included offense—counsel or client? When can counsel speak to a present or former client whom a different client says would be helpful, and when is there a potential conflict of interest? What is the obligation of assigned counsel when she spots a potentially meritorious issue in an appeal from a guilty plea which will result in the client facing the original, greater charge and the likelihood of more time, when the client's response to the letter advising against raising the issue is either silence or a letter stating that he can't get more time because of double jeopardy? The list of the real dilemmas facing defense counsel is a long one and the list of resources for finding a quick and accurate answer is short. So a book that attempts to answer the right questions could be worth buying.

I purposely wrote "could" not "would" because even if a book addresses enough of the right questions, the book's value is determined by the quality of its answers to those questions. So the second criterion is whether the book's answers address the complexity and nuance of the issues in a manner likely to provide meaningful guidance.

Only if a book succeeds on both criteria will a practitioner want to buy and use it. In my mind, since 1995, the gold standard has been *Ethical Problems Facing the Criminal Defense Lawyer*, edited by Randy Uphoff and published by the Criminal Justice Section of the American Bar Association (ABA). As good as that book is, it is non-exhaustive and it had not been updated. So there is a need for another criminal defense ethics book. Unfortunately, Professors Peter A. Joy and Kenvin C. McMunigal's book, *Do No Wrong: Ethics for Prosecutors and Defenders*, also published by the ABA, does not appear to be book practitioners having been waiting for.

Do No Wrong is a somewhat updated compilation of the ethics column which Professors Joy and McMunigal write for the ABA's publication, *Criminal Justice.* What makes good reading in a magazine aimed at prosecutors and defense counsel might not result in a useful book for defense attorneys, both in terms of the topics treated and in the answers provided.

For example, there is an entire chapter devoted to the ethics of defense attorney strategy of suggesting a different person perpetrated the crime. Although there are obvious strategic aspects about introducing evidence of third party guilt, even the authors suggest that the only ethical concern is that one should not knowingly implicate an innocent man. Not exactly a common problem. The chapter does conclude by recognizing that in *Holmes v South Carolina* (547 US 319 [2006]), the United States Supreme Court ruled unanimously that the right of a defendant to have a meaningful opportunity to present a complete defense cannot be unduly limited. Considering that this is a thin book, which covers few issues, one suspects the inclusion of this issue directly relates to it having made for an interesting article for a magazine.



The book barely and superficially discusses issues involving allocation of decision-making between counsel and clients. In a total of only seven pages, the book provides the broadest outline of the general rules set for by the Court in *Jones v Barnes* (463 US 745 [1983]) and a brief summary of a few cases with interesting fact patterns, such as that of Ted Kaczynski. It does not, however, attempt to address the thorny questions of applying these rules in the variety of situations which practitioners find troubling.

The book's six page treatment of the topic of conflicts of interests between clients and counsel, consisting almost entirely of a summary of the holding in *Mickens v Taylor* (535 US 162 [2002]), made sense as a magazine article, but is inadequate for a chapter in a book practicing attorneys might wish to consult to insure they are acting ethically.

Similarly, the eight page chapter on the reference to religion in summations is interesting, and made a useful magazine article, but cannot logically be the only mention in a book on ethics regarding closing arguments.

Perhaps the most helpful part of the book for defense practitioners is the half of the book devoted to issues of prosecutorial ethics, such as why prosecutors have a duty to seek justice. These chapters contain useful materials which will come in handy when dealing with a prosecutor who acts improperly.

Bottom line, the book is a quick read with some useful information, but not enough in depth discussion of critical issues to likely satisfy a criminal defense practitioner. ⚖

* ***Brian Shiffrin, Esq.*** *is a partner in the Rochester, New York firm, Easton Thompson Kasperek Shiffrin LLP. He is the co-author of the chapter on Appeals in Criminal Cases in the New York Bar Association's* Criminal Practice Handbook *and is a frequent presenter at CLEs on behalf of NYSDA and the Monroe County Bar Association.*

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.

New York State Court of Appeals

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

Grand Jury (General) **GRJ; 180(3)**

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

People v Mayo, 13 NY3d 767, __ NYS2d __ (2009)

Holding: The evidence presented to the grand jury was legally sufficient to establish that the defendant constructively possessed the glassine bags containing crack/cocaine on the bedroom floor. *See People v Manini*, 79 NY2d 561, 573-575. The evidence included that the police unexpectedly arrived at the apartment; the defendant was dressing in a small bedroom and his child was in the apartment; the police saw a plastic bag containing 47 glassine bags of crack/cocaine in plain view on the bedroom dresser; the 96 glassine bags found on the floor were packaged similarly to those on the dresser; and the defendant was close to the drugs on the dresser and on the floor. "[T]he grand jury could have reasonably inferred that the drugs did not belong to the apartment's lessee by virtue of the fact that she volunteered the location of the additional drugs in a manner that prevented the defendant and his accomplice from overhearing." Order affirmed.

Appeals and Writs (Arguments of Counsel) (Preservation of Error for Review) **APP; 25(5) (63)**

Trial (Trial Order of Dismissal) **TRI; 375(60)**

People v Kolupa, 13 NY3d 786, __ NYS2d __ (2009)

Holding: "Defendant failed to preserve his argument that the People introduced insufficient evidence to corroborate the child victim's testimony. At the close of the People's case, the trial court denied defendant's motion to dismiss and defendant proceeded to present his own evidence. He did not thereafter renew the motion to dismiss at the close of his proof or specifically argue that there was not sufficient corroboration of the victim's statements. As a result, this issue is not reviewable (see *e.g. People v Lane*, 7 NY3d 888, 889 [2006]; *People v Payne*, 3 NY3d 266, 273 [2004]; *People v Hines*, 97 NY2d 56, 61-62 [2001]." Order affirmed.

Concurring: [Smith J] "Today's decision correctly applies *People v Hines* . . . . I have expressed my unhappiness with *Hines* before (*People v Payne*, . . . [R.S. Smith, J. concurring]), but this case, in which the Appellate Division did not mention preservation, defendant does not argue the issue, and the Appellate Division's decision on the merits seems clearly correct, is not the right one for further examination of the *Hines* rule."

Escape (Elements) (Evidence) **ESC; 145(15) (20)**

People v Hardy, No. 141, 10/15/2009

Before sentencing, the court increased the defendant's bail and told him that if he posted bail and failed to appear, the court would assume that he gave up his rights and breached his obligation to appear, and that the case would proceed without him, an arrest warrant would be issued, and forfeiture of the bond would be considered. Deputies handcuffed the defendant and, since there was no holding cell in the courthouse, brought him to the seating area in the hallway and told him to stay there. While the court clerk was preparing the securing order, the defendant went to the basement and left the courthouse through the back door. He was arrested about 20 minutes later. A jury found the defendant guilty of second-degree escape.

Holding: The defendant's conviction was proper. To make out a prima facie case of second-degree escape, the prosecution must establish that the defendant broke free or got away from the restraint or control of the deputies. *See People v Antwine*, 8 NY3d 671, 674. The court's order increasing bail authorized the restraint or control of the defendant, and the court's statements after the bail increase and the handcuffing of the defendant made it clear that he was not free to leave. Because the prosecution "proved that defendant removed himself from the lawful custody of the deputies without authorization, they met their burden and the elements of Penal Law § 205.10(2) were satisfied." Order affirmed.

Evidence (Circumstantial Evidence) (Common Plan or Scheme) (Prejudicial) (Relevancy) (Uncharged Crimes) **EVI; 155(25) (30) (106) (125) (132)**

People v Arafet, No. 142, 10/22/2009

Based on circumstantial evidence, the defendant was convicted of stealing a trailer containing more than one million dollars in equipment. The prosecution presented evidence that the defendant's cell phone traveled from New Jersey to the general area of the theft and back on the day of the theft, and the phone was used on the return trip

NY Court of Appeals *continued*

to call Nelson Quintanilla and a warehouse leased by Jose Gotay's company. The trailer was found less than 20 miles from the defendant's house and the warehouse. Over the defendant's objection, evidence of four crimes was introduced at trial—three involved Quintanilla and Gotay. Two were offered to prove that Gotay's truck bays were used for fencing operations; nothing connected the defendant to those crimes. The third crime was offered to show that Quintanilla helped the defendant with a trailer theft in 1996. And the fourth was offered to prove that the defendant stole a trailer in 2000. The Appellate Division affirmed.

Holding: The court properly admitted the evidence of the crimes involving Gotay and Quintanilla, but erred in admitting the evidence of the 2000 trailer theft. The evidence of Gotay's fencing operation was not *Molineux* evidence since it could not show the defendant's propensity to commit crime. The evidence was relevant because it showed that the defendant called the business in the hours after the theft, supporting an inference that the defendant needed the services of the fencing operation at that time. Evidence of the 1996 theft was admissible as a "distinctive repetitive pattern" of criminal activity to establish the defendant's identity. *See People v Allweiss*, 48 NY2d 40, 48. Regarding the 2000 theft, "we see no justification, at least in a case like this, for creating a 'specialized crime' exception to *Molineux.*" While the crime may be beyond an average person's skills, any experienced tractor-trailer driver probably could have committed it. The prosecution could have used a less prejudicial way to prove the defendant's experience driving tractor-trailers. However, the admission of this evidence was harmless error in light of the overwhelming evidence of guilt. *See People v Crimmins*, 36 NY2d 230, 241-242. Order affirmed.

Dissent: [Ciparick, J] "[T]he admission of evidence regarding defendant's prior bad acts and the bad acts of third parties was highly prejudicial and served to deprive the defendant of a fair trial. Where the evidence is far from overwhelming, it cannot be said that the result would have been the same if it were possible to extricate such egregious errors."

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

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

People v McNair, No. 144, 10/22/2009

Holding: By not moving to withdraw his plea, the defendant failed to preserve the issue. During his plea allocution, the defendant initially made statements that "cast significant doubt" on his guilt related to the intent to defraud element. The court then conducted a proper inquiry to ensure that the defendant's plea was knowing and voluntary and found that he possessed the necessary criminal intent. Because the court made the necessary inquiry, the case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662). Therefore, the defendant cannot raise the issue for the first time on direct appeal. Order affirmed.

Identification (Expert Testimony) (Eyewitnesses) (Misidentification) (Weapons) — **IDE; 190(5) (10) (33) (60)**

People v Abney, Nos. 139 & 140, 10/27/2009

Defendant Abney was convicted of robbing a girl at knifepoint in a subway stairwell. The detective on the case suspected Abney, who had been arrested for another subway-related robbery. The accuser identified Abney from a photo array and a lineup. The court denied the defendant's motion to call an eyewitness identification expert to testify about factors influencing eyewitness reliability. The Appellate Division affirmed. Defendant Allen and another man were accused of a robbing a barbershop. Although the perpetrators wore masks, an eyewitness who knew Allen identified him by his voice and body type. That witness picked Allen out of a mug book and a photo array. Another eyewitness identified Allen from a photo array, and both selected the defendant from a lineup. The court denied the defendant's motion to present testimony from an eyewitness identification expert. The Appellate Division affirmed.

Holding: The trial court has discretion as to the admission of expert testimony on eyewitness identification, but it should be guided by whether the testimony would aid the jury and whether it is generally accepted by the relevant scientific community. *See People v Lee*, 96 NY2d 157, 160, 162; *People v Young*, 7 NY3d 40, 45. While jurors may be familiar with certain factors that affect reliability, scientific studies of factors affecting reliability are beyond the ken of a typical juror. Where eyewitness testimony is critical and there is little or no corroborating evidence, it is an abuse of discretion to exclude expert testimony on identification reliability if it is relevant to the witness's identification, based on principles generally accepted by the relevant scientific community, given by a qualified expert, and beyond the understanding of an average juror. *See People v LeGrand*, 8 NY3d 449, 452. In *Abney*, the court properly denied the defendant's pretrial motion as premature and overly broad. However, the court abused its discretion in denying the renewed motion made at the end of the prosecution's case. By then, it was clear that the identification was the only evidence

NY Court of Appeals *continued*

connecting the defendant to the crime, the accuser's description did not mention unusual or distinctive features or characteristics, and almost all of the proposed areas of testimony were relevant to the identification. The court should have allowed testimony about witness confidence and held a *Frye* hearing regarding the other relevant proposed areas, *ie*, the effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification. The court's error was not harmless. In *Allen*, the court properly exercised its discretion in denying the motion because the case did not depend on one witness's identification; another witness independently identified the defendant as the person who searched him and stood near him during the robbery and both eyewitnesses knew the defendant. Order in *Abney* reversed and new trial ordered; order in *Allen* affirmed.

Appeals and Writs (Arguments of Counsel) (Counsel) **APP; 25(5) (30)**

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

People v D'Alessandro, No. 143, 10/27/2009

Three years after the defendant's conviction was affirmed on direct appeal, he brought an unsuccessful application for a writ of error coram nobis based on appellate counsel's failure to make a specific speedy trial argument. Nine years later, the defendant, now represented by counsel, brought another coram nobis application premised on a different speedy trial theory. The Appellate Division treated it as a motion to reargue the earlier order and denied reargument.

Holding: The Appellate Division erred in treating the second application as a motion to reargue because the application raised new arguments that were not in his first application. This Court has inherent authority to look beyond the Appellate Division's characterization to determine if the application sought coram nobis relief. *See* CPL 450.90(1); *People v Giles*, 73 NY2d 666, 669-670. A motion to reargue must be based on issues of fact or law that the court allegedly overlooked or misapprehended in deciding the prior motion (*see* CPLR 2221[d][2]), and it cannot be used to raise new questions. *See People v Bachert*, 69 NY2d 593, 597. The defendant's application was not a motion for reargument. It did not identify overlooked or misapprehended points; instead, it raised a new argument that appellate counsel was ineffective for not arguing that the trial court erred in denying the motion to dismiss on speedy trial grounds in light of the decisions in *People v McKenna* (76 NY2d 59) and *People v Correa* (77 NY2d 930), which were decided before the defendant's trial and appeal. Although the defendant argued in his initial petition that counsel was ineffective for failing to raise a speedy trial claim, that argument was based on a different theory. It is irrelevant that the argument in the second petition related to the same broad legal category as the one in the first petition. The lengthy passage of time between the first application for coram nobis and the instant one does not, alone, bar review. Order reversed and matter remitted to the Appellate Division.

First Department

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

People v Sarubbi, 61 AD3d 493, 877 NYS2d 50 (1st Dept 2009)

Holding: The court erred in denying the defendant's challenges for cause of two prospective jurors without comment or further inqury. During voir dire, one prospective juror told defense counsel that her experience as a crime victim might prevent her from being an impartial juror. The other prospective juror disclosed that her two grandsons had been murdered and that being a juror in a criminal case made her "'a little' uncomfortable." She also volunteered that she thought her watch had just been stolen while in the courthouse and made a statement that presumably indicated that she could not be completely impartial. "As to each panelist, defense counsel elicited a sufficient basis to require the court to either grant the challenge for cause or make its own inquiry of the panelist." Defense counsel did not have to ask additional clarifying questions. "Where 'potential jurors themselves openly state that they doubt their own ability to be impartial in the case at hand, there is far more than a *likelihood* of bias, and an unequivocal assurance of impartiality must be elicited if they are to serve' (*People v Johnson*, 94 NY2d 600, 614 [2000])." Judgment reversed and matter remitted for a new trial. (Supreme Ct, New York Co [Stone, J (suppression hearing); Cataldo, J (trial and sentence)])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (Detention) **SEA; 335(10[g(i)]) (25)**

People v Francois, 61 AD3d 524, 877 NYS2d 54 (1st Dept 2009)

Holding: The court properly denied the defendant's motion to suppress. An officer saw the defendant repeatedly try to use a credit card in a MetroCard vending machine at a subway station. The credit card appeared to work, but the defendant appeared unable to enter the zip code matching the credit card. Since most people know

First Department *continued*

their own zip codes, the police had a founded suspicion of criminality that warranted a level-two inquiry. *See People v Wilson*, 52 AD3d 239 *lv den* 11 NY3d 743. When the officer approached and asked if he needed help, the defendant responded that he was having problems with his credit card. The officer asked the defendant to go with him and his partner to a nearby wall of the station, and without the use of force, the officer physically guided the defendant by grasping his elbow. The officer's conduct did not elevate the encounter to a seizure requiring reasonable suspicion. *See eg People v Stevenson*, 55 AD3d 486. The officer lawfully asked to see the credit card and the defendant's identification, and the officer had probable cause for the arrest based on the discrepancy between the defendant's appearance and the identification card. Judgment affirmed. (Supreme Ct, New York Co [Cataldo, J])

Dissent: [Catterson, J] The police forcibly stopped and detained the defendant without a reasonable suspicion that he had committed or was about to commit an offense. "[A]ny reasonable person who is grasped by the elbow, 'put [. . .] on the wall', and surrounded by police officers in the middle of a subway station would believe that there was a significant limitation on his freedom."

Insanity (Civil Commitment) (Psychiatrists and Psychologists) — **ISY; 200(3) (50)**

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

Matter of State of New York v Bernard D., 61 AD3d 567, 877 NYS2d 84 (1st Dept 2009)

Holding: "The State does not have a right to videotape Mental Hygiene Law (MHL) § 10.06 psychiatric examinations (*Matter of State of New York v R.H.*, 21 Misc 3d 1127[A], 2008 NY Slip Op 52249[U] [Nov 5, 2008]; *Matter of State of New York v Rosado*, 20 Misc 3d 468 [2008]). Article 10 contains no express provision authorizing such videotaping, unlike other contexts in which litigants are given the right to videotape (*see Matter of Charles S*., 60 AD3d 954 [2d Dept] . . .). Indeed, by limiting discovery of section 10.06 examinations to the production of examiners' reports (MHL 10.06[d], [e]), and leaving the methodology of examinations up to the examiner (MHL 10.08[b]), article 10 indicates that the Legislature intended that the courts not have the discretion to order the videotaping of section 10.06 examinations. Although in the context of criminal cases in which a psychiatric defense is advanced, the Court of Appeals has held that fundamental fairness requires that the State have a reciprocal right to observe a defendant's psychiatric examination for the purposes of trial preparation (*Matter of Lee v County Court of Erie County*, 27 NY2d 432, 444 [1971], *cert denied* 404 US 823 [1971]; *see also* CPL 250.10[3]), and although the same fairness concerns are implicated in article 10 proceedings, they are mitigated by the State's right to examine the respondent before the latter's right to counsel attaches (MHL 10.05[e], 10.06[c]), to subject him or her to a rebuttal examination after it reviews the report of his or her examiner (MHL 10.06[d]), and to have access to any relevant medical, clinical or other information generated by any State agency, office or department (MHL 10.08[c])." Order reversed, motion denied, and appeal from the earlier order dismissed. (Supreme Ct, Bronx Co [Gross, J])

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

Counsel (*Anders* Brief) (Competence/Effective Assistance/Adequacy) (Right to Counsel) (Scope of Counsel [Entry]) — **COU; 95(7) (15) (30) (38[b])**

Juveniles (Parental Rights) (Permanent Neglect) (Right to Counsel) — **JUV; 230(90) (105) (130)**

Matter of Nikerrah S., 62 AD3d 615, 878 NYS2d 892 (1st Dept 2009)

Holding: The appellant's counsel filed an application to withdraw as counsel. A review of the record reveals nonfrivolous issues, including "whether the inability of the court to assign counsel when the mother appeared to contest the permanent neglect petition deprived her of her statutory and constitutional right to counsel (*see Matter of Isaiah H.*, 61 AD3d 1372 [2009]; *Matter of James R.*, 238 AD2d 962 [1997]), whether subsequently assigned counsel provided ineffective assistance, and whether a suspended judgment should have been granted." Appeal held in abeyance, assigned counsel's application to withdraw granted, and new counsel assigned to prosecute the appeal. (Family Ct, New York Co [Knipps, J])

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

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

Juveniles (Right to Counsel) (Support Proceedings) — **JUV; 230(130) (135)**

Matter of Tanya T. McD. v Timothy E.D., 63 AD3d 423, 879 NYS2d 331 (1st Dept 2009)

First Department *continued*

The court found that the respondent father was in willful violation of a child support order and committed him to custody for a six month term.

Holding: "We reach the father's contention that he was deprived of his right to counsel at the hearing that resulted in the issuance of the order of commitment, even though the father's jail term has ended (*see Matter of Bickwid v Deutsch*, 87 NY2d 862, 863 [1995]; *Matter of Michelle F.F. v Edward J.F.*, 50 AD3d 348, 349 [2008], *lv denied* 11 NY3d 708 [2008]). Since the proceeding was one that could and did result in the loss of physical liberty, the father had both a constitutional and statutory right to have assigned counsel (*see Matter of Broome County Dept. of Social Servs. v Basa*, 56 AD3d 1092, 1093-1094 [2008]; *Matter of Er-Mei Y.*, 29 AD3d 1013, 1015 [2006]; Family Ct Act § 262[a] [vi]). Furthermore, the fact-finding order and recommendation of the Support Magistrate specifically states that the father invoked his right to counsel, and that the matter proceeded notwithstanding the unavailability of counsel for assignment." Order reversed and petition dismissed. (Family Ct, New York Co [Lupuloff, J])

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

Juveniles (Support Proceedings) **JUV; 230(135)**

Matter of John T. v Oletha P., 64 AD3d 484, 883 NYS2d 38 (1st Dept 2009)

In 2001, the court entered a default judgment directing the respondent to pay $1,065 per month in child support. In 2004, the support magistrate reduced the support obligation for one year because she was unable to work. A year later, the respondent moved to terminate her obligation because her only means of support was Supplemental Security Income (SSI). The court found that the respondent was unable to work, reduced the support obligation to $25 per month, and fixed arrears at $39,200. The court denied without prejudice the respondent's request to cap the arrears at $500 pursuant to Family Court Act (FCA) 413(1)(g). In 2006, the support magistrate directed the respondent to pay $25 per month. When she refused, the support magistrate found her in willful violation of the order and recommended incarceration, which the court confirmed after she failed to appear in court twice.

Holding: The court erred in finding a willful violation of the support order. "Where a noncustodial parent demonstrates that she needs Social Service financial assistance, she satisfies 'one unassailable criterion to overcome the presumption that would require her to be obligated for support of her [child]' (*Matter of Rose v Moody*, 83 NY2d 65, 70 [1993], *cert denied* 511 US 1084 [1994])." The respondent showed that she had no income other than her SSI and the court recognized her inability to work. Without proof of an ability to pay, the order of commitment cannot stand. *See* FCA 455(5); *Matter of Riccio v Paquette*, 284 AD2d 335. Because the respondent showed that her income from 2001 on did not exceed the federal poverty guidelines, arrears should have been fixed at $500. *See Matter of Walsh v Shevlin*, 307 AD2d 322. Order reversed, orders of commitment and fixing arrears vacated, and matter remanded for further proceedings. (Family Ct, New York Co [Bednar, J])

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

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

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

Matter of State of New York v F.E., 64 AD3d 497, 883 NYS2d 507 (1st Dept 2009)

Holding: The court properly dismissed the State's petition for civil management under Mental Hygiene Law (MHL) article 10. The respondent pleaded guilty to first-degree sexual abuse and received a determinate sentence. The court did not impose a period of post-release supervision (PRS); the Department of Correctional Services (DOCS) administratively added 5 years of PRS. After release, the respondent's PRS was revoked and he was returned to prison for 2 years. Instead of being released on the conditional release date, the respondent was placed in an Office of Mental Health (OMH) facility pursuant to MHL article 9. The Court of Appeals found this procedure improper. *See State of New York ex rel Harkavy v Consilvio*, 7 NY3d 607. The State then filed an article 10 petition alleging that the respondent was in the custody of an agency with jurisdiction, *ie*, OMH. "While it is true that respondent falls within the literal definition of a 'detained sex offender' under section 10.03(g)(5), we reject petitioner's argument that section 10.03(g)(5) applies to all sex offenders improperly committed under article 9 no matter the nature of any other irregularity or unlawfulness involved in the commitment, including those, like respondent, who has been improperly detained by virtue of an unlawful, administratively imposed period of PRS." Because the respondent was not in DOCS' lawful custody when he was transferred to OMH, OMH was not an agency with jurisdiction and the respondent was not a detained sex offender. *See People ex rel Joseph II v Superintendent of Southport Correctional Facility*, 59 AD3d 921. Order affirmed. (Supreme Ct, New York Co [McLaughlin, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause]) (Motions to Suppress [CPL § Article 710]) **SEA; 335(10[g]) (45)**

First Department *continued*

People v Frank, 65 AD3d 461, 884 NYS2d 718 (1st Dept 2009)

Holding: The court erred in summarily denying the defendant's motion to suppress physical evidence seized from his apartment on the day of his arrest. In his affirmation in support of the motion, defense counsel provided all of the details necessary to allege a violation of *Payton v New York* (445 US 573 [1980]). Counsel alleged that the defendant was lawfully in his apartment at the time of the seizure, did not engage in any activity on the date in question that would provide grounds for his arrest, and that the property listed in the voluntary disclosure form was illegally seized at the time of his arrest because the police did not have an arrest warrant and they lacked probable cause to enter his apartment and take him into custody. The prosecution's response stated that they intend to introduce certain tangible property, the property was lawfully obtained, and all allegations to the contrary are denied; the prosecution did not assert that the police had a warrant, that the defendant consented to the police entry and search, or that the defendant was in the hallway or at his apartment entrance. Appeal held in abeyance and matter remanded for a hearing on the suppression motion. (Supreme Ct, New York Co [Uviller, J])

Search and Seizure (Consent [Coercion and Other Illegal Conduct] [Third Persons, by]) **SEA; 335(20[f] [p])**

Matter of Leroy M., 65 AD3d 500, 884 NYS2d 231 (1st Dept 2009)

Suspecting that the appellant had a stolen laptop computer, five officers went to his home, a single family residence. Without ringing the doorbell, knocking, or announcing their presence, the police entered the front door. They knocked on an interior door and said "Police." The appellant's sister responded, said she was glad they were there, and asked them to get "him" out of the house. She directed the police upstairs where they found a laptop matching the description of the missing computer. The appellant entered the room and said, "That's mine, but a kid gave it to me." The police then arrested him.

Holding: The court erred in denying the appellant's motion to suppress. The police did not have consent to enter the house, nor did they have a search or arrest warrant. And the presentment agency did not allege that there were exigent circumstances. The sister's subsequent consent is irrelevant. "[T]he taint of the illegal entry was not dissipated at the time the consent was given. With regard to the factor of temporal proximity, the sister's consent occurred virtually contemporaneously with the officers' unlawful entry into the home." *See People v Packer*, 49 AD3d 184, 187 *affd* 10 NY3d 915; *People v Borges*, 69 NY2d 1031. "Finally, the flagrancy of the police misconduct must be considered." Order reversed, motion granted, and petition dismissed. (Family Ct, Bronx Co [Gribetz, J])

Dissent: [Nardelli, J] The actions of the police in going upstairs to the appellant's room were attenuated by his sister's voluntary invitation, and the police did not coerce the sister into giving consent. *See People v Gonzalez*, 39 NY2d 122, 128.

Second Department

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

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles]) (Detention) **SEA; 335(10[a]) (25)**

People v Creary, 61 AD3d 887, 877 NYS2d 208 (2nd Dept 2009)

While on patrol, a police officer saw a car parked in front of an auto repair shop that he thought "stood out." He pulled into the lot and blocked the car with his vehicle. The officer told the car's occupants to stay in the car. After checking the driver's license and registration, the officer allowed him to go into the shop. The front seat passenger looked nervous and when the officer asked him whether he had anything hidden that would make him nervous, he said no and agreed to let the officer check the car. The officer saw the handle of a gun sticking out from underneath the passenger's seat. He arrested all three men. At the precinct, before administering *Miranda* warnings, he told them that unless they could establish who owned the gun, all three would be charged. The defendant said that the gun was his and agreed to give a statement. He was then advised of his *Miranda* rights and admitted to owning the gun.

Holding: The court erred in denying the defendant's motion to suppress the gun and his statements. Confining the occupants to their car is equivalent to a stop, and the officer did not have grounds for reasonable suspicion that the defendant or the other occupants were involved in criminal acts or posed a danger to him. *See People v Taylor*, 31 AD3d 1141. Telling the defendant that he would arrest all three men unless they could determine who owned the gun was the functional equivalent of interrogation. *See Rhode Island v Innis*, 446 US 291, 301 (1980). Because the defendant was not given *Miranda* warnings, his statements to the detectives should have been suppressed. *See People v Campbell*, 123 AD2d 878. Judgment reversed,

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motion to suppress granted, indictment dismissed, and matter remitted. (County Ct, Suffolk Co [Doyle, J])

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

Matter of Said v Said, 61 AD3d 879, 878 NYS2d 384 (2nd Dept 2009)

Holding: The court erred in granting the father's custody modification petition and denying the mother's petition for permission to move with the children to Pennsylvania. The stipulation of settlement that was incorporated but not merged into the parties' judgment of divorce awarded the mother sole custody. A custody agreement shall not be modified unless there is a sufficient change in circumstances following the stipulation and the modification is in the best interests of the children. *See Matter of Manfredo v Manfredo*, 53 AD3d 498, 499. The decision to transfer custody to the father is not supported by a sound and substantial basis in the record. Given the ages and maturity of the children, their expressed preference to live with the mother is entitled to great weight. The hearing evidence showed that the children have been in the mother's custody for most of their lives, she is a fit parent, and the children have thrived in her care. *See Eschbach v Eschbach*, 56 NY2d 167, 171. Contrary to the family court's concern, the mother and her fiancé encouraged the father's visitation with the children. The court's decision to deny the mother permission to relocate with the children also lacks a sound and substantial basis in the record. "[T]he mother established that the children's best interests would be served by permitting the relocation, which will, among other things, still permit the children to have a meaningful relationship with the father (*see Matter of Cooke v Alaimo*, 44 AD3d 655 . . .)." Order reversed, father's petition denied, mother's petition granted, and matter remitted for proceedings to establish an appropriate visitation schedule. (Family Ct, Nassau Co [Singer, J])

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

People v Hayes, 61 AD3d 992, 878 NYS2d 167 (2nd Dept 2009)

Holding: The court erred in denying the defendant's challenges for cause of two potential jurors. *See People v Garrison*, 30 AD3d 612. During voir dire, one of the jurors indicated that she did not know if she could be fair and impartial given that she was the victim of an identity theft, which is similar to the charges here of criminal possession of a forgery device. The other juror expressed doubt about her ability to get past her prejudices. The defendant exercised peremptory challenges to remove these prospective jurors and he used up his allotment of peremptory challenges before the end of jury selection; the convictions must be reversed and a new trial ordered. *See* CPL 270.20(2); *People v Torpey*, 63 NY2d 361. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [McGuire, J])

Sentencing (Concurrent/Consecutive) (Youthful Offenders) SEN; 345(10) (90)

People v Raymond W., 61 AD3d 1007, 876 NYS2d 899 (2nd Dept 2009)

Holding: The court erred in sentencing the defendant to consecutive terms of imprisonment of 1 1/3 to 4 years. Since the court found the defendant to be a youthful offender, the court did not have the authority to impose consecutive sentences with an aggregate total in excess of 4 years. *See* Penal Law 60.02(2); 70.00(2), (3); CPL 720.20(1)(a); *People v Ralph W.C.*, 21 AD3d 904. Judgment modified to provide that the sentences shall run concurrently with each other and judgment as modified is affirmed. (Supreme Ct, Kings Co [Mangano, Jr., J])

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

Juveniles (Right to Counsel) (Support Proceedings) JUV; 230(130) (135)

Matter of Scott v Scott, 62 AD3d 714, 879 NYS2d 488 (2nd Dept 2009)

The mother filed an enforcement and violation petition. The court scheduled the willfulness hearing for a week after the father first appeared with assigned counsel. Counsel told the court that a scheduling conflict prevented him from representing the father and that new counsel would have to be assigned. On July 9, the court assigned new counsel, but denied counsel's two requests for an adjournment. After the hearing, the support magistrate found that the father willfully failed to pay and recommended a six month period of incarceration. The family court confirmed the determination.

Holding: The support magistrate abused her discretion in denying the adjournment requests and thus denied the father his right to counsel. "The right to counsel implies that the court will afford a respondent and his or her attorney a reasonable opportunity to appear and present evidence and arguments (*see Matter of Keenan v Keenan*, 51 AD3d [1075] at 1077 . . .). While the decision whether to grant an adjournment is ordinarily committed to the sound discretion of the trial court, that discretion is more circumscribed when fundamental rights such as the right to counsel are implicated (*see* Family Ct Act § 435[a];

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People v Spears, 64 NY2d 698, 700 . . .).” The father’s attorney needed time to confer with his client before he testified, to investigate whether the father was served with the judgment of divorce, which gave him notice of his support obligation, and to gather evidence in support of his claim that he was disabled and thus unable to pay support. Order and order of commitment reversed and matter remitted for further proceedings. (Family Ct, Westchester Co [Klein, J; Thompson, SM])

Defenses (Agency) **DEF; 105(3)**

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

People v Rhodes, 62 AD3d 815, 878 NYS2d 773 (2nd Dept 2009)

Holding: The court erred in denying the defendant’s motion to withdraw her guilty plea because her plea was not knowing, voluntary, and intelligent. The defendant was charged with third-degree criminal sale and third- and seventh-degree criminal possession of a controlled substance. According to the lab report, the drugs weighed one two-hundredth (0.005) of an ounce. The defendant agreed to plead guilty to fourth-degree criminal sale, a class C felony, in full satisfaction of the indictment. During her plea allocution, the defendant’s account of the crime raised the possibility of an agency defense. *See People v Lam Lek Chong*, 45 NY2d 64, 74 *cert den* 439 US 935 (1978). The court did not ask the defendant if defense counsel had explained possible defenses to her (*cf People v Phillips*, 28 AD3d 939, 940), and it did not explain to her the significance of the allocution facts or ask defense counsel to explain it. Thus, there is no indication that the defendant was aware of the possible defense and affirmatively waived it. *See People v Castro*, 175 AD2d 953. Instead, the court suggested that the defendant plead to fourth-degree criminal possession, also a class C felony, for which agency could not be a defense. The prosecutor and defense counsel agreed to the change and no one explained to the defendant that an element of the new charge was that the weight of the drugs be at least one-eight of an ounce, which was refuted by the lab report. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Nassau Co [Peck, J])

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

People v Ketteles, 62 AD3d 902, 879 NYS2d 208 (2nd Dept 2009)

Holding: The court properly denied the defendant’s motion to suppress. The officer testified that, while on patrol with his partner in an unmarked police car, he saw the defendant standing on the other side of the street holding a glass pipe, which the officer recognized as the type commonly used to smoke crack cocaine. The defendant put the pipe in his pocket. When the officer and his partner approached him, the partner reached into the defendant’s pocket and retrieved the pipe. The officers then arrested him and during a search incident to the arrest, the officers found other items that connected him to a recent burglary. The court correctly concluded that the officers had probable cause to arrest and search the defendant. *See People v Manigault*, 247 AD2d 255. The defendant did not challenge the officer’s characterization of the object as a crack pipe, and since a crack pipe is a sign of narcotics possession, the defendant’s possession of the pipe in plain view in public gave the officers reason to believe that the defendant unlawfully possessed at least crack cocaine residue. *See People v Edwards*, 160 AD2d 501. Judgment affirmed. (Supreme Ct, Kings Co [Dowling, J (motion to suppress); Sullivan, J])

Dissent: [Leventhal, J] “[T]he mere possession of a glassine envelope or a pipe which can be used to smoke an illegal substance does not amount to probable cause to believe that the holder of the envelope or pipe is in possession of an illicit substance.” *See People v McRay*, 51 NY2d 594, 601-602. The record is devoid of any evidence of an additional factor, other than observation of the pipe, that would establish that the officer had probable cause to believe that the defendant committed a crime.

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

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

People v Torres, 62 AD3d 914, 880 NYS2d 296 (2nd Dept 2009)

Holding: “Assigned counsel has submitted a brief in accordance with *Anders v California* (386 US 738) in which he seeks to be relieved of the assignment to prosecute this appeal. In this brief, counsel indicated that the defendant had asked him to raise certain specific issues on appeal. Counsel ‘then proceeded to analyze th[ese] issue[s] in the brief and demonstrate why [they were] factually and legally without merit, thereby disparaging his client’s appellate claims and for all practical purposes, preclud[ing] his client from presenting them effectively in a pro se brief’ (*People v Herrera*, 282 AD2d 472, 473 [internal quotation marks omitted]; *see People v Vasquez*, 70 NY2d 1, 4; *see also People v Nash*, 38 AD3d 922; *People v James*, 286 AD2d 739). Accordingly, new counsel must be assigned

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and consideration of the appeal deferred until the filing of further briefs." Motion to be relieved as counsel granted, new counsel assigned, and briefing schedule set. (Supreme Ct, Nassau Co [Donnino, J])

Judges (General) (Powers) JGS; 215(9) (10)

Juries and Jury Trials (Deliberation) (General) JRY; 225(25) (37)

People v Cassell, 62 AD3d 1021, 880 NYS2d 303 (2nd Dept 2009)

Holding: A new trial is required because the court's law clerk and a court officer assumed judicial functions during jury deliberations. A juror told the court officer that she wanted to go home and did not want to continue deliberations. The court officer escorted the juror outside; about 15 to 20 minutes later, the court's law clerk told the officer to bring the juror back into the jury room to resume deliberations. When the court officer told the juror she had to continue deliberations, the juror said that she wanted to go home; the court officer responded, "I don't think you're going to be going home." About 10 minutes after the juror returned to the jury room, the jury informed the court that it had reached a verdict. "While a court officer can communicate with the jury during deliberations in connection with his or her administerial duty (*see* CPL 310.10[1]), the court officer's communication here conveyed a legal instruction to the juror regarding her duty and obligation to continue deliberating (*see People v Torres*, 72 NY2d 1007, 1008-1009 . . .). This instruction should have been given to the juror directly by the trial court in the defendant's presence (*see People v Bonaparte*, 78 NY2d 26, 30 . . .) and the trial court's failure to have done so is per se reversible (*see People v Lara*, 199 AD2d 419; *People v Boyd*, 166 AD2d 659)." The law clerk's assumption of a judicial function is also improper. *See People v Ahmed*, 66 NY2d 307, 311-312. Judgment reversed and new trial ordered. (Supreme Ct, Kings Co [Heffernan, J])

Family Court (General) FAM; 164(20)

Jurisdiction (Subject Matter) JSD; 227(10)

Juveniles (Paternity) (Support Proceedings) JUV; 230(100) (135)

Matter of H.M. v E.T., 65 AD3d 119, 881 NYS2d 113 (2nd Dept 2009)

The petitioner mother sought to have the respondent, her former same-sex partner, adjudicated a parent of her child and required to pay child support. The couple was not married or in a civil union and the respondent did not adopt the child. While they were living together, the petitioner was impregnated by sperm from an anonymous donor. Four months after the child was born, the respondent ended the relationship. The support magistrate denied the petition, but the family court granted the petitioner's objections based on the doctrine of equitable estoppel and later granted the petition.

Holding: The family court does not have subject matter jurisdiction over the petitioner's application because it is not of a type that the family court, a court of limited jurisdiction, has been specifically authorized to entertain. *See* NY Const, art VI, § 13; Family Ct Act 115; *Matter of Roy v Roy*, 109 AD2d 150, 151. Family Court Act article 5 only addresses controversies concerning a male's fatherhood of a child. Although the doctrine of equitable estoppel can be applied to article 5 proceedings, it does not give the family court the power to grant equitable relief beyond that specifically authorized by the State Constitution or statute. *See Matter of Brescia v Fitts*, 56 NY2d 132, 139. The legislature is responsible for providing a vehicle for resolving this type of controversy. Notice of appeal treated as an application for leave to appeal, leave granted, order reversed, petitioner's objections denied, support magistrate's order reinstated, and orders granting the petition and setting a monthly support obligation vacated. (Family Ct, Rockland Co [Warren, J; Kaufman, SM])

Dissent: [Balkin, J] "[T]he Family Court possesses subject matter jurisdiction to entertain H.M.'s petition under UIFSA [Uniform Interstate Family Support Act], not for purposes of establishing maternity, but to establish a party responsible for child support."

Family Court (General) FAM; 164(20)

Juveniles (Custody) (General) (Visitation) JUV; 230(10) (55) (145)

Matter of Awan v Awan, 63 AD3d 733, 880 NYS2d 683 (2nd Dept 2009)

Holding: The court erred in granting the mother's petition to enforce a provision of a prior custody and visitation order that allowed her to take the child on a trip abroad. The father asked the court to preclude the mother from taking the child abroad because of the child's seizure disorder. At a hearing, the child's pediatrician testified that the child was medically fit for travel, the seizure disorder was "well controlled" with medication, and the mother would have emergency medication for travel. But the pediatrician did not know about a possible seizure episode after he wrote a letter approving the travel. He acknowledged that the seizure condition might pose an emergency situation and that it was important for the child to have access to emergency medical services. To modify a custody order to which the parties voluntarily agreed, the petitioner must show that there is a change in

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circumstances and that modification is in the best interests of the child. *See Matter of Penn v Penn*, 41 AD3d 724. "In light of the evidence of a possible change in the child's medical condition that was not fully explored at the hearing, the hearing evidence did not demonstrate that the proposed travel was in the best interests of the child." And it was not established that any travel encompassed in the court order directing the mother to remain within 75 miles of emergency services was in the child's best interests. Order reversed, matter remitted for a new hearing and a new determination of the petition and motion. (Family Ct, Suffolk Co [Tarantino, Jr., J])

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

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

People v Booker, 63 AD3d 750, 880 NYS2d 343 (2nd Dept 2009)

Holding: "[T]he Court's charge to the jury that a firearm is defined as 'any pistol or revolver' (Penal Law § 265.00[3]), coupled with the Court's refusal to charge the jury that they must be unanimous on any conviction as to a particular gun for each count, warrants reversal (*see People v Jones*, 233 AD2d 342; *People v Jackson*, 174 AD2d 444). This issue was preserved at trial and is independent of the issue of annotating the jury's verdict sheet. A retrial of those counts on which the defendant was convicted is prohibited by double jeopardy (*see People v Jones*, 233 AD2d at 342; *People v Caliendo*, 158 AD2d 531, 531-532)." Since it is not clear which gun the jury found the defendant to have possessed, retrial on the lesser-included offenses that the jury did not reach is not permitted because it would risk violating the prohibition against double jeopardy. Judgment reversed and indictment dismissed. (Supreme Ct, Kings Co [Dowling, J])

Juveniles (Delinquency) (Delinquency—Procedural Law) **JUV; 230(15) (20)**

Unlawful Imprisonment (Elements) (Evidence) (General) **UNI; 377(10) (15) (17)**

Matter of Jimmy D., 63 AD3d 737, 880 NYS2d 334 (2nd Dept 2009)

Holding: The two counts of second-degree unlawful imprisonment must be dismissed under the merger doctrine. "The merger doctrine precludes a finding with respect to the counts of unlawful imprisonment since the criminal sexual act and the imprisonment were 'essentially simultaneous and inseparable, and any restriction on the victim's movements was wholly incidental to the commission of the criminal sexual act' (*Matter of Charles S.*, 41 AD3d 484, 486; *see Matter of Bradley M.*, 36 AD3d 815, 815-816)." The fact-finding order must be corrected because it includes a finding as to the sexual misconduct count even though the court dismissed that count in its oral decision on the record after the fact-finding hearing. The order must conform to the court's decision (*see Scheuering v Scheuering*, 27 AD3d 446, 447), and if there is a conflict, the decision controls. *See Verdrager v Verdrager*, 230 AD2d 786, 787. The inconsistency can be corrected through a motion for resettlement or on appeal. *See* CPLR 2221, 5019(a); *Spier v Horowitz*, 16 AD3d 400; *Green v Morris*, 156 AD2d 331. Order modified by vacating the provisions adjudicating the appellant a juvenile delinquent based on a finding that he committed acts which, if committed by an adult, would constitute second-degree unlawful imprisonment and sexual misconduct, those counts dismissed, and order affirmed as modified. (Family Ct, Queens Co [Lubow, J])

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

People v Kadry, 63 AD3d 856, 880 NYS2d 694 (2nd Dept 2009)

Holding: The court erred in resentencing the defendant to concurrent terms of 8 to 24 years imprisonment on each of the two second-degree conspiracy counts. The court originally sentenced the defendant to consecutive terms of 5 to 15 years. Later, the court granted the defendant's motion to set aside the sentences as violative of Penal Law 70.25, and resentenced him to concurrent terms of 8 to 24 years. "The only defect in the sentence was in directing that those prison terms run consecutively. 'Once that illegality was successfully challenged by the defendant in his motion pursuant to CPL 440.20, there was no other defect to rectify' (*People v Romain*, 288 AD2d [242] at 243; *see People v Yannicelli*, 40 NY2d 598). Thus, the Supreme Court lacked any statutory or inherent authority to modify the defendant's already-commenced legal sentence by increasing the term of imprisonment imposed upon each count of conspiracy in the second degree . . . ." Resentence modified by reducing the terms of imprisonment to indeterminate terms of 5 to 15 years and resentence affirmed as modified. (Supreme Ct, Kings Co [Collini, J])

Juveniles (Support Proceedings) **JUV; 230(135)**

Matter of Brennan v Burger, 63 AD3d 922, 882 NYS2d 181 (2nd Dept 2009)

Second Department *continued*

Holding: The court erred in finding that the father willfully violated the support order, which was based on his income of $72,000. The father's failure to pay constituted prima facie evidence of a willful violation (*see* Family Court Act 454[3][a]), and the father had the burden of showing that he was unable to do so. *See Matter of Powers v Powers*, 86 NY2d 63, 69-70. By providing competent evidence of his unemployment, efforts to find a new job, and lack of assets, the father rebutted the prima facie case. The court concluded that the father was responsible for his failure to find a new job because he had an unreasonable expectation of finding another position that would pay approximately $72,000. That finding is inconsistent with the court's conclusion that there was no basis for a downward modification of the father's support obligation, which was based on his previous salary. The father established that a downward modification was warranted based on a substantial change of circumstances. *See Matter of Prisco v Buxbaum*, 275 AD2d 461. Order granting mother's willful violation petition reversed and petition denied, order denying father's objection to the order denying his downward modification petition reversed, father's objection sustained, and order vacated, and matter remitted for further proceedings. (Family Ct, Rockland Co [Christopher, J; Apotheker, J; Miklitsch, SM])

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

Guilty Pleas (Withdrawal) — **GYP; 181(65)**

People v Dixon, 63 AD3d 957, 880 NYS2d 529 (2nd Dept 2009)

Holding: "On the record presented, the Supreme Court erred in determining the defendant's motion for leave to withdraw her plea of guilty without a hearing after defense counsel adopted a position adverse to the defendant (*see People v Earp*, 7 AD3d 538, 539; *People v Caccavale*, 305 AD2d 695). The defendant's right to counsel was adversely affected when her attorney, in effect, became a witness against her and took a position adverse to her (*see People v Bedoya*, 53 AD3d 621; *People v Bryant*, 22 AD2d 676, 677 . . .). The Supreme Court should have assigned a different attorney to represent the defendant before it determined the motion to withdraw the plea (*see People v Bedoya*, 53 AD3d 621)." Matter remitted for hearing and report on the defendant's motion to withdraw her guilty plea, defendant's appellate counsel shall represent her, and appeal held in abeyance. (Supreme Ct, Nassau Co [Ayres, J])

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

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

Witnesses (Cross-Examination) (Defendant as Witness) — **WIT; 390(11) (12)**

People v Montoya, 63 AD3d 961, 882 NYS2d 429 (2nd Dept 2009)

Holding: The court's errors deprived the defendant of a fair trial. The defendant moved for a *Sandoval* hearing (*see People v Sandoval*, 34 NY2d 371, 374; CPL 240.43); the prosecution consented to the hearing, stating that they would give prior notice of any prior uncharged acts that they intended to use at trial to impeach him. The motion court granted the hearing request, but the trial court, considering the matter resolved, did not hold a hearing. During cross-examination of the defendant, the prosecution asked him about his citizenship status and his failure to pay taxes. The court overruled defense counsel's objections to the questions, concluding that *Sandoval* did not apply to prior bad acts, only convictions. The court erred in allowing the prosecution to impeach the defendant without holding a pre-trial *Sandoval* hearing. *See People v Marrow*, 301 AD2d 673, 675. The court improperly struck the testimony of one of the defendant's character witnesses and failed to instruct the jury to disregard the testimony or give a curative instruction regarding the witness's testimony about the defendant's reputation for inappropriate sexual contact with children. "This error, coupled with its unilateral dismissal of the witness, which impeded defense counsel's ability to develop her theory of the case, and prevented her from clarifying [the witness's] testimony, deprived the defendant of a fair trial (*see People v Melendez*, 227 AD2d 646)." The court also improperly exercised its discretion in curtailing defense counsel's cross-examination of key prosecution witnesses, including the accuser and her mother. Judgment reversed and matter remitted for a new trial. (Supreme Ct, Kings Co [Heffernan, J])

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

People v Stewartson, 63 AD3d 966, 883 NYS2d 91 (2nd Dept 2009)

The court did not mention any period of post-release supervision (PRS) when it sentenced the defendant in 2000. In 2007, the defendant moved to vacate his conviction and sentence based on the Department of Correctional Services' imposition of a five-year term of PRS. The sentencing judge denied the motion, but directed that the defendant be resentenced to add PRS. Another judge

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resentenced the defendant to the original determinate terms, plus two concurrent five-year periods of PRS.

Holding: The court properly resentenced the defendant. The original sentencing judge is presumed to know that PRS was a mandatory part of every determinate sentence and that the defendant would serve a period of PRS upon his release. *See Lambrix v Singletary*, 520 US 518, 532 n4. The defendant has not made a showing that overcomes this presumption. *See United States v Carter*, 489 F3d 528, 541 *cert den* 128 S Ct 1066. "The court's failure to expressly pronounce the PRS component of the sentence does not indicate that it was unaware that PRS would be part of the sentence, since, until 2008 (*see Matter of Garner v New York State Dept. of Correctional Servs.*, 10 NY3d 358, 363; *People ex rel. Burch v Goord*, 48 AD3d 1306), there was authority for the proposition that PRS automatically became part of every determinate sentence by operation of law, even without a pronouncement by the sentencing court (*see People v Sparber*, 34 AD3d 265, *mod* 10 NY3d 457; *People v Crump*, 302 AD2d 901 . . .). Thus, in this case, there was no basis for the resentencing court to reconsider the propriety of the imprisonment component of the sentence." Resentence affirmed. (Supreme Ct, Kings Co [Gerges, J])

Family Court (General) **FAM; 164(20)**

Juveniles (Paternity) **JUV; 230(100)**

Matter of Marilene S. v David H., 63 AD3d 949, 882 NYS2d 155 (2nd Dept 2009)

The petitioner filed a Family Court Act (FCA) article 5 petition to establish the respondent's paternity. The petitioner was married to another man when the child was conceived and born. The support magistrate summarily dismissed the petition based on the presumption of legitimacy. The family court denied the petitioner's objections, finding that the petition was premature because there was no application to vacate the paternity of the petitioner's husband.

Holding: The support magistrate erred in finding that the presumption of legitimacy is conclusive. *See Matter of Findlay*, 253 NY 1, 7. While a child born during marriage is presumed to be the biological child of the husband, the presumption can be "'rebutted by clear and convincing evidence excluding the husband as the father or otherwise tending to disprove legitimacy' (*Matter of Barbara S. v Michael I.*, 24 AD3d [451] at 452 . . .)." Because the respondent challenged his alleged paternity on the ground of equitable estoppel, the support magistrate should have transferred the matter to a family court judge. *See* FCA 439(a). The family court incorrectly held that the petition was premature. The petitioner's husband has not acknowledged his paternity (*see* FCA 516-a; *Matter of Miskiewicz v Griffin*, 41 AD3d 853), and the petitioner and her husband have not conceded in any manner that he is the child's father. Order reversed, objections granted, order vacated, petition reinstated and matter remitted for further proceedings on the petition before a Family Court Judge. (Family Ct, Westchester Co [Duffy, J; Hochberg, SM])

Confessions (Illegal Arrest) (Interrogation) (*Miranda* Advice) **CNF; 70(35) (42) (45)**

People v Alexander, 63 AD3d 1166, 882 NYS2d 473 (2nd Dept 2009)

The defendant was arrested by Nassau County police and questioned about Nassau County crimes. A New York City detective went to the jail to question the defendant about robberies in Queens. Eleven hours after the arrest, the detective was allowed to speak to the defendant. He administered *Miranda* warnings (*see Miranda v Arizona*, 384 US 436 [1966]). The defendant waived his *Miranda* rights. During questioning, the defendant made statements about several Queens robberies. The judicial hearing officer recommended that the motion to suppress be denied, but the court granted the motion, holding that the prosecution failed to present evidence of the lawfulness of the defendant's arrest in Nassau County.

Holding: The court erred in granting the defendant's motion to suppress his statements to the detective. "When taken together, the length of time between the defendant's arrest by the Nassau County police and the discrete questioning 11 hours later by a different detective about an entirely different subject, the administering of a fresh set of *Miranda* warnings, and the defendant's being shown the surveillance photograph capturing him perpetrating a robbery in Queens, constituted a definite and pronounced break sufficient to dissipate the taint of any prior illegality associated with the defendant's arrest (*see People v Girdler*, 50 AD3d 1157; *People v Monk*, 50 AD3d 925 . . .)." Order reversed and defendant's motion to suppress statements denied. (Supreme Ct, Queens Co [McGann, J; Demakos, JHO])

Dissent: [Mastro, JP] The prosecution failed to meet its burden of proving that the defendant's arrest was lawful. *See People v Gonzalez*, 80 NY2d 883, 885; *People v Varlack*, 259 AD2d 392, 393. And the defendant's statements were not sufficiently attenuated from the taint of the illegal arrest; the detective started interrogating the defendant ten minutes after the Nassau interrogation ended and the interrogations occurred in the same location and involved similar offenses.

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

Judges (Disqualification) (General) JGS; 215(8) (9)

Matter of Zugibe v Bartlett, 63 AD3d 1165, 881 NYS2d 307 (2nd Dept 2009)

During the pendency of a criminal action, the respondent justice disclosed to the parties that an acquaintance made an ex parte communication to her that disparaged one of the codefendants. The respondent considered recusing herself, but concluded that recusal was unwarranted and that she could be completely impartial.

Holding: The CPLR article 78 petition seeking to prohibit the respondent justice from presiding over the criminal action is denied. The petitioner, the Rockland County District Attorney, failed to establish a clear right to prohibition. *See Matter of Borrell v Hanophy*, 246 AD2d 647. "Contrary to the petitioner's contention, the record does not support a finding that Acting Justice Bartlett actually recused herself after disclosing the ex parte communication, or that she was otherwise disqualified under the terms of 22 NYCRR 100.3(E) and thus required to obtain the consent of all parties to participate in the proceeding pursuant to 22 NYCRR 100.3(F). Absent a legal disqualification under Judiciary Law § 14, recusal is a matter solely within the discretion and personal conscience of the court (*see People v Moreno*, 70 NY2d 403, 405-406 . . .)." Petition denied and proceeding dismissed.

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

Juveniles (Foster Care) (Neglect) JUV; 230(50) (80)

Matter of Amanda G., 64 AD3d 595, 882 NYS2d 490 (2nd Dept 2009)

Holding: "The foster parents have the right to participate in these neglect proceedings which concern children who reside with them, and have the right to appeal from an order by which they are aggrieved (*see* Family Ct Act § 1089[b][1][i]; CPLR 5511; Family Ct Act § 1112[a]; *Matter of Dept. of Social Servs. v Sarah L.*, 236 AD2d 396)." The court erred in ordering that one of the children be returned to the respondent mother without making a best interests determination. *See gen* Family Court Act 1055; *Matter of Craig B.*, 289 AD2d 327, 328. Because the family court judge has expressed a preconceived opinion and repeatedly exhibited a lack of impartiality, a different judge must preside over the matter on remittal. Motion to dismiss the foster parents' appeal denied, order reversed, and matter remitted for further proceedings, including a new hearing before a different judge. (Family Ct, Suffolk Co [Tarantino, J])

Juveniles (Custody) (Foster Care) JUV; 230(10) (50) (120) (Removal)

Matter of Jesse J., 64 AD3d 598, 882 NYS2d 487 (2nd Dept 2009)

Holding: Despite the court's decision to credit the petitioner's evidence and discredit the parents' evidence, "the evidence was insufficient, as a matter of law, to find that the children would be subjected to imminent risk if they remained in the custody of the parents during the pendency of these proceedings. Moreover, it appears that the Family Court failed to consider whether risk to the children could have been mitigated by reasonable efforts to avoid the drastic option of removal." *See Nicholson v Scoppetta*, 3 NY3d 357, 378. While the appeals were pending, after the six children spent one year in foster care, one child was paroled to her biological father who is not a party, four were paroled to the appellant father under supervision of the respondent, and the oldest child (now 17) was paroled to the appellant mother under supervision of the respondent. "The appeals are not academic, since the continued removal of the children created a permanent and significant stigma (*see Matter of C. Children*, 249 AD2d 540), and the mother still seeks return of all of the children to her." Order remanding the children to the care of the Commissioner of Social Services and orders removing the children reversed and matter remitted for further proceedings, including whether the current custodial arrangement is in the best interests of the children. (Family Ct, Richmond Co [DiDomenico, J])

Juveniles (Custody) (Jurisdiction) JUV; 230(10) (70)

Matter of Felty v Felty, __ AD3d __, 882 NYS2d 504 (2nd Dept 2009)

In April 2007, four months after the respondent father filed for divorce in Kentucky Family Court, the petitioner mother and children moved to New York. In June, the divorce action was dismissed without prejudice. The father lived with the mother and children in New York from June 9 to July 14 and then the children visited their father in Kentucky from July 15 to August 27. On November 1, 2007, the mother filed a custody petition in the Orange County Family Court.

Holding: The court incorrectly concluded that neither New York nor Kentucky was the children's home state and transferred the case to Kentucky, which it found was the most convenient forum. "New York has home-state jurisdiction pursuant to Family Court article 6 and the [Uniform Child Custody Jurisdiction and Enforcement Act] UCCJEA since the children's six-week vacation with their father in Kentucky did not constitute a change in their residency." The definition of home state allows for a temporary absence during the six-month period needed

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to establish home-state residency. *See* Domestic Relations Law 75-a(7); *Arnold v Harari*, 4 AD3d 644. The facts support the mother's claim that she intended to stay in New York permanently: she never changed her permanent address to Kentucky, the children received special education services in New York, and they lived in their own home with their mother, their primary caregiver since birth. Although the mother misled the father about agreeing to reconcile their marriage, she did so to escape an allegedly abusive relationship that included threats of domestic violence; therefore, her conduct is not construed as wrongful removal. *See* Domestic Relations Law 76-g(4); *Hector G. v Josefina P.* 2 Misc 3d 801, 821-822. Order reversed, motion to dismiss denied, petition reinstated, and matter remitted for further proceedings. (Family Ct, Orange Co [Kiedaisch, J])

Discrimination (Race) DCM; 110.5(50)

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

People v Hall, 64 AD3d 665, 882 NYS2d 515 (2nd Dept 2009)

Holding: Because the prosecutor exercised her peremptory challenges in a discriminatory manner, a new trial is required. *See Batson v Kentucky*, 476 US 79 (1986). In support of her removal of one black potential juror, the prosecutor stated that the juror was in a "helping profession" and seemed to be close to the age of the defendant's mother, who was an alibi witness for the defendant. However, the prosecutor did not explain how the juror's employment related to the case or the juror's qualifications to serve (*see People v Pinto*, 56 AD3d 494), and the defendant identified two seated jurors who were in "helping professions." Additionally, the prosecutor did not use peremptory strikes against eight other prospective jurors who were similar in age to the defendant's mother, but who were not black. *See People v McLaurin*, 47 AD3d 843. Thus, the prosecutor's nonracial explanations for the challenge were pretextual. *See Purkett v Elem*, 514 US 765, 768 (1995). Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [McGann, J])

Evidence (Other Crimes) (Prejudicial) (Relevancy) (Uncharged Crimes) EVI; 155(95) (106) (125) (132)

Instructions to Jury (Cautionary Instructions) ISJ; 205(25)

People v Sayers, 64 AD3d 728, 883 NYS2d 142 (2nd Dept 2009)

Holding: The defendant was deprived of a fair trial. The defendant and the codefendant, her boyfriend, were accused of criminal contempt and aggravated harassment for threatening the complainant. The complainant had a prior relationship with the codefendant. At the *Molineux* hearing, the prosecution requested permission to present testimony regarding seven prior incidents. Only two of those incidents involved the defendant. The defendant objected to the evidence on several grounds, including that she was not involved in most of the incidents and the evidence would have a prejudicial "spill-over effect." The court concluded that the evidence was probative and relevant and it fit within several *Molineux* exceptions, and it told the defendant it would instruct the jury not to consider the codefendant's prior convictions for any reason as to the defendant. However, the limiting instructions the court gave at several points in the trial were confusing and did not expressly limit the evidence of the codefendant's uncharged crimes to the case against the codefendant. "[A]s a result of the trial court's failure to parse the testimony and instructions relating to evidence of uncharged crimes (*see People v Ventimiglia*, 52 NY2d [350] at 361), the overwhelming majority of the evidence presented at trial pertained to the prior bad acts of the codefendant, rather than the instant offenses of which the defendant was convicted." The prejudice to the defendant clearly outweighed the probative value of the evidence. *See People v Montanez*, 41 NY2d 53, 58. The prosecutor's comments during his opening statement and summation regarding the uncharged crimes, when combined with the other errors, were unduly prejudicial to the defendant and the errors were not harmless. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Knopf, J])

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

People v Goodwin, 64 AD3d 790, 882 NYS2d 707 (2nd Dept 2009)

Holding: The court improperly denied the defendant's challenge for cause to a prospective juror. The defendant was convicted of fourth-degree criminal possession of stolen property and second-degree unauthorized use of a motor vehicle. The prospective juror disclosed that his car had been broken into two times. In response to the prosecutor's questions, the juror indicated that he thought his experience would affect his ability to be fair and impartial. During further questioning by the prosecutor, the juror stated that he would try to put aside his own experience and be fair and impartial. However, when defense counsel asked whether the prior experience "would affect his 'ability to really look at things for just what they are here or they all get mixed together [sic],' the prospective juror then responded, '[p]robably get mixed

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together.'" Because the juror again expressed doubt about his ability to be impartial, the court was required to determine that the juror's prior experience would not influence his verdict and that he would render an impartial verdict based on the evidence (*see People v Arnold*, 96 NY2d 358, 361-362), which the court failed to do. Because the defendant used a peremptory challenge to excuse the juror and he exhausted his peremptory challenges before the end of jury selection, the denial of the for cause challenge constitutes reversible error. *See* CPL 270.20(2); *People v Torpey*, 63 NY2d 361, 365. Judgment reversed and new trial ordered. (County Ct, Suffolk Co [Mullen, J])

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

Sentencing (General) **SEN; 345(37)**

People v Key, 64 AD3d 793, 884 NYS2d 106 (2nd Dept 2009)

Holding: The defendant's guilty plea was not knowing, voluntary, and intelligent because the court failed to advise him when he pleaded guilty that his sentence would include post-release supervision. *See People v Boyd*, 12 NY3d 390. "[D]efense counsel's statement regarding postrelease supervision during the plea negotiations several days before the defendant pleaded guilty cannot substitute for the court's duty to ensure, at the time the plea is entered, that the defendant is aware of the terms of the plea (*see People v Garcia*, 61 AD3d 475), especially in light of the fact that it was not stated that postrelease supervision was required to be part of any sentence with a determinate prison term." Judgment reversed, guilty plea vacated, and matter remitted for further proceedings. (County Ct, Nassau Co [Weinberg, J])

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

Witnesses (Child) (Competency) **WIT; 390(3) (5)**

People v Batista, 65 AD3d 554, 882 NYS2d 904 (2nd Dept 2009)

Holding: The court correctly granted the defendant's motion to dismiss counts one through four of the indictment. The prosecutor improperly presented the recorded testimony of the then four-year old complainant to the grand jury as sworn testimony. There is a rebuttable presumption that a witness who is less than nine years old is not competent to give sworn testimony. *See* CPL 60.20(2). To rebut the presumption, the witness must be shown to possess sufficient intelligence and capacity to give testimony (*see* CPL 60.20[1]) and that the witness knows, understands, and appreciates the nature of an oath in order to warrant that the testimony be sworn. *See People v Morales*, 80 NY2d 450, 452-453. The complainant was not competent to give sworn testimony because she did not appreciate the nature of the oath or the consequences of not telling the truth. *See gen People v Groff*, 71 NY2d 101, 104. It is unnecessary to review the merits of the court's decision regarding the lack of corroborative evidence submitted to the grand jury; the court did not need to reach that question because the prosecution presented the complainant's statements as sworn testimony and did not instruct the grand jury on the need for corroboration. Order affirmed. (County Ct, Westchester Co [Cohen, J])

Juveniles (Custody) (Hearings) (Neglect) (Removal) **JUV; 230(10) (60) (80) (120)**

Matter of Isaiah J., 65 AD3d 629, 884 NYS2d 456 (2nd Dept 2009)

Holding: There is record support for the court's determinations that the removal of the six children from the mother's custody was necessary to avoid imminent risk to their life or health. *See* Family Court Act 1027(b)(i). However, "the risks presented by the family's situation would not have been insurmountable had the mother received additional appropriate services and cooperated with the Administration for Children's Services in addressing those risks." The children were removed in June 2008, but the permanency hearing was not completed by July 2009, when this appeal was argued. "Given the unique circumstances of this case, it is in the best interests of all of the children if the four youngest children . . . are returned to their mother under a trial discharge (*cf.* Family Ct Act § 1089), with appropriate safeguards, pending the completion of the permanency hearing. It is also necessary that, within 30 days of the date of this decision and order, the Administration for Children's Services, or other appropriate social services official, provide such services as are ordered herein, and such additional services as may be necessary to facilitate the trial discharge of the four youngest children to their mother, pursuant to Family Court Act § 1015-a, with continuing protection for those children, pending the completion of the permanency hearing." Orders determining that the Administration for Children's Services (ACS) made reasonable efforts to prevent removal and removed the children modified by returning the four youngest children to their mother and requiring ACS to provide intensive case management, identify appropriate housing for the family, help the mother obtain such housing, and provide additional necessary services, and orders affirmed as modified. (Family Ct, Kings Co [Staton, JHO])

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

People v Devore, 65 AD3d 695, 885 NYS2d 497 (2nd Dept 2009)

Holding: The court erred in denying the defendant's motion to dismiss on speedy trial grounds. The defendant met his initial burden by showing that the prosecution failed to declare readiness within the time required by CPL 30.30, and the prosecution did not show that a sufficient portion of the time should be excluded. *See People v Luperon*, 85 NY2d 71, 77-78. The prosecution "failed to prove either that the defendant was attempting to avoid apprehension or that his location could not be determined by due diligence, a necessary predicate for an exclusion based upon the defendant's absence." The police tried to find the defendant by visiting his primary address, but a neighbor told them that the defendant had moved. They also left a business card at a possible address for the defendant's girlfriend. The defendant testified that he was living with his grandmother for six years and he provided letters he received at that address during the relevant time period from private companies and government agencies, including the Social Security Administration (SSA) and the New York State Departments of Taxation and Finance, Motor Vehicles, Labor, and Education. Despite knowing the defendant's social security number, the police did not check with SSA or state agencies. The police did not exhaust all reasonable investigative leads in their search, and checking with government agencies for the defendant's address is a reasonable element of the investigation. *See People v Petrianni*, 24 AD3d 1224, 1225. "Such efforts are particularly necessary where, as here, the initial investigation resulted in information that the defendant had moved from his known address." Judgment reversed, motion to dismiss granted, indictment dismissed, and matter remitted. (County Ct, Westchester Co [Adler, J (motion); Cohen, J (trial and sentencing)])

Dissent: [Dillon, J] "Police efforts may constitute due diligence even where, as here, greater efforts conceivably could have been undertaken by them (*see People v Grey*, 259 AD2d 246, 249 . . .)."

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

Juries and Jury Trials (Deliberation) (Hung Jury) **JRY; 225(25) (40)**

People v Patterson, 65 AD3d 705, 884 NYS2d 768 (2nd Dept 2009)

On the second day of deliberations, the court received a jury note stating that they reached a verdict on two counts and asking what would happen if they could not reach a decision on the third count. The court instructed the jury that the case was important, much time and expense was put into it, and the jury would be kept together until there is a verdict. After the jury left the courtroom, defense counsel objected to the instruction as coercive and requested that the jury be brought back for further instructions, which the court denied. Two hours later, the jury returned a verdict on all three counts.

Holding: "[T]he Supreme Court's *Allen* charge (*see Allen v United States*, 164 US 492 [1896]) was coercive and requires reversal. First, by its seemingly absolute and improper statement that the jury would be kept together until it reached a verdict, the court 'overemphasized the jury's obligation to return a verdict' (*People v Aponte*, 2 NY3d 304, 308). Moreover, the court should have instructed the jury, in response to defense counsel's request, as to its duty to consider the evidence impartially and to try to reach an agreement without any juror surrendering his or her individual judgment (*see People v Aleman*, 12 NY3d 806, 807 . . .)." Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Aloise, J])

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

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

Matter of State of New York v Humberto G., 65 AD3d 690, 885 NYS2d 312 (2nd Dept 2009)

In April 2001, the respondent was sentenced to a determinate term without post-release supervision (PRS). Upon his release from the Department of Correctional Services (DOCS) in January 2007, DOCS administratively imposed a term of PRS and the respondent was transferred to an Office of Mental Health (OMH) facility pursuant to Mental Hygiene Law (MHL) 9.13 as a voluntary patient. In July 2007, the respondent violated his PRS and was returned to DOCS custody. In September 2007, DOCS provided notice to OMH and the Attorney General that the respondent may be a detained sex offender nearing his anticipated release date (*see* MHL 10.05[b]); the State then filed an article 10 petition. In October 2008, at a resentencing hearing regarding his 2001 sentence, the court declined to impose a period of PRS because the prosecutor decided not to seek supervision.

Holding: The court properly granted the respondent's motion to dismiss the MHL article 10 petition because the notice was not properly issued by an agency with jurisdiction. "Since the respondent was not lawfully in the custody of DOCS when the article 10 review was commenced, DOCS was not an agency with jurisdiction and, thus, the respondent was not a detained sex offender

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(*see People ex rel. Joseph II. v Superintendent of Southport Correctional Facility*, 59 AD3d 921, 922; *Matter of State of New York v Randy M.*, 57 AD3d 1157, 1159).” The respondent’s admission to an OMH facility under MHL 9.13 did not make him a detained sex offender under MHL 10.03(g)(5). Order affirmed. (Supreme Ct, Kings Co [Dowling, J])

Third Department

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

People v Miller, 63 AD3d 1186, 880 NYS2d 383 (3rd Dept 2009)

Holding: Defense counsel’s ineffective assistance deprived the defendant of his fundamental right to a fair trial. Early on, the defendant challenged his counsel’s effectiveness by telling the court that counsel had little contact with him and disclosed a privileged communication. The court deferred consideration of the complaints, but did not resolve them later. During the *Huntley* hearing, defense counsel did not argue for suppression of the written statement based on lack of voluntariness and failed to ask about the circumstances surrounding the defendant’s oral and written confessions. Despite the court’s suggestion that there might be grounds for excluding the videotape of the defendant reading his statement, counsel did not make an objection or address issues related to coercion, redundancy, and prejudice. And he did not request a *Wade* hearing regarding the photo identification. Counsel committed numerous errors during trial. He was ill-prepared, made incoherent opening and closing statements, pursued a defense that had no legal basis, and conducted ineffective and incomplete cross-examination of some witnesses. He elicited evidence that reflected badly on his client and the court admonished him for accusing the complainant of perjury. Counsel did not object to the prosecution’s bolstering of the accomplice’s testimony and failed to request a jury instruction on the voluntariness of the defendant’s statements. Because the defendant did not receive meaningful or competent representation (*see People v Zaborski*, 59 NY2d 863, 865), the harmless error doctrine does not apply. *See People v Benevento*, 91 NY2d 708, 714. Judgment reversed and matter remitted for a new trial. (County Ct, Broome Co [Mathews, J])

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

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

People v Rose, 63 AD3d 1184, 879 NYS2d 852 (3rd Dept 2009)

Holding: Although the court correctly told the jury that the defendant was charged with first-degree falsifying business records, the court mistakenly charged the jury on the law governing first-degree offering a false instrument for filing. “Despite defendant’s failure to object to this fundamental error at trial, inasmuch as it cannot be determined if the jury found defendant guilty of the crime with which she was charged, the conviction on that count must be reversed as a matter of discretion in the interest of justice . . . .” *See People v Steiner*, 117 AD2d 692, 692 *lv den* 67 NY2d 951. By not making the appropriate trial objection, the defendant failed to preserve for review her argument that the other verdicts were not supported by legally sufficient evidence. *See People v Golden*, 37 AD3d 972, 973 *lv den* 9 NY3d 844. And the verdicts are not against the weight of the evidence. Judgment modified by reversing the first-degree falsifying business records conviction, matter remitted for a new trial on that count, and judgment affirmed as modified. (Supreme Ct, Ulster Co [Kavanagh, J])

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

People v Gonzalez, 63 AD3d 1293, 883 NYS2d 600 (3rd Dept 2009)

Holding: The court erred in directing that the defendant’s one-year sentences on the two counts of endangering the welfare of a child run consecutively to one another. Penal Law 70.25(3) provides that when consecutive definite sentences are imposed for offenses that were committed as part of the same incident or transaction, the aggregate of the terms of the sentences cannot exceed one year. “In the case at hand, defendant’s conviction was based upon only one incident of providing alcohol to minors even though it involved more than one victim.” Therefore, Penal Law 70.25(3) precluded the consecutive sentences. *See People v Williams*, 277 AD2d 508, 509. Judgment modified by directing the jail sentences be served concurrently rather than consecutively and judgment affirmed as modified. (County Ct, Franklin Co [Main, Jr., J])

Counsel (Right to Counsel) (Scope of Counsel [Entry]) COU; 95(30) (38[b])

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

People v Merck, 63 AD3d 1374, 882 NYS2d 337 (3rd Dept 2009)

Holding: The court correctly denied the defendant’s speedy trial motion. On September 14, 2006, the defen-

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dant was arraigned in city and town courts on related charges. He requested counsel and preliminary hearings, but the courts adjourned the cases without determining his eligibility for counsel or assigning counsel. Counsel was assigned on September 18 and 19. When the prosecutor decided not to go forward with the hearings, the county court divested the local courts of jurisdiction. On February 26, the prosecutor sent a letter notifying defense counsel that the case would be presented to the grand jury on March 1. On February 28, the defendant requested an opportunity to testify before the grand jury and the court ordered the sheriff to produce him on March 8. After hearing his testimony, the grand jury voted to indict. The prosecutor filed the indictment and a statement of readiness on March 13, one day beyond the statutory period. *See* CPL 30.30(1)(a), 210.10. However, the statement of readiness was timely because the seven-day delay in the grand jury proceedings to accommodate the request of the defendant, who was incarcerated, to testify was chargeable to the defendant. *See* CPL 30.30(4)(b); *People v Casey*, 61 AD3d 1011, 1012. All of the prosecution's witnesses testified on March 1 and the only reason the vote was delayed was due to the defendant's desire to testify. "Although we do not reach the merits of defendant's argument that the time between his arraignment and assignment of counsel is chargeable to the People for speedy trial purposes, we direct the attention of Town Court to the provisions of 22 NYCRR 200.26(b) and (c)." Judgment affirmed. (County Ct, St. Lawrence Co [Richards, J])

Fourth Department

Parole (General) (Officers [Generally]) **PRL; 276(10) (25)**

Search and Seizure (Parolees and Probationers) **SEA; 335(50)**

People v Lynch, 60 AD3d 1479, 875 NYS2d 730 (4th Dept 2009)

Holding: The court properly denied the defendant's motion to suppress his statements to the police and the physical evidence recovered after the statements were made. "[I]t cannot be said that the court erred in concluding as a matter of law that the questioning and detention of defendant by officers of the New York State Division of Parole (DOP) was in furtherance of parole purposes and related to their duties as parole officers (*see People v Johnson*, 63 NY2d 888, 890, *rearg denied* 64 NY2d 647; *cf. People v Huntley*, 43 NY2d 175, 181-182). Likewise, the arrest and detention of defendant in violation of Executive Law § 259-i(3)(a)(i), does not require suppression of the statements made and evidence recovered as a result of defendant's detention by the DOP. The technical violation of the Executive Law did not infringe upon defendant's constitutional right to be free from unreasonable searches and seizures, and thus the application of the exclusionary rule is not warranted under these circumstances (*see People v Lopez*, 288 AD2 70, 71, *lv denied* 97 NY2d 706 . . .)." Judgment affirmed. (County Ct, Erie Co [DiTullio, J])

Driving While Intoxicated (General) (Prior Convictions) **DWI; 130(17) (20)**

People v Ballman, 64 AD3d 9, 877 NYS2d 771 (4th Dept 2009)

Holding: The defendant's 1999 out-of-state conviction cannot be used to elevate his driving while intoxicated offense from a misdemeanor to a felony because it occurred before November 1, 2006. The amendment of Vehicle and Traffic Law (VTL) 1192(8) to allow the use of out-of-state convictions to elevate DWI offenses to felonies took effect on November 1, 2006. Because it is not clear whether the references to convictions in the enabling language relate to out-of-state convictions, a review of the legislative history is necessary. In 1985, the Legislature enacted VTL 1192 (former [7]), which deemed a prior out-of-state conviction to be a prior conviction for purposes of determining penalties to be imposed. *See* L 1985, ch 694. That amendment took effect "on the 120th day 'next succeeding the date on which it shall have become law *and shall apply to out-of-state convictions occurring on or after such date*' (L 1985, ch 694, § 2 [emphasis added] . . .)." In 1988, former subdivision 7 became 1192(6) and "[t]he words 'out-of-state' were removed and the date of November 29, 1985 was substituted for the '120th day' language." In 1990, VTL 1192(6) became 1192(8), and when 1192(8) was amended in 2006, the date restrictions were removed from the statute and placed in the enabling language. Although the words "out-of-state" do not precede the word "convictions" in the enabling language, it is clear from the legislative history that the date restriction refers to predicate out-of-state convictions. Judgment reversed, plea vacated, count one dismissed without prejudice, count two reinstated, and matter remitted. (County Ct, Ontario Co [Doran, J])

Juveniles (Abuse) (Hearings) (Neglect) **JUV; 230(3) (60) (80)**

Matter of Breanna R., 61 AD3d 1338, 876 NYS2d 829 (4th Dept 2009)

Holding: The court erred in dismissing the Family Court article 10 petition alleging that the respondent father sexually abused his three children. At the fact-finding hearing, the petitioner presented evidence of state-

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ments made by the two oldest children to a child protective services caseworker and that one of the children made similar statements to their counselor. The petitioner also presented validation testimony from a licensed psychologist who investigated the allegations by interviewing the two children and the parents, reviewing the petitioner's records, and conducting psychological testing of the parents. Based on his investigation and experience, the psychologist concluded that the father sexually abused the two oldest children. The record, viewed as a whole, supports a finding of abuse. *See Matter of Heather P.*, 233 AD2d 912, 913. The children's out-of-court statements were sufficiently corroborated by the testimony of the psychologist and the caseworker, as well as the fact that the children had age-inappropriate knowledge of sexual matters (*see Matter of Briana A.*, 50 AD3d 1560), the cross-corroborating accounts of the children regarding the father's conduct and the setting for that conduct, and one of the children exhibited behavior that was consistent with having been sexually abused. *See Matter of Elizabeth G.*, 255 AD2d 1010, 1012. Order reversed, petition granted, two oldest children found to be abused children, youngest child found to be a neglected child, and matter remitted for a dispositional hearing. (Family Ct, Erie Co [Maxwell, J])

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

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

People v Brown, 61 AD3d 1427, 879 NYS2d 263 (4th Dept 2009)

Holding: The court erred in denying the defendant's CPL 330.30 motion to set aside the verdict in part on the ground of ineffective assistance of counsel. The defendant based his motion on defense counsel's failure to object to the admission into evidence of the accuser's medical records that contain references to prior allegations of sexual abuse against the defendant. "Under the circumstances of this case, that failure alone constitutes ineffective assistance of counsel because it was 'so "egregious and prejudicial" as to deprive [the] defendant of his constitutional right' to a fair trial (*People v Turner*, 5 NY3d 476, 480)." Defense counsel's response to the court's inquiry about the CPL 330.30 motion "did not establish that his failure to object to the admission of such prejudicial information was part of a legitimate trial strategy (*cf. People v Pierce*, 303 AD2d 966, 966-967, *lv denied* 100 NY2d 565)." Judgment reversed, motion to set aside the verdict in part granted, verdict set aside in part, and new trial granted on counts two and three. (County Ct, Onondaga Co [Walsh, J])

Family Court (General) **FAM; 164(20)**

Juveniles (Hearings) (Permanent Neglect) (Representation) **JUV; 230(60) (105) (125)**

Matter of Isaiah H., 61 AD3d 1372, 877 NYS2d 786 (4th Dept 2009)

Holding: "Family Court erred in granting petitioner's motion for a default order finding that respondent mother permanently neglected her son and thereafter, following a dispositional hearing, terminating her parental rights with respect to him pursuant to Social Services Law § 384-b. The mother's failure to appear at the fact-finding hearing on the issue of permanent neglect 'does not automatically constitute a default,' in view of the fact that the attorney for the mother appeared on her behalf and requested an adjournment (*Matter of David A.A. v Maryann A.*, 41 AD3d 1300, 1300; *Matter of Shemeco D.*, 265 AD2d 860. 'A party who is represented at a scheduled court appearance by an attorney has not failed to appear' (*Matter of Sales v Gisendaner*, 272 AD2d 997, 997)." Order reversed, petitioner's motion denied, and matter remitted for a hearing on the petition. (Family Ct, Erie Co [Szczur, J])

Juveniles (Disposition) (Parental Rights) (Visitation) **JUV; 230(40) (90) (145)**

Matter of Josh M., 61 AD3d 1366, 877 NYS2d 784 (4th Dept 2009)

Holding: The court erred in failing to determine whether it was in the child's best interests to have post-termination of parental rights contact with his father. The court properly terminated the father's parental rights on the ground of mental retardation. *See* Social Services Law 384-b(4)(c). The hearing evidence showed that the father is mildly mentally retarded and that his mental retardation rendered him incapable of providing proper and adequate care for his child, who has developmental disabilities. The court and the law guardian stated that post-termination contact might be appropriate and the court urged the parties to agree to have the father conditionally surrender his parental rights and arrange for some form of continued contact. After the father refused to conditionally surrender his parental rights, the court terminated his parental rights without determining whether post-termination contact was in the child's best interests. The court incorrectly conditioned post-termination contact on the parties' ability to agree on the terms of that contact and on the father's agreement to a conditional surrender of his parental rights. Order modified by remitting for further proceedings on the issue of post-termination contact and order affirmed as modified. (Family Ct, Ontario Co [Doran, J])

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Due Process (Fair Trial) (Misconduct) DUP; 135(5) (15)

Misconduct (Prosecution) MIS; 250(15)

People v Morrice, 61 AD3d 1390, 877 NYS2d 547 (4th Dept 2009)

Holding: The prosecutor's misconduct during the trial deprived the defendant of a fair trial. Although the defendant failed to preserve for review his contention as to certain instances of misconduct, the matter is reviewed in the interest of justice. The prosecutor failed to correct the misstatement of the prosecution's main witness that she was not getting anything in return for her testimony (*see People v Novoa*, 70 NY2d 490, 496-498); in fact, the witness was an accomplice and received transactional immunity in exchange for her grand jury testimony. And the prosecutor compounded his misconduct by repeating the witness's misstatement in his summation. The prosecutor improperly questioned a detective on direct examination about the defendant's invocation of his right to counsel (*see People v Nicholas*, 286 AD2d 861, 862 *affd* 98 NY2d 749), commented about his invocation of that right during summation (*see gen People v Romero*, 54 AD3d 781 *lv den* 11 NY3d 930), and cross-examined the defendant about his discussion of the case with his attorney during a recess. Other instances of prosecutorial misconduct include questioning a defense witness about prior arrests (*see People v Cook*, 37 NY2d 591, 596), questioning that witness about whether her boyfriend was incarcerated, and characterizing the defendant as a liar during summation. *See People v Fiori*, 262 AD2d 1081. The prosecutor's misconduct caused such substantial prejudice to the defendant that he was deprived due process of law. *See People v Galloway*, 54 NY2d 396, 401. Judgment reversed and new trial granted. (County Ct, Ontario Co [Doran, J])

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

Rape (Degrees and Lesser Offenses) RAP; 320(10)

People v Scott, 61 AD3d 1348, 877 NYS2d 536 (4th Dept 2009)

Holding: The defendant's conviction for first-degree rape must be reversed. "[T]he predatory sexual assault count charged rape in the first degree as one of its elements and, as charged in the indictment, the elements of the predatory sexual assault with respect to rape in the first degree are precisely those required for rape in the first degree under Penal Law § 130.35(4)." Because it was impossible for the defendant to commit predatory sexual assault without, by the same conduct, committing first-degree rape, first-degree rape is an inclusory concurrent county of predatory sexual assault. *See* CPL 300.30(4); *People v Miller*, 6 NY3d 295, 300. Judgment modified by reversing the first-degree rape conviction, count two dismissed, and judgment affirmed as modified. (County Ct, Onondaga Co [Walsh, J])

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

People v Stein, 63 AD3d 99, 876 NYS2d 814 (4th Dept 2009)

Holding: The court incorrectly determined that the defendant is a level two risk under the Sex Offender Registration Act. The defendant was convicted of second-degree criminal sexual act for sexual contact with his foster child. The Board of Examiners of Sex Offenders assessed twenty points under risk factor 7, "relationship with victim," concluding that the offense arose from the "abuse of a professional relationship." The court properly rejected that conclusion, but erred in assessing points under risk factor 7 because the defendant became the child's foster parent in order to victimize her. The record does not contain clear and convincing evidence to support that finding. The child started living with the defendant and his wife three months before the sexual contact started. Before this offense, the defendant did not have a criminal record and there is no evidence that he has sexually abused another child in the past. *Cf People v Marinconz*, 178 Misc 2d 30, 37. There is no evidence that would support an inference that the defendant became a foster parent to gain access to children in order to sexually abuse them (*cf People v Carlton*, 307 AD2d 763, 764), or that he became the child's foster parent for the primary purpose of victimizing her. *See* Risk Assessment Guidelines and Commentary at 12; *see People v Terdeman*, 175 Misc 2d 379, 384. "To conclude that the relationship between a foster parent and a foster child is a professional relationship is to distort the nature of that relationship and to ignore the policy served by recognition of this risk factor." Order modified by reducing the defendant to a level one risk and order affirmed as modified. (County Ct, Herkimer Co [Kirk, J])

Narcotics (Treatment Programs) NAR; 265(60)

Sentencing (Delay) (General) SEN; 345(25) (37)

People v Andrews, 62 AD3d 1237, 877 NYS2d 812 (4th Dept 2009)

Holding: The court properly sentenced the defendant to an indeterminate term of 1 to 3 years in prison. The defendant entered a guilty plea to second-degree criminal possession of a forged instrument with the understanding that he would be allowed to enter a drug court program. The court advised the defendant that he would receive a 1 to 3 year prison sentence if he did not successfully complete the program. On October 30, 2003, the defendant

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signed a participation agreement in which he agreed to participate for up to 36 months and abstain from drugs, and he agreed that persistent positive drug tests and new arrests could result in his termination from the program. The defendant also acknowledged that he would receive a 1 to 3 year sentence if he was not successful. After entering the program, the defendant was arrested twice and was convicted of those crimes, and he admitted to using drugs several times. On February 28, 2007, he was terminated from the program, and on May 3, 2007, he was sentenced to the 1 to 3 year indeterminate term. The defendant's agreement to participate in the program for not more than 36 months "did not impose a time limitation upon the deferral of sentencing or otherwise deprive the court of authority to sentence defendant pursuant to the terms of the plea agreement (*see generally People v Roberts*, 38 AD3d 1014)." And the plea agreement did not limit the court's authority to defer sentencing to give the defendant the opportunity to successfully complete the program. *See gen People v Woods*, 192 Misc 2d 590, 592. Judgment affirmed. (County Ct, Oneida Co [Balzano, AJ])

Sentencing (Enhancement) (Hearing) SEN; 345(32) (42)

People v Davis, 62 AD3d 1266, 878 NYS2d 539 (4th Dept 2009)

Holding: The court improperly imposed an enhanced sentence without conducting an *Outley* (*see People v Outley*, 80 NY2d 702) hearing. During the plea proceedings, the court informed the defendant that if he was arrested prior to sentencing, he could be sentenced to up to a year in jail. At sentencing, the prosecution told the court that the defendant had been arrested. Defense counsel told the court that he did not have the accusatory instrument or lab report related to the arrest and that the court must give the defendant an opportunity to contest the legality or reasonableness of the arrest. "The mere fact that defendant was arrested, without more, is insufficient to justify an enhanced sentence based on a post-plea arrest . . . ." Judgment modified by vacating the sentence, judgment affirmed as modified, and matter remitted for further proceedings. (Supreme Ct, Erie Co [Wolfgang, J])

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

Juveniles (Parental Rights) (Representation) (Right to Counsel) JUV; 230(90) (125) (130)

Matter of Davontae D., 62 AD3d 1251, 877 NYS2d 724 (4th Dept 2009)

Holding: The court abused its discretion in entering a default order terminating the respondent mother's parental rights "after granting the motion of the mother's attorney to withdraw as counsel without notice to the mother (*see* CPLR 321[b][2]; Family Ct Act § 165[b]; *Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116; *Matter of Michael W.*, 239 AD2d 865). 'Because the purported withdrawal of counsel in this case was ineffective, the order entered by Family Court was improperly entered as a default order and appeal therefrom is not precluded' (*Matter of Tierra C.*, 227 AD2d 994, 995; *see Matter of Kwasi S.*, 221 AD2d 1029)." Order reversed and matter remitted for reassignment of counsel and a new hearing on the petition. (Family Ct, Monroe Co [O'Connor, J])

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

People v Brewer, 63 AD3d 1604, 880 NYS2d 444 (4th Dept 2009)

Holding: The court improperly exercised its discretion in determining that the defendant is a level three risk under the Sex Offender Registration Act. Therefore, this Court can substitute its own discretion, even though the lower court did not abuse its discretion. *See Matter of Von Bulow*, 63 NY2d 221, 224. Although the defendant was presumptively a level three risk based on the risk assessment instrument, there is clear and convincing evidence of circumstances that warrant a one-level downward departure. *See People v Weatherley*, 41 AD3d 1238. The defendant was 20 years old when he engaged in sexual activity with a 16 year old who admitted that she willingly engaged in the activity, and there was no allegation or evidence of forcible compulsion. That offense was the defendant's only sex offense and he was in sex offender counseling at the time of the risk assessment hearing. Under the circumstances, the defendant is not at a high risk of reoffending. *See* Corr L 168-l(6)(c); *cf People v Heichel*, 20 AD3d 934. Order modified by determining that the defendant is a level two risk and order affirmed as modified. (County Ct, Ontario Co [Kocher, J])

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories]) SEA; 335(15[f])

People v Francisco, 63 AD3d 1554, 880 NYS2d 806 (4th Dept 2009)

Holding: The court erred in denying the defendant's motion to suppress the marijuana found in the trunk of his car during an alleged inventory search. The prosecution failed to show that the search was valid by demonstrating that the department had a policy concerning

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inventory searches, that the officer properly conducted the search in compliance with an established procedure, or that the officer filled out a meaningful inventory list. *See People v Johnson*, 1 NY3d 252, 255-256. Judgment modified by reversing the third-degree criminal possession of marijuana conviction, motion to suppress property granted, count one dismissed, and judgment affirmed as modified. (County Ct, Ontario Co [Kocher, J])

Juveniles (Adoption) (General) (Parental Rights) **JUV; 230(5) (55) (90)**

Matter of Jaleel F., 63 AD3d 1539, 881 NYS2d 242 (4th Dept 2009)

Holding: The court denied the respondent father's due process rights by failing to inform him of the date of the dispositional hearing on the termination of parental rights petition. *See Matter of Samantha L.J.*, 155 AD2d 980. The petitioner sought to free the children for adoption after their mother died. The court determined that the respondent, the biological father of one of the children, was a notice father. *See* Social Services Law 384-c. The respondent contends that he is consent father (*see* Domestic Relations Law 111[1][d]), and that his consent to the adoption of his child is required. Even assuming the court correctly determined him to be a notice father, he was entitled to notice of the termination of parental rights proceeding and an opportunity to be heard regarding his child's best interests. *See Matter of Alyssa M.*, 55 AD3d 505, 506. The father's appearance, in person or by counsel, at each court date of which he had notice showed his intention to exercise his rights. *Cf Matter of Desmond K.*, 59 AD3d 240. Order reversed, determination that the respondent is a notice father vacated, and matter remitted for a new hearing. (Family Ct, Erie Co [Maxwell, J])

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

Juveniles (Parental Rights) (Representation) (Right to Counsel) **JUV; 230(90) (125) (130)**

Matter of La'Derrick W., 63 AD3d 1538, 880 NYS2d 805 (4th Dept 2009)

Holding: The court erred in entering a default order terminating the respondent's parental rights based on a finding of permanent neglect. The court "abused its discretion in granting the motion of the mother's attorney to withdraw as counsel for the mother without notice to her. 'An attorney of record may withdraw as counsel only upon notice to his or her client' (*Matter of Hohenforst v DeMagistris*, 44 AD3d 1114, 1116; *see* CPLR 321[b][2]; Family Ct Act § 165[b]; *Matter of Davontae D.*, [62] AD3d [1251] . . .)." Because counsel's withdrawal was ineffective, the court improperly entered a default order and an appeal is authorized. *See Matter of Tierra C.*, 227 AD2d 994, 995. Order reversed and matter remitted for assignment of counsel and a new hearing on the petition. (Family Ct, Jefferson Co [Hunt, J])

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

Venue (Change of Venue) **VEN; 380(5)**

Matter of State of New York v Zimmer, 63 AD3d 1562, 880 NYS2d 422 (4th Dept 2009)

Holding: The court erred in granting the petitioner's motion to change the venue of the trial from Oneida County, where the respondent is located, to Broome County, where the underlying offenses occurred. Mental Hygiene Law 10.08(e) allows a court to change venue for good cause, which may include the convenience of the parties or witnesses or the respondent's condition. The attorney's affirmation in support of the motion contained general allegations regarding the convenience of unidentified witnesses and a conclusory statement that the respondent had the greatest ties to Broome County. Because of the lack of specificity, the petitioner failed to establish good cause for the venue change. Order reversed, motion denied, and first and third ordering paragraphs vacated. (County Ct, Oneida Co [Tormey, J])

Records (Access) (Sealing) **REC; 327(5) (40)**

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

Matter of State of New York v Zimmer, 63 AD3d 1563, 880 NYS2d 813 (4th Dept 2009)

Holding: The court properly granted the petitioner's motion to unseal the respondent's records that were sealed pursuant to CPL 160.50(1) and make them available to the petitioner for use in the Mental Hygiene Law (MHL) article 10 proceeding. MHL 10.08(c) provides that, notwithstanding any other provision of law, the petitioner is authorized to request, and state agencies are allowed to provide, records and reports related to the respondent's commission or alleged commission of a sex offense or other relevant information. The statute also provides that otherwise confidential materials obtained pursuant to 10.08(c) may not be further disseminated or otherwise used. It is clear from the unambiguous statutory language that MHL 10.08(c) supersedes the sealing provisions in CPL 160.50(1). *See Matter of Melendez v Wing*, 8 NY3d 598, 609. The petitioner demonstrated that the records may contain information regarding the alleged commission of a sex offense and are otherwise relevant to the proceeding.

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The respondent's constitutional arguments relate to the admissibility and use of the records at an article 10 trial and the court reserved decision on the issue of admissibility. Therefore, it would be premature to review that issue. *See Matter of Parrinello*, 213 AD2d 1006, 1008. Because the respondent's argument that MHL 10.08(c) is permissive rather than mandatory was raised for the first time in his reply brief, it is not properly before this Court. *See gen Turner v Canale*, 15 AD3d 960 *lv den* 5 NY3d 702. Order affirmed. (County Ct, Oneida Co [Tormey, J])

Grand Jury (General) (Procedure) (Selection) **GRJ; 180(3) (5) (10)**

People v Connolly, 63 AD3d 1703, 881 NYS2d 257 (4th Dept 2009)

Holding: The court erred in denying the defendant's motion to dismiss the indictment on the ground that the grand jury proceeding was defective. *See* CPL 210.35(5). The defendant, a county sheriff, was accused of directing members of his office to identify, locate, follow, and, if possible, issue traffic tickets to individuals who were opposed his candidacy or posted articles that criticized his job performance. When the special prosecutor began presenting evidence to the grand jury, one of the jurors told him that she was the mother of one of the alleged victims and the mother-in-law of another and that her daughter filed a civil suit against the defendant. The prosecutor told the juror not to participate in proceedings concerning those witnesses and not to listen to their testimony. But, the juror did remain in the grand jury room for the rest of the proceedings, including during the defendant's testimony, and she voted on all of the charges that did not involve her relatives. Because she participated in the rest of the proceedings, including the vote to indict him, and her daughter had a financial interest in the defendant's indictment and conviction, "potential prejudice arose from permitting the victims' family member to determine whether to indict the defendant." The prosecutor was required to excuse the juror from participating in the defendant's case or present the issue to the court. *See gen People v Nash*, 236 AD2d 845 *lv den* 89 NY2d 1039. The prosecutor's failure to do so necessitates dismissal of the indictment. Judgment reversed, motion to dismiss granted, and indictment dismissed without prejudice to the prosecution to re-present the charges to another grand jury. (County Ct, Seneca Co [Falvey, J])

Juveniles (Custody) (Parental Rights) (Permanent Neglect) **JUV; 230(10) (90) (105)**

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

Matter of Deborah E.C. v Shawn K., 63 AD3d 1724, 883 NYS2d 401 (4th Dept 2009)

Holding: The court properly denied the stepmother's petition for custody of the respondent father's son. The child's parents were respondents in a Family Court Act (FCA) article 10 neglect proceeding, and the mother's parental rights were terminated. The father is incarcerated until at least 2013. In June 2006, when a family friend could no longer care for the child, he was transferred to foster care. After the petitioner and the respondent father married in January 2007, the petitioner filed custody petitions in the article 10 proceeding and under FCA article 6. After a joint hearing, the court concluded that the stepmother should not be given custody because of her emotional issues and extended history of relationships that involved domestic violence and substance abuse. The court correctly applied the best interests of the child standard in reviewing both custody petitions. *See Matter of Bennett v Jeffreys*, 40 NY2d 543, 548; FCA 1017(2)(a), 1055 (former (a)(i)); *Matter of Harriet U. v Sullivan County Dept of Social Servs*, 224 AD2d 910, 911. While the child has bonded with his stepmother, that is only one factor in the best interests determination. *See Matter of Esposito v Shannon*, 32 AD3d 471, 473. The record does not provide any reason to disturb the court's best interests determination. "[T]he court properly considered the father's incarceration and the potential that the father may relapse into a life of crime or substance abuse (*see generally Matter of Marie Annette M.*, 23 AD3d 167, 169 . . .)." Once the court denied the custody petitions, the father had to make other arrangements for his son's long-term care in order to avoid a permanent neglect finding. As an incarcerated parent, the father cannot rely on long-term foster care to satisfy the planning requirement. *See Matter of Gregory B.*, 74 NY2d 77, 90. Orders denying custody petition and terminating the respondent's parental rights affirmed. (Family Ct, Genesee Co [Adams, J])

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

People v Helmer, 65 AD3d 68, 880 NYS2d 598 (4th Dept 2009)

Holding: The court incorrectly concluded that the prosecution presented clear and convincing evidence that the defendant and the complainant were strangers. Therefore, the court erred in finding that the defendant was a level two risk. Although the defendant and the complainant met in person for the first time on the day that they had sexual relations, for several weeks before that meeting, they communicated online more than 100 times and spoke on the phone 30 times. The defendant searched MySpace.com for women between the ages of 20 and 30 in the Auburn area and came up with the complainant's name. The complainant was only 15 years old,

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but her profile stated that she was 20 years old. Through their conversations, the complainant learned the defendant's name and age and the status of his divorce (*cf People v Tejada*, 51 AD3d 472), and the complainant told the defendant her address and details about her family. The defendant picked up the complainant and they went to the park and had dinner before going to the defendant's house, where they had sex. They had contact several times after that date. Two months later, the defendant found out that the complainant was only 15 years old and that she was pregnant. The commentary to risk factor 7, "relationship with the victim," defines the term stranger as a person who is not the victim's actual acquaintance. *See* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 12 (2006). Given their extensive communications over a period of several weeks and the information they exchanged, the defendant was not a stranger to the complainant at the time of their sexual contact. Order modified by reducing the defendant's risk level to one and order affirmed as modified. (County Ct, Cayuga Co [Fandrich, J])

Juveniles (Hearings) (Parental Rights) (Permanent Neglect) **JUV; 230(60) (90) (105)**

Matter of Patricia C., 63 AD3d 1710, 881 NYS2d 260 (4th Dept 2009)

Holding: The court violated the respondent father's due process rights by refusing to allow him to present evidence at the fact-finding hearing after he failed to timely appear on the fourth day of the hearing. The father did not waive his right to be heard on matters concerning his child. *See Matter of Kendra M.*, 175 AD2d 657, 658. He was at the first three hearing days and told the court he planned to testify. On the fourth day, the respondent's attorney told the court that, according to his client's employer, his client thought the hearing was starting at 10:00, rather than 9:00, and that he was on his way. And the father's first witness was available to testify before he arrived. The court erred in closing the hearing and refusing to allow him to present evidence in opposition to the termination of parental rights petition. *See Matter of Cleveland W.*, 256 AD2d 1151, 1152. The petitioner did not show that he permanently neglected his daughter. By failing to tailor its efforts to meet the needs of this particular father and daughter (*see Matter of Maria Ann P.*, 296 AD2d 574, 575), the petitioner did not establish, by clear and convincing evidence, that it made diligent efforts to strengthen the father-daughter relationship and to reunite the family. *See Matter of Sheila G.*, 61 NY2d 368, 373). The record also showed that, despite various obstacles, the father made significant efforts to maintain contact and to plan for his daughter's future, and that he completed parenting classes, was in counseling to deal with domestic violence and anger management issues, and tried to stay employed full-time during the relevant time period. Order reversed and petition dismissed. (Family Ct, Onondaga Co [Mulroy, J])

Accusatory Instruments (General) (Sufficiency) **ACI; 11(10) (15)**

Conspiracy (General) (Pleading) **CNS; 80(23) (25)**

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

People v Pike, 63 AD3d 1692, 880 NYS2d 832 (4th Dept 2009)

Holding: Count four of the indictment, charging the defendant with second-degree conspiracy, is jurisdictionally defective because it does not allege that the required overt act was actually committed. *See People v Keiffer*, 149 AD2d 974, 974. The elements of the overt act were not incorporated into the conspiracy count by the reference to Penal Law 105.15 in that count. *See gen People v D'Angelo*, 98 NY2d 733, 735. The requirement that an overt act be pleaded and proved appears in Penal Law 105.20, not 105.15. Because the defect is the failure to allege a material element of the crime, it cannot be cured by incorporating the allegations in the bill of particulars into the indictment. *See gen People v Iannone*, 45 NY2d 589, 600-601. The court did not abuse its discretion in denying the defendant's motion for funds to retain a jury consultant because the defendant failed to show that the expert was necessary under the circumstances of the case. *See gen* County Law 722-c; *People v Koberstein*, 262 AD2d 1032, 1033 *lv den* 94 NY2d 798. The court also did not abuse its discretion by allowing the prosecution's expert to give a tutorial on blood spatter evidence because the "testimony tended to aid the jury in considering and evaluating the expert's conclusions concerning the blood spatter evidence presented at trial (*see generally People v Lee*, 96 NY2d 157, 162.)" Judgment modified by reversing the second-degree conspiracy conviction, count four dismissed, and judgment affirmed as modified. (County Ct, Chautauqua Co [Ward, J])

Arrest (General) (Warrantless) **ARR; 35(12) (54)**

Homicide (Felony Murder) (Murder [Degrees and Lesser Offenses]) **HMC; 185(20) (40[g])**

People v Vandyne, 63 AD3d 1681, 881 NYS2d 268 (4th Dept 2009)

The defendant was convicted of first- and second-degree murder and first-degree robbery.

Fourth Department *continued*

Holding: The defendant's second-degree felony murder conviction must be reversed because that offense is a lesser included offense of first-degree felony murder. *See* CPL 300.40(3)(b); *People v Santiago*, 41 AD3d 1172, 1175 *lv den* 9 NY3d 964. The defendant's warrantless arrest was not illegal because he was not arrested in his home and he did not have a reasonable expectation of privacy in the place of arrest. After receiving a notice regarding his failure to pay rent, the defendant voluntarily vacated his apartment and turned in his keys, which showed his intent to terminate the lease. He was arrested in an unlocked storage cubicle in the basement of that apartment building. While his apartment lease had not expired yet, he no longer had a reasonable expectation of privacy in the apartment or the storage cubicles based on the lease. *See eg People v Bradley*, 17 AD3d 1050, 1051 *lv den* 5 NY3d 786. And he did not have a reasonable expectation of privacy in the storage cubicle where he was arrested because the cubicle was not assigned to him and was accessible to all of the apartment building tenants. *See gen People v Allen*, 54 AD3d 868, 869 *lv den* 11 NY3d 922. Judgment modified by reversing the second-degree murder conviction, that count dismissed, and judgment affirmed as modified. (County Ct, Monroe Co [Marks, J])

Homicide (Murder [Definition] [Degrees and Lesser Offenses]) **HMC; 185(40[d] [g])**

People v Wright, 63 AD3d 1700, 882 NYS2d 605 (4th Dept 2009)

Holding: The evidence is legally insufficient to support the defendant's second-degree depraved indifference murder conviction. The defendant preserved the issue for review by making a motion for a trial order of dismissal specifying the alleged insufficiency (*see People v Hawkins*, 11 NY3d 484, 492), which notified the court that the defendant's acts were intentional and demonstrated an intent to kill or cause serious physical injury and that the depraved indifference count should not be submitted to the jury. *See gen People v Jean-Baptiste*, 11 NY3d 539, 542. And the court's denial showed that it expressly decided the issue. The defendant and two others beat the decedent for about 20 to 30 minutes and the decedent died of blunt force trauma. Although intent to harm the decedent was established, the defendant's acts did not demonstrate wanton cruelty, brutality or callousness directed against a particularly vulnerable person, combined with utter indifference to the decedent's life or safety. *See People v Suarez*, 6 NY3d 202, 213. The defendant's abandonment of the decedent in a vacant lot does not alone constitute depraved indifference murder because it does not establish the depraved indifference element of the offense. *See People v Mancini*, 7 NY3d 767, 768. The evidence is legally sufficient to support a second-degree manslaughter conviction. *See* Penal Law 125.15(1); *People v Atkinson*, 21 AD3d 145, 151 *mod* 7 NY3d 765. Judgment modified by reducing the murder conviction to second-degree manslaughter, sentence imposed thereon vacated, sentence imposed on first-degree robbery count vacated, judgment affirmed as modified, and matter remitted for sentencing. (Supreme Ct, Monroe Co [Affronti, J]) ⚖

Defender News *(continued from page 9)*

This issue's Job Opportunities includes a job posting for the Cortland County Conflict Defender position (see p. 6).

NYSDA maintains a list of chief defenders with the contact information for each office. (www.nysda.org/html/chief_defenders.html.) To ensure that the list is kept current, we ask anyone with information about changes in public defense office leadership or contact information for public defense offices to please call the Backup Center.

Organizations Support the Public Defense Act of 2009

The Public Defense Act of 2009 (S.6002/A.8793) was not among the items listed in the Governor's call for a special session of the Legislature on November 10, 2009. But the Campaign for an Independent Public Defense Commission has led efforts to maintain legislators' awareness of this bill and the need for public defense reform while they grapple with other issues.

Many organizations in addition to the Campaign itself have provided memos in support of the act. Reflecting the broad range of support for public defense reform, the organizations include bar associations, good government groups, faith communities, and many others. Among them: Capital Region Ecumenical Organization; Center for Community Alternatives; Committee for an Independent Public Defense Commission; Committee for Modern Courts; Fortune Society; Justice Fund; League of Women Voters of New York State; Mental Health Association in New York State; New York State Bar Association; New York State Catholic Conference; New York State Defenders Association; and Prison Action Network.

The *Democrat & Chronicle* (Rochester) editorialized strongly in favor of S.6002/A.8793 on October 29, 2009. Acknowledging that the current economic climate makes reform difficult, the editorial added, "But, remember, the plight of the poor in New York courtrooms was overlooked long before the economy started to tank."

For the latest information on public defense reform efforts in New York State, visit the Campaign's blog. http://newyorkjusticefund.blogspot.com. ⚖

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