

## CASES OF INTEREST

January 2009

The Fourth Department had a banner day and decided 7 cases of interest to defense attorneys on the last day of the year. First, they determined that the decision not to suppress in 3 cases had to be overturned:

### **People v. Anthony Ervin** **2008 WL 5413363**

In this case, the Court found that the trial court had erred in refusing to suppress a statement made in a police vehicle while traveling to the station. The officer had been asking the defendant questions about his life and his church and the Court held (using the language of *Rhode Island v. Innis* which they cited) that the People had failed to establish that the officer's questions did not constitute interrogation or its functional equivalent.

The Court also reversed the lower court's decision not to suppress the written statement made at the police station, even though made after being given and waiving his *Miranda* rights. Because the same officer who had questioned him in the vehicle was present with him in the stationhouse, the Court held that there was not such a pronounced break in the interrogation that the defendant could be said to have returned to the status of one who is not under the influence of questioning (citing *Chapple*).

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### **People v. Deborah Stock** **2008 WL 5413479**

Here the officer made a vehicle stop, resulting in a felony DWI arrest, which the Court found lacked the requisite reasonable suspicion of criminal activity. The officer testified that he believed the defendant's presence in the location he saw her car leaving was suspicious, and he did not testify that he had observed any erratic driving or the violation of any traffic laws. Therefore, the Court found that there should have been suppression of all the evidence obtained as a result of the warrantless stop of her vehicle.

### **People v. Douglas H. Christianson** **2008 WL 5413289**

This defendant had accidentally ignited a fire in his furnace. The fire officials were able to extinguish the flames, ventilate the home and conduct their investigation. However, when the Fire Chief noticed a locked and sealed room in the home he asked the Sheriff's office to provide a "second opinion". That opinion resulted in an arrest for criminal possession of marijuana.

However, the Court found that the People could not rely on the emergency exception to the warrant requirement, and that therefore the search of his home and the seizure of the plants were illegal. They held that the emergency doctrine applied only in limited circumstances presenting an immediate danger to life or property. Once those duties are completed, the emergency exception no longer applies and further searches are subject to the warrant requirement.

The Court also found that the People's second argument, that the defendant had consented to the search, or at least consented by failing to demand that the Sheriff's Deputy leave, was not borne out by the record which they found was devoid of any conduct or words by the defendant that would establish consent.

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Next, the Court emphasized again that motions addressed at inaccuracies in the pre-sentence report **must** be made at the trial level:

**People v. Kenneth J. Hall**  
**2008 WL 5413791**

Here the defendant took a plea and was sentenced, apparently without mentioning that the pre-sentence report contained inaccurate assertions and unsupported speculation that were likely to prejudice him for years to come. These arguments for amending the report were not raised until the appeal. Therefore, the Court found them unpreserved for their review.

[The Court cited People v. Harrington, 3 AD3d 737, 739 (3d Dept. 2004), where the Third Department had suggested that the proper procedure was to ask for a pre-sentence conference and to raise objections to the report at the time of sentencing.]

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In the following case, the trial court's restriction of defense counsel's cross-examination at the preliminary hearing actually inured to the benefit of the client.

**People v. Kevin Harvey**  
**2008 WL 5413649**

The Court found that the trial court's limitations on cross of the victim were so unduly restrictive that the People should not have been able to admit her hearing testimony when she did not appear for trial, as admission of that "uncrossed" testimony violated the defendant's right of confrontation.

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This case is one appellate attorneys must be aware of, as many courts have a habit of abbreviating the discussion of the waiver of the defendant's appellate rights in just this fashion:

**People v. Chad L. Springstead**  
**2008 WL 5413355**

County Court asked the defendant only whether he understood that he was "waiving his right to appeal". This Court found that language invalid inasmuch as the court failed to engage the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice.

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In another DWI case, the court below had sentenced the defendant to consecutive terms for two arrests stemming from the same drive.

**People v. Dean S. Tuszynski**  
**2008 WL 5413180**

The Appellate Court found that the sentences were for a single, continuous act. Therefore, they must be run concurrently pursuant to PL §70.25(2).

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One older case out of the Fourth Department, from June 13, 2008, finds that a police station property log does not constitute a "written instrument" for the purposes of the forgery statute.

**People v. David Washington**  
**52 AD3d 1303**

Here the Court found that an improperly signed fingerprint card, which can be used to the advantage of a person, usually allowing someone to hide her identity from the authorities, comes within the purview of a "written instrument". However, a property log is essentially just the equivalent of a receipt for personal property confiscated from the

defendant, and is therefore legally insufficient to support a conviction for second-degree forgery even if the defendant signed it with a false name.

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Finally, a case out of the Second Department involving the dismissal of an indictment because an impermissible time interval was charged.

**People v. Bennett**

**888 NYS2d 314**

**December 9, 2008**

The indictment here charged two sexual acts between June and December of 2001. The Court found that where an indictment charges a time interval which is so large that it is virtually impossible for a defendant to answer the charges and prepare a defense, dismissal should follow.

The Court of Appeals had previously decided in People v. Sedlock, 8 NY3d 535 (200 ), that a nine-month time frame was *per se* unreasonable. Here, the Appellate Division added that when a *per se* bar does not apply, a significantly lengthy period is a factor to be considered with proportionally heightened scrutiny. This Court held that this seven-month period unreasonable when weighed against the imperative notice rights of the defendant.