



# Public Defense Backup Center REPORT

VOLUME XV NUMBER 3

April 2000

A P U B L I C A T I O N O F T H E D E F E N D E R I N S T I T U T E

## Defender News

### Immigration Manual Update Distributed

Representing Noncitizen Criminal Defendants in New York State, 2nd Edition, the updated manual from NYSDA's Criminal Defense Immigration Project, has been distributed at no charge to public defense offices across the state. Manuel D. Vargas, Project Director and the manual's author, reported the update and other Project news at the April 26 meeting of NYSDA's Board of Directors.

Copies of the new edition are available for \$50 from the Backup Center. Ask about bulk order discounts.

### Attorney General OKs Warrantless Arrest of Noncitizens

Noting that there is no definitive New York caselaw on the subject, the Office of the Attorney General said on March 21 that it appears likely New York courts would find New York law enforcement officers are authorized to make warrantless arrests for violations of the federal Immigration and Nationality Act (INA). The INA allows state and local officers to arrest an individual without a warrant, if state law permits, when the arresting officer has probable cause to believe that the person committed a criminal violation of the act; reasonable belief that the person committed a civil violation of the act will not suffice. Mere status as an undocumented noncitizen, without evidence that the person illegally entered the U.S., does not provide the necessary probable cause.

The letter, Informal Opinion No. 2000-1, is available on the Internet. A link is available through the NYSDA web site at [www.nysda.org](http://www.nysda.org). A printed copy of the opinion is available from the Backup Center.

### State Budget Stalled, 18-b Fee Hike Unlikely

After some indications that New York State's budget would be finalized only days past the April 1 deadline, the legislature recessed for the Passover and Easter holidays with no budget action. The need for increased assigned counsel fees has dominated discussions about funding for public defense, but it did not appear at *REPORT* presstime that an increase was imminent. (*NY Law Journal*, 4/6/00.)

Nothing new has occurred concerning funding for the NYSDA Backup Center and other public defense programs. As noted in the last issue of the *REPORT*, some money for public defense was included in an Assembly one-house resolution, but will not be definite until the budget process is completed.

### Challenges Heard to Death Penalty Statute and Capital Fees

Capital defense fees, which have received less public attention recently than 18-b rates, were the subject of oral argument on April 27 before the Appellate Division. The case is an Article 78 action filed by the New York State Association of Criminal Defense Lawyers (NYSACDL) against six members of the Court of Appeals for the reduction in death penalty defense fees ordered at the end of 1998. Jay Cohen, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, argued on behalf of NYSACDL. Third Department justices Bruce Crew, Anthony Carpinello, Edward Spain, Victoria Graffeo and Carl Mugglin reportedly asked many questions of both Cohen and counsel for the NY Solicitor General's office appearing on behalf of the respondents.

Two November decisions from the 2nd Department ordering payment of capital fees appear in the case digests in this issue (*see* pp. 14-15).

In the Court of Appeals, a portion of the capital punishment statute itself was the subject of oral argument at the beginning of the March/ April session. The issue in *Francois v Dolan and Grady*, No. 46, argued on Mar. 29, is whether first-degree murder defendants can pre-empt a death sentence by pleading to the indictment before a prosecutor files notice that it intends to seek the death penalty. (*NY Law Journal*, 3/30/00.)

Another challenge to the death penalty statute was heard in *People v Couser*, No. 62, on April 6. The

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issue is the whether the use of the word “command” in Penal Law 125.27(1)(a)(vii), which makes a defendant who commanded another person to cause a death liable for first-degree murder, is sufficient to furnish a principled means of distinguishing among those who may be subjected to New York’s death penalty and those who may not. The defendant, John Couser, is represented by J. Scott Porter of Syracuse.

A synopsis of these cases, and other cases on the Court’s current calendar, is available at the court’s web site [www.courts.state.ny.us/ctapps/calendar.htm](http://www.courts.state.ny.us/ctapps/calendar.htm).

## **NAMI-NY Announces Criminal Justice Coordinator**

NAMI-New York State, previously known as the Alliance for the Mentally Ill of New York, has created (with help from the State Office of Mental Health [OMH]) the position of Criminal Justice Coordinator. Robert K. Corliss, former Assistant Director of Field Operations at the State Commission of Correction, has taken the post. He will be providing direct assistance to families of loved ones with mental illness who become involved with the police, courts, or correctional agencies. Corliss also plans to work with NAMI-New York State’s 70 affiliates to set up a network of ombudsmen to help families deal with the criminal justice system.

In addition, Corliss will be participating in training efforts for those who work in criminal justice, including public defense providers. The training programs, some of which have already been instituted by OMH, are intended to help such officials understand and address the needs of those with serious mental illness. Training will focus on teaching criminal justice professionals how to access mental health resources that can provide support for seriously mentally ill people caught up in the justice system.

NAMI-New York State is a grassroots, self-help, support and advocacy organization dedicated to improving the lives of people affected by mental illness. Among its priorities is working to strengthen the ability of criminal justice agencies to divert those with serious mental illness who can be better served in the mental health system. The group is also working to improve the provision of mental health services in correctional facilities, and to ensure effective discharge planning, under the newly enacted Kendra’s Law, for persons being released after incarceration.

## **Treatment Must be Maintained**

Among the projects described on the group’s web site at [www.naminys.org](http://www.naminys.org) is the following, under the heading “Treatment Must be Maintained,” concerning the problems people with mental illness may face in accessing medication when they are released from jails and prisons:

*An individual’s inability to maintain treatment while waiting for Medicaid approval leads to an unnecessary cycle of expensive hospitalizations that could be avoided if access to medications was immediate at the time of*

*discharge. Regular disruptions of treatment can in some cases cause a permanent setback in a person’s condition.*

*Individuals with a psychiatric disability leaving a prison or jail often end up incarcerated again when their psychotic symptoms reoccur due to the inability to access necessary medications.*

For more information about NAMI-NYS and its work relating to criminal justice, contact Corliss at the NAMI New York State hotline (800)950-FACT [3228] or at (518)462-2000. NAMI-NYS is located at 260 Washington Avenue, Albany NY 12210; e-mail [naminys@knick.net](mailto:naminys@knick.net); web site [www.naminys.org](http://www.naminys.org)

## **Crime Scene Investigation Reference Issued**

The National Institute of Justice (NIJ), research arm of the U.S. Department of Justice (DOJ), has issued a handbook, “Crime Scene Investigation: A Guide for Law Enforcement.” The NIJ has already issued guides on “Eyewitness Identification,” “Investigation of Death,” “Arson,” and “Bombs” and is progressing with similar work on DNA. Highly publicized crime scene questions arising in the “OJ” and “Jon Benet” cases, among others, brought to DOJ’s attention the need for a comprehensive guide, and training, on basic crime scene investigation. The NIJ assembled a Technical Working Group of police, crime scene and laboratory people, prosecutors and defense attorneys, [including Norman Shapiro, a Vice President of NYSDA’s Board of Directors] in the interest of clarity and precision. In early April, the working group finished work on a training manual to go with the handbook. “Crime Scene Investigation: A Guide for Law Enforcement.” and other handbooks named above are available on the Web—check NYSDA’s web site ([www.nysda.org](http://www.nysda.org)) for further information and links—or from the DOJ Reference Service, (800)851-3420, and should be consulted in defense cases where physical evidence may be in issue. ♪

### **Public Defense Backup Center *REPORT***

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The *REPORT* is printed on recycled paper.

# CONFERENCES & SEMINARS

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Defender Advocacy Institute  
**Dates:** May 31-June 6, 2000  
**Place:** Dayton, OH  
**Contact:** NLADA: tel (202)452-0620; Fax: (202) 872-1031, e-mail [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

**Sponsor:** New York State Bar Association Continuing Legal Education  
**Theme:** Ethics Fundamentals for Experienced and Newly Admitted Lawyers  
**Date:** June 2, 2000  
**Places:** Buffalo, NY and New York City  
**Contact:** NYSBA CLE: tel (800)582-2452 or (518)463-3724; fax (518)487-5618; fax on demand (800)828-5472; web site [www.nysba.org](http://www.nysba.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Seminar  
**Date:** June 10, 2000  
**Place:** Binghamton, NY  
**Contact:** Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site <http://www.nysacdl.org>

**Sponsor:** NYS Office of Alcoholism and Substance Abuse Services and Division of Criminal Justice Services  
**Theme:** 2nd Annual Substance Abuse Treatment and the Justice System Conference: From Theory to Practice—Closing the Gap  
**Dates:** June 12-14, 2000  
**Place:** Albany, NY  
**Contact:** Andy Evans: (518) 485-2116

**Sponsor:** New York State Defenders Association  
**Theme:** 33rd Annual Meeting & Conference  
**Dates:** July 27-30, 2000  
**Place:** Hudson Valley Resort & Spa, Kerhonkson, NY  
**Contact:** NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [training@nysda.org](mailto:training@nysda.org); web site [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Seminar: Difficult Clients, Difficult Cases: Theory and Practice  
**Dates:** August 2-6, 2000  
**Place:** La Jolla, CA  
**Contact:** NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail [assist@nacdl.com](mailto:assist@nacdl.com); web sites [www.criminaljustice.org](http://www.criminaljustice.org) or [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** National Bar Association  
**Theme:** 75th Annual Convention & Exhibits  
**Dates:** August 5-12, 2000  
**Place:** Washington, DC  
**Contact:** National Bar Association, 1225 11th Street NW, Washington DC 20001-4217. tel (202)842-3900; fax (202)289-6170; e-mail [nba@nationalbar.org](mailto:nba@nationalbar.org); web site [www.nationalbar.org](http://www.nationalbar.org)

**Sponsor:** National Institute for Trial Advocacy  
**Theme:** Building Trial Skills Program: Northeast Regional  
**Dates:** August 15-22, 2000  
**Place:** Hempstead, NY  
**Contact:** NITA: tel (800)225-6482 or (219)239-7770; fax (219)282-1263; e-mail [nita.1@nd.edu](mailto:nita.1@nd.edu); web site [www.nita.org](http://www.nita.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Grand Jury Practice  
**Date:** September 15, 2000  
**Place:** New York City  
**Contact:** Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site <http://www.nysacdl.org>

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Trial Skills Seminar  
**Date:** September 23, 2000  
**Place:** Rochester, NY  
**Contact:** Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site <http://www.nysacdl.org>

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Federal Practice Seminar  
**Date:** September 29, 2000  
**Place:** Albany, NY  
**Contact:** Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site <http://www.nysacdl.org>

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Defender Leadership and Management Training  
**Dates:** October 28-31, 2000  
**Place:** Washington, DC  
**Contact:** NLADA: tel (202)452-0620; fax: (202) 872-1031, e-mail [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org)

**Sponsor:** National Coalition to Abolish the Death Penalty  
**Theme:** Conference 2000  
**Dates:** November 16-19, 2000  
**Place:** San Francisco, CA  
**Contact:** NCADP: tel (202)387-3890; web site [www.ncadp.org](http://www.ncadp.org)

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** 78th Annual Conference  
**Dates:** November 29-December 2, 2000  
**Place:** Washington, DC  
**Contact:** NLADA: tel (202)452-0620; fax: (202) 872-1031, e-mail [info@nlada.org](mailto:info@nlada.org); web site [www.nlada.org](http://www.nlada.org) ⚡

# Job Opportunities

The CHEMUNG COUNTY PUBLIC DEFENDER'S OFFICE seeks an entry-level **Attorney** to represent criminal defendants in Elmira City Court and various Justice Courts in Chemung County. Training will be provided. Interest in criminal law and commitment to representing indigent criminal defendants a must. Ability to work independently and handle high-volume caseload required. Recent law school grads awaiting bar results will be considered. Salary \$30K+ full benefits package. Send resume and cover letter to: Richard W. Rich, Jr., Chemung County Public Defender, PO Box 588, Elmira NY 14902-0588. tel (607)737-2969; fax (607) 737-2853.

The Rochester, NY division of the New York State CAPITAL DEFENDER OFFICE (CDO) seeks a **Mitigation Specialist**. The CDO, created by statute, is charged with guaranteeing effective assistance of counsel in every capital eligible case throughout New York State. Mitigation Specialists conduct thorough social history investigations; identify factors in clients' backgrounds that require expert evaluations; assist in locating experts and provide background materials and information to experts; identify potential penalty phase witnesses; and work with the client and the client's family. Extensive travel is required. Excellent oral and written communication skills required. Fluency in Spanish desirable. Salary CWE. EOE. Please send resumes to: Ms. Cheryl Thompson, Capital Defender Office, 277 Alexander Street, Suite 600, Rochester NY 14607.

The OFFICE OF THE APPELLATE DEFENDER (OAD) in New York City seeks a **Senior Staff Attorney**. OAD is a not-for-profit, 16-lawyer firm devoted to high quality representation of indigent defendants in state criminal appeals and state and federal collateral proceedings. Part law firm, part training program, OAD strives to attract outstanding lawyers and to find innovative and economical ways to serve the poor. All cases are double-teamed by a staff attorney and supervisor. Moot courts are conducted for every argument. The senior staff attorney will have primary responsibility for a caseload but will receive supervision consistent with the double-teaming model. Required: substantial criminal defense experience, including appellate work or other relevant writing experience; high energy; strong commitment to client-centered indigent defense; and excellent analytical, writing, and oral advocacy skills. Salary CWE, excellent benefits. Submit cover letter, resume, and writing sample to Tuli Taylor, Administrative Attorney, Office of

the Appellate Defender, 45 W 45th St, 7th Floor, New York NY 10036

OAD also offers two **Staff Attorney Fellowships**, commencing in 9/00, to relatively new lawyers with demonstrated top-level skills in legal research and writing and a commitment to providing legal services to the indigent. Each will be intensively trained and supervised within the double-teaming model. The positions are open to outstanding lawyers completing judicial clerkships, those with non-judicial post-graduate experience, and distinguished law graduates straight out of school. Salary \$39,000 the first year, \$42,000 the second year, plus benefits. Submit cover letter, resume, and writing sample to the above address.

The WAYNE COUNTY PUBLIC DEFENDER'S OFFICE seeks an **Assistant Public Defender**. The position involves handling felony and misdemeanor cases. Experience in criminal defense, including trial experience, preferred. EOE, minorities encouraged to apply. Send resume, writing sample and references to: Ronald C. Valentine, Esq., Wayne County Public Defender, 26 Church Street, 2nd Floor, Lyons NY 14489

PRISONERS' LEGAL SERVICES OF NEW YORK (PLS) seeks two attorneys, for the positions of **Litigation Coordinator** and **Associate Director** for its 24-attorney program. The positions may be located in any PLS office: Albany, Buffalo, Ithaca, Plattsburgh, or Poughkeepsie. PLS provides civil legal services to incarcerated persons in state prisons, handling cases involving discipline matters, medical care, guard brutality, conditions of confinement, correspondence, religious freedom and jail time credit, among others, and engaging in routine and impact litigation. The program has been extremely successful in providing high quality, effective legal services and in establishing important rights for its clients. PLS believes in a team effort and team spirit, and places a strong emphasis on cooperative and collegial working relationships within and between offices. PLS encourages professional development, and provides in-house training; staff also attend relevant outside training events. PLS believes in allowing individuals substantial independence, and encourages individual initiative and innovation.

Required: admitted to practice in New York State or eligible for admission *pro hac vice* and willing to take the next available bar exam; 5 years of legal practice experience, preferably in the area of civil legal services, civil rights or poverty law. Previous supervisory and training/ teaching

experience preferred. Outstanding benefit package including free health, dental, disability, and life insurance, substantial leave time and very liberal and flexible leave policies. EEOE. PLS clients are about 50% African-American and 30% Latino. PLS seeks to be a well-balanced, diverse program. Minorities are encouraged to apply.

The **Associate Director's** duties include: Create vehicles to empower others, monitor and lead in conducting litigation; Assist the Executive Director in coordinating PLS work with outside individuals and organizations advocating the interests of PLS clients; Assist the Executive Director in advocating for PLS clients in the Legislature and Executive branches of government, and in contacts with the media; Act as in-house counsel on matters such as ethics issues and cases involving PLS; Establish and maintain training materials on management of attorneys and their litigation; Ensure all managing attorneys attend the training sessions necessary to properly manage their staff and litigation in his/her office; Create vehicles to develop substantive expertise and identify issues for litigation; Coordinate the dissemination of information on substantive law and practice; Create litigation tools; Provide limited assistance to the Executive Director on administration of matters; Assume responsibilities of Executive Director in his/her absence; Coordinate with the Litigation Coordinator a Litigation Council of experienced attorneys.

The **Litigation Coordinator's** duties include: Monitoring litigation, coordinating strategy on state wide litigation, visiting each office every six months, reviewing the litigation plans of attorneys, and ensuring review and evaluation of attorneys by their Managing Attorneys; Approving litigation; Critiquing litigation skills of those attorneys with whom the litigation coordinator is working to ensure that each attorney receives necessary training; Teaching litigation skills; Establishing and maintaining model written training materials on various litigation skills; Helping others to do litigation primarily by co-counseling impact and class action litigation; Litigating by having a small individual caseload; Coordinating with the Associate Director a Litigation Council of experienced attorney staff.

Send resume with a writing sample and a list of three references with phone numbers to: Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850. tel (607)273-2283; fax (607)272-9122. ♪

# Defense Automation Tips

FROM YOUR DESKTOP...

## New York Prison and Jail Information on the Web

by Ken Strutin\*

**Ed. Note:** Resources that appear in the text below with an underline, when viewed on our web site at [www.nysda.org/Publications/The\\_Report/Apr2000Report.pdf](http://www.nysda.org/Publications/The_Report/Apr2000Report.pdf), will function as hyperlinks to the resource being discussed. The web addresses also appear in endnotes for the convenience of our print-copy readers.

### Prisons and Prisoners

Location of inmates, conditions of confinement and standards of care are a few of the issues that New York criminal defense lawyers face when representing a client locked away in prison. Fortunately, there is plenty of information on the web to help lawyers learn about their clients or to help address their clients' concerns. Key government agencies are the starting point:

- New York State Department of Correctional Services<sup>1</sup> (DOCS)  
DOCS manages the day to day confinement of New York's state prison population.
- New York State Commission of Correction<sup>2</sup>  
The Commission is responsible for issuing standards and overseeing the operations of state and local correctional facilities.
- Division of Criminal Justice Services<sup>3</sup> (DCJS)  
DCJS provides support for many of New York State's criminal justice operations, which includes maintaining criminal histories and fingerprint records as well as research into prison related issues.
- Federal Bureau of Prisons<sup>4</sup>  
The Federal Bureau of Prisons is responsible for handling and confining inmates in the federal system, similar to DOCS.

### Locating Clients in Federal, State or Local Prisons

Ask an experienced criminal lawyer about the three things to remember when representing someone in prison and her response will be "Location, Location, Location." These three locations are federal prison, state prison and

\*Ken Strutin is a legal information consultant. The author of many articles on information management and criminal law, Ken has been a law librarian at Syracuse University School of Law, a criminal defense attorney for the Orange County and Nassau County Legal Aid Societies, and a staff attorney at NYSDA. His recent work on the NYSDA web site, and as a co-trainer with Managing Attorney Charlie O'Brien, has helped many New York public defense providers use the Internet in their clients' cases.

local jail. From your desktop you can find information about your client or a particular prison facility.

The Federal Bureau of Prisons<sup>4</sup> publishes on the web a complete directory of federal detention centers<sup>5</sup>. To learn how to locate someone in federal prison, select Inmate Information<sup>6</sup> from the menu of options on their web site. Instructions for making requests by phone or in writing will appear.

Due to the large volume of phone requests to the New York State Department of Correctional Services<sup>7</sup>, it chose to open its records to the public through the Internet. The Inmate Lookup<sup>8</sup> is a search engine that is connected to the live DOCS database of state inmate files. It contains detailed records of anyone who has served or is currently serving state time, including the name of the facility, DIN number, pedigree information, convictions, term of sentences; parole hearing, parole eligibility, conditional release and maximum expiration dates; and release information. This is a powerful investigative tool for learning more about clients or potential witnesses. Note that other states also offer this service for their prisons (see discussion below).

DOCS also provides a Directory<sup>9</sup> and Map<sup>10</sup> of New York State Correctional Facilities. Attorneys can use the list to ascertain the correct mailing address for their clients or to contact the prison to arrange a visit. The Legal Aid Society of New York City<sup>11</sup> has published a guide entitled, *Legal Visits in New York State Prisons: A Guide for Criminal Appeals Lawyers*, which answers many questions about arranging and preparing for prison visits.

The New York State Criminal Justice Agencies Directory<sup>12</sup> published by the Division of Criminal Justice Services<sup>13</sup> is an essential part of any criminal defense attorney's library. Updated annually, it lists complete contact information for state prisons, local jails and juvenile facilities. Police, probation, parole and other criminal justice agencies are also listed. Questions about gaining access to New York City prisons can be answered by viewing the New York City Department of Corrections<sup>14</sup> web site, which provides other useful information.

### Standards and Guidelines

Research into jail time, prison overcrowding, complaints about mistreatment or other questions arising from incarceration begins with the government agency resources below: New York State Commission of Correction<sup>15</sup>

- Minimum Standards and Regulations for Management of County Jails and Penitentiaries<sup>16</sup> (July 1999)
- Corrections Accreditation Manual<sup>17</sup> (New York State Sheriff's Association Institute, June 1998)
- Jail Time Manual: A Handbook for Local Correctional Administrators<sup>18</sup> (May 1998); Appendix<sup>19</sup> (applicable provisions of law) and Case Law References<sup>20</sup>
- Reportable Incident Guidelines<sup>21</sup>
- Inmate Prison Population Statistics<sup>22</sup> (1995-1999)

## Defense Automation Tips *continued*

- [Correction Law Report](#)<sup>23</sup> (1998-1999)
- [New York State Department of Correctional Services](#)<sup>24</sup> (DOCS)
- [DOCS Research Studies Bibliography](#)<sup>25</sup>
- [Division of Criminal Justice Services](#)<sup>26</sup> (DCJS)
- [How to Read the New York State Rap Sheet](#)<sup>27</sup> (PDF)

### Additional Resources

The online libraries of many organizations also contain helpful information about confinement-related issues:

- [ACLU National Prison Project](#)<sup>28</sup>
- [American Correctional Association](#)<sup>29</sup>
- [Americans for Effective Law Enforcement Legal Center](#)<sup>30</sup>
- [Corrections Connection](#)<sup>31</sup>
- [Fortune Society](#)<sup>32</sup>
- [Health Care Network](#)<sup>33</sup>
- [Legal Action Center](#)<sup>34</sup>
- [National Institute of Corrections](#)<sup>35</sup>

There are also sites to which lawyers may refer prisoners' families and others for information and support. Clients' supporters who have no personal computer may still be able to access these sites through a public library or other publicly available Internet connection, or lawyers may provide postal

addresses, phone numbers, and other contact information from the sites. A disclaimer as to the usefulness of any site a lawyer is not personally familiar with, and as to any links the clients' friends or family find on a recommended site, would be in order. Among prisoner/prisoner family resources available on the web are the various chapters of Citizens United for Rehabilitation of Errants (CURE). CURE National<sup>36</sup> includes contact information for CONTROL UNIT CURE and CURE FOR VETS, both located in New York. The state chapter is CURENY.<sup>37</sup>

Clients released from prison and seeking help should consult the New York Public Library's list of [Ex-Offender Organizations](#).<sup>38</sup> A bibliography of self-help books for people behind bars can be found at the [Families Against Mandatory Minimums](#)<sup>39</sup> web site. For information about prisons outside New York and other related resources, consult the prison section of Professor Cecil Greek's [Criminal Law Links](#).<sup>40</sup> Finally, news about prison litigation, reports about prison conditions and related information may be found on NYSDA's [Prisoner's Rights](#)<sup>41</sup> page under Hot Topics.<sup>42</sup>

Public defense Internet research should be interactive. If you know of any additional web sites on this topic, please share them with your colleagues through NYSDA's Backup Center. You can send your comments or suggestions by e-mail to [kstrutin@nysda.org](mailto:kstrutin@nysda.org), or call the Backup Center at (518) 465-3524. ☺

### Endnotes

1. New York State Department of Correctional Services (DOCS): <http://www.docs.state.ny.us/>
2. New York State Commission of Correction: <http://www.scoc.state.ny.us/>
3. Division of Criminal Justice Services (DCJS): <http://criminaljustice.state.ny.us/dcjs1.htm>
4. Federal Bureau of Prisons: <http://www.bop.gov/>
5. Directory of Federal Detention Centers: <http://www.bop.gov/facilnot.html>
6. Inmate Information: <http://www.bop.gov/inmate.html>
7. New York State Department of Correctional Services: <http://www.docs.state.ny.us/>
8. Inmate Lookup: <http://nysdocs.docs.state.ny.us:84/kinqw00>
9. Directory: <http://www.docs.state.ny.us/faclist.html>
10. Map: <http://www.docs.state.ny.us/jailmap.html>
11. Legal Aid Society of New York City: <http://www.legal-aid.org/>
12. New York State Criminal Justice Agencies Directory: <http://criminaljustice.state.ny.us/crimnet/ojsa/agdir/htframe.htm>
13. Division of Criminal Justice Services: <http://criminaljustice.state.ny.us/dcjs1.htm>
14. New York City Department of Corrections: <http://www.ci.nyc.ny.us/html/doc/home.html>
15. New York State Commission of Correction: <http://www.scoc.state.ny.us/>
16. Minimum Standards and Regulations for Management of County Jails and Penitentiaries <http://www.scoc.state.ny.us/minstands.pdf>
17. Corrections Accreditation Manual <http://www.scoc.state.ny.us/nyssa.pdf>
18. Jail Time Manual: A Handbook for Local Correctional Administrators <http://www.scoc.state.ny.us/jtm1.pdf>
19. Appendix <http://www.scoc.state.ny.us/jtm2.pdf>
20. Case Law References <http://www.scoc.state.ny.us/jtm3.pdf>
21. Reportable Incident Guidelines <http://www.scoc.state.ny.us/reportb1.htm>

## Defense Automation Tips *continued*

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22. Inmate Prison Population Statistics <http://www.scoc.state.ny.us/pop.htm>
23. Correction Law Report <http://www.scoc.state.ny.us/correcti.htm>
24. New York State Department of Correctional Services (DOCS) <http://www.docs.state.ny.us/>
25. DOCS Research Studies Bibliography <http://www.docs.state.ny.us/annotate.html>
26. Division of Criminal Justice Services (DCJS) <http://criminaljustice.state.ny.us/dcjs1.htm>
27. How to Read the New York State Rap Sheet (PDF) <http://criminaljustice.state.ny.us/crimnet/cust/rapsheet.pdf>
28. ACLU National Prison Project <http://www.aclu.org/issues/prisons/hmprisons.html>
29. American Correctional Association <http://www.corrections.com/aca/>
30. Americans for Effective Law Enforcement Legal Center <http://www.aele.org/index.html>
31. Corrections Connection <http://www.corrections.com/>
32. Fortune Society <http://www.fortunesociety.org/>
33. Health Care Network <http://www.corrections.com/healthnet/index.html>
34. Legal Action Center <http://www.lac.org/>
35. National Institute of Corrections <http://www.nicic.org/inst/>
36. CURE National <http://curenational.org/>
37. CURENY <http://www.bestweb.net/~cureny/>
38. Ex-Offender Organizations <http://www.nypl.org/branch/oss/exoffender.html>
39. Families against Mandatory Minimums [http://www.famm.org/fammgr\\_Dec96/fammgr31.html](http://www.famm.org/fammgr_Dec96/fammgr31.html)
40. Criminal Law Links <http://www.fsu.edu/~crimdo/prison.html>
41. Prisoner's Rights [http://www.nysda.org/Hot\\_Topics/Prisoners\\_Rights/prisoners\\_rights.html](http://www.nysda.org/Hot_Topics/Prisoners_Rights/prisoners_rights.html)
42. Hot Topics [http://www.nysda.org/Hot\\_Topics/hot\\_topics.html](http://www.nysda.org/Hot_Topics/hot_topics.html)

## Book Review

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### DWI Reference Guide

by Michael S. Taheri and James F. Orr

*J & E Publishing Inc.*

136 pages

by Glenn Edward Murray\*

The *DWI Reference Guide* by Michael S. Taheri and James F. Orr is an ideal addition to any DWI practitioner's library, especially for those on a limited budget.

Although not a substitute for the Vehicle and Traffic Law (VTL) or treatises like Albany-based Peter Gerstenzang's *Handling the DWI case in New York* and Rochester-based Edward Fiandach's *New York Driving While Intoxicated* (both published by West Group), it fills a critical void in the practitioner's library, because to some extent those treatises, with their elaborate statutory and case citations, treat the VTL like the Tax Code.

This *Guide* explains many tactical considerations not found in the VTL or any treatise and it highlights the most essential components of DWI defense: formulation of defense theory and proof of facts (especially elements of opera-

tion and proof of intoxication). Taheri and Orr provide concise explanations drawn from years of experience.

The *DWI Reference Guide* provides a uniquely practical methodology for the evaluation and trial of a DWI case. It explains tactics and strategy like no other publication I know. Despite my own extensive experience, when I read the tactics and strategy in this publication I say to myself, "Let me note this my next DWI trial." This handbook spotlights reminders for the experienced and pitfalls for the neophyte.

Chapter 8, "Trial Defenses to Infrared Breath Test Results," offers checklists and memoranda of law that address legal fundamentals and scientific proof. These help to identify and present defenses including: blood/alcohol extrapolation, blood/breath ratios, and breath sample contamination. Facts critical to formulation and presenting defenses are outlined to make defense strategy more efficient and effective.

Other especially valuable chapters are: "What Constitutes 'Operation of a Motor Vehicle'" and "Cross-examination of a Breath Test Operator."

The next edition should elaborate on strategies concerning sentencing, conditional driving privileges, and re-licensure of multiple offenders, which will become very prevalent in the next decade.

The *DWI Reference Guide* is available through J & E Publishing Inc., PO Box 1135, Williamsville NY 14231-1135, for \$37.80 ☞

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\*Glenn Edward Murray practices criminal law in Buffalo and has handled DWI cases for over 15 years.

*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 available.*

## United States Supreme Court

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

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

### Smith v Robbins, 98-1037, 1/19/00, 120 Sct 746

Appointed appellate counsel decided there were no nonfrivolous issues in the respondent's case and complied with California's procedures for such occasion. The state Court of Appeal affirmed the respondent's murder and grand theft convictions, and the state high court denied review. A federal district court granted habeas relief, and the 9th Circuit affirmed.

**Holding:** The procedures set forth in *Anders v California* (386 US 738 [1967]) for appointed appellate counsel's filing of no-merit briefs are prophylactic rather than mandatory and may be replaced by other procedures for ensuring indigent defendants' right to adequate and effective appellate review. Constitutional standards are met by a state procedure under which counsel, instead of following *Anders* by filing a brief identifying arguable issues, summarizes the history of the case and indicates that the client has been notified of the attorney's conclusion and the client's right to file a *pro se* brief, where the appellate court then independently examines the record for arguable issues and directs counsel to brief any such issues it finds. For a claim of ineffective assistance of appellate counsel for filing a no-merit brief there must be a showing not only that counsel was objectively unreasonable in failing to find arguable issues but also that the indigent client was prejudiced as a result. *Strickland v Washington*, 466 US 688 (1984). Judgment reversed.

**Dissent:** [Souter, J] The procedure fails to assure representation by counsel of the adversarial character demanded by the constitution.

Due Process (General) DUP; 135(7)

Juries and Jury (Challenges) JRY; 225(10)

### United States v Martinez-Salazar, No. 98-1255, 1/19/00, 120 Sct 774

The respondent and his codefendant were jury-tried for narcotics and weapons offenses. As required by Rule 24(b) of the Federal Rules of Criminal Procedure, the district court

allotted 10 peremptory challenges, jointly exercisable by the codefendants, in the selection of 12 jurors. When a prospective juror indicated on his questionnaire and in his discussion with the trial judge that he would favor the prosecution, the codefendants unsuccessfully challenged the juror for cause. After two unsuccessful objections to the for-cause ruling, the respondent used a peremptory challenge to remove the juror. Subsequently, the codefendants exhausted all of their peremptory challenges. The 9th Circuit reversed the resulting conviction because the failure to dismiss the juror for cause, while not violative of the 6th Amendment where the challenged juror did not hear the case, violated the respondent's 5th Amendment due process rights.

**Holding:** The respondent's exercise of his statutory peremptory challenges was not denied or impaired when he chose to use such a challenge to remove a juror who, it was uncontested, ought to have been excused for cause. Peremptory challenges are auxiliary and not of constitutional dimension; the loss of a peremptory challenge does not constitute a violation of the 6th Amendment right to an impartial jury. And as the codefendants were accorded the exact number of peremptory challenges that federal law requires, there was no 5th Amendment due process violation. *Ross v Oklahoma*, 487 US 81 (1988). Judgment reversed.

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

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

### Weeks v Angelone, No. 99-5746, 1/19/00, 120 Sct 727

After a Virginia jury found the petitioner guilty of capital murder, the prosecution sought to prove two aggravating circumstances in the penalty phase, and the defense presented 10 witnesses in mitigation. During deliberations, the jurors sent the trial judge a note asking whether, if they believed the petitioner guilty of at least one of the aggravating circumstances, it was their duty to issue the death penalty, or whether they must decide whether to issue the death penalty or a life sentence. The judge responded by directing them to a paragraph in their instructions stating: "If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two [aggravating circumstances], and as to that alternative, you are unanimous, then you may fix the punishment . . . at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment . . . at [life] imprisonment . . ." Over two hours later, the jury returned its verdict, which said in part that having unanimously found the petitioner's conduct in committing the offense satisfied the aggravating circumstance of being outrageously or wantonly vile, horrible or inhumane, and having considered the evidence in mitigation, they unanimously fixed the punishment at death. Unsuccessful appeal and habeas efforts on behalf of the petitioner followed.

**Holding:** The constitution is not violated when a trial court, in response to a question regarding the proper consid-

## US Supreme Court *continued*

eration of mitigating evidence, directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction. Here, the trial judge gave precisely the same Virginia capital instruction that was upheld in *Buchanan v Angelone* (522 US 269 [1998]) as being sufficient to allow jury consideration of mitigating evidence. The judge also gave a specific instruction on mitigating evidence that was not given in *Buchanan*. The constitution does not require more, as a jury is presumed both to follow its instructions, *Richardson v Marsh* (481 US 200, 211 [1987]) and to understand a judge's answer to its question (see *eg Armstrong v Toler*, 11 Wheat 258, 279 [1826] [opin of Marshall, CJ]). To presume otherwise would require reversal every time a jury asks about a constitutionally significant matter, regardless of the judge's answer. Judgment affirmed.

**Dissent:** [Stevens, J] There is a likelihood that the jurors acted on the basis of a misunderstanding of their duty, returning a sentence of death despite a strong desire to spare the petitioner's life.

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

### **Roe v Flores-Ortega, No. 98-1441, 2/23/00**

The respondent pled guilty to second-degree murder. At sentencing, the trial judge advised him that he had 60 days to file an appeal. His counsel wrote "bring appeal papers" in her file, but no notice of appeal was timely filed. The respondent's attempt to file the notice later was unsuccessful. The 9th Circuit found the respondent entitled to relief because, under its precedent, a habeas petitioner need only show that counsel's failure to file a notice of appeal was without the petitioner's consent.

**Holding:** Under *Strickland v Washington* (466 US 668 [1984]), in order to establish that counsel was ineffective a defendant must show that counsel's representation failed to meet an objective standard of reasonableness and that prejudice resulted from counsel's deficient performance. A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a professionally unreasonable manner. See *Rodriguez v United States*, 395 US 327 (1969). A defendant who explicitly tells counsel not to file an appeal cannot later complain that counsel performed deficiently by following those instructions. See *Jones v Barnes*, 463 US 745, 751 (1983). While in most cases counsel will have a duty to consult with the defendant about an appeal, a *per se* rule is inconsistent with *Strickland's* circumstance-specific reasonableness requirement. As to prejudice, it is unfair to require an indigent defendant to show before any advocate reviews the record that a hypothetical appeal might have had merit; defendants are required only to show that but for deficient conduct of counsel, they would have appealed. The court below undertook neither part of the *Strickland* inquiry and the record does not provide sufficient information to deter-

mine whether the respondent's counsel had a duty to consult with him (either because there were potential grounds for appeal or because the respondent expressed interest in appealing), whether that obligation was satisfied, and, if not, whether the respondent was prejudiced thereby. Judgment vacated, case remanded.

## New York State Court of Appeals

**Courts (Rules)** **CRT; 97(55)**

**Ethics (General)** **ETH; 150(7)**

### **Matter of Citrin, No. 12, 3/30/00**

**Holding:** The petitioner, a disbarred attorney, unsuccessfully sought a Committee on Character and Fitness report prepared in conjunction with his quest for reinstatement and given to the Appellate Division. He first applied for reinstatement in 1997, submitting evidence that he had successfully completed the probationary sentence imposed following his guilty plea to fifth-degree conspiracy, paid restitution, complied with the disbarment order, gotten treatment for his gambling problem, and passed the Multistate Professional Responsibility Examination. The application was denied. His second, unopposed application was likewise rejected. While a 2nd Department rule would have required disclosure of a report recommending that the application be disproved, neither the report nor its recommendation that the application be granted were ever disclosed. The report was the only document mentioned in the denial of the first application and must be deemed to have factored into the second denial. The petitioner was denied the opportunity contemplated by 22 NYCRR 690.16 to correct any errors or address the Committee's concerns. He was not, however, entitled to a more detailed statement of reasons for the denial, as he requested. Order reversed, with costs, matter remitted to the 2nd Department for further proceedings.

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**Appeals and Writs (Question of Law and Fact)** **APP; 25(75)**

**Driving While Intoxicated (General)** **DWI; 130(17)**

### **People v Taylor, No. 19, 3/30/00**

**Holding:** After a Town Court found the defendant's testimony incredible and convicted him of operation of a vehicle with ability impaired, the Appellate Term reversed, dismissing the charges because a review of the record showed that guilt had not been established beyond a reasonable doubt. The court used the wrong standard; "the issue for intermediate appellate court review in this case involved only a legal assessment of whether inferences of guilt could be rationally drawn from proven facts, rather than a substituted fact-finding reassessment of the overall persuasiveness of the evidence (*see, People v Geraci*, 85 NY2d 359,

**NY Court of Appeals** *continued*

371-372...)." The evidence was legally sufficient to support the conviction. Order reversed and case remitted.

**Trial (Presence of Defendant)** **TRI; 375(45)**  
**People v Rivera, No. 24, 3/30/00**

**Holding:** A videotape was made of an undercover officer's exchange with the defendant. The defense moved for an audibility hearing. In the presence of counsel, but not the defendant, the judge listened to the tape. He ruled, in the defendant's presence and over counsel's argument, that it was audible and admissible. The Appellate Division affirmed. Where no arguments were heard in the defendant's absence, his presence would have been useless. *People v Velasco*, 77 NY2d 469, 473. Order affirmed.

**First Department**

**Freedom of Information (General)** **FOI; 177(20)**  
**Records (Access)** **REC; 327(5)**

**In re Application of Spencer v Lombardi, No. 2153, 1st Dept, 12/2/99**

The respondents were granted a cross-motion to dismiss the petitioner's article 78 claim that the New York City Police Department's Records Access officer improperly refused to provide access to documents requested under the Freedom of Information Law.

**Holding:** All governmental records are open for public inspection and copying unless the record falls within one of the enumerated exemptions contained in Public Officers Law 87(2). *Matter of Gould v New York City Police Dept*, 89 NY2d 267, 274-5. The agency has the burden of demonstrating that the materials sought qualify for exemption. See *Matter of Hanig v State of New York Dept. of Motor Vehicles*, 79 NY2d 106, 109. While the police department is entitled to withhold complaint follow-up reports under an applicable exemption when "the requisite particularized showing is made," the Individual Assignment System court erred in relying on such ground when respondents never advanced the confidentiality exemption under Public Officers Law 87(2)(e)(iii). The factual issue of whether the respondents' letter denying the petitioner's request for additional materials was mailed and received remains to be resolved. Order reversed, matter remanded for a hearing. (Supreme Ct, New York Co [Shainswit, JJ])

**Freedom of Information (General)** **FOI; 177(20)**  
**Records (Access)** **REC; 327(5)**

**In re Application of Cuadrado v Morgenthau, No. 2612, 1st Dept, 12/7/99**

The petitioner's application to compel the prosecution to provide access to records under the Freedom of Information Law was dismissed in Supreme Court.

**Holding:** The respondent did not sustain its burden of showing that there was a diligent search for the vouchers, videotape and write-ups that the petitioner requested. See *Matter of Key v Hynes*, 205 AD2d 779, 781. The respondent "should search the file of Spiro Varsos for whom petitioner was convicted of committing murder, and should also represent how it stores videotapes." Because the respondent did not specifically deny the existence of other records, or otherwise specifically justify the refusal to disclose them (see *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571), the respondent is directed to determine whether they exist, and if so, to produce them or indicate why they are exempt. Order modified, and as modified, affirmed. (Supreme Ct, New York Co [Gonzalez, JJ])

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

**Housing (General)** **HOS; 186(15)**

**In re Application of Cardona v Franco, No. 2457, 1st Dept, 12/9/99**

The petitioner's public housing tenancy was terminated by the respondent New York City Housing Authority after a determination that the petitioner had violated a stipulation of settlement in a prior non-desirability proceeding that conditioned her eligibility on the continued absence of her emancipated son (who had been found on the premises with marijuana but had displayed no violent or disruptive tendencies) from the apartment.

**Holding:** For two years after the stipulation, the son was not seen on the premises in nine investigative inspections. The one time an investigator found the son in the basement of the apartment, the petitioner was not home and the son said he was only visiting. Because of the "absence of evidence that petitioner had consciously and intentionally violated the stipulation, the *de minimis* nature of the violation, and especially . . . the drastic consequences to this particular petitioner who is an elderly woman and purportedly in ill health," the penalty imposed was unduly harsh. Determination annulled and respondent directed to reinstate the petitioner's tenancy. (Supreme Ct, New York Co [Moskowitz, JJ])

**Evidence (Uncharged Crimes)** **EVI; 155(132)**

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

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

**People v Laverpool, No. 2690, 1st Dept, 12/14/99**

The defendant was convicted of second-degree murder, first-degree manslaughter, and two counts of second-degree

## First Department *continued*

assault. He was sentenced as a second violent felony offender to concurrent terms of 25 years to life and 12 ½ to 25 years on the murder and manslaughter convictions and to 3 ½ to 7 years on the assault convictions, to run consecutively to the homicide convictions and to each other.

**Holding:** The court properly exercised its discretion in denying the defendant's challenge for cause to a prospective juror. If the claim that the juror was biased, requiring an expurgatory oath, were reviewed (it was unpreserved), the record would reveal that the prospective juror did not express any bias, but instead mentioned her background in the interest of full disclosure. The court properly found that the prospective juror could be fair and impartial. See *People v Williams*, 63 NY2d 882, 885. The court properly exercised its discretion in admitting evidence of the defendant's prior bad acts or uncharged crimes on the issue of identity where there was a history of prior hostility and conflict between the defendant and the deceased. Because the murder and manslaughter were the underlying felonies for the assault convictions, the sentences for the assault convictions must run concurrently with the sentences for the homicides. Order unanimously modified, and as modified, affirmed. (Supreme Ct, New York Co [Torres, JJ])

**Guilty Pleas (Vacatur)** **GYP; 181(55)**

**Sentencing (Excessiveness)** **SEN; 345(33)**

### **People v Vasquez, No. 2753, 1st Dept, 12/16/99**

The defendant, convicted of sale of a controlled substance and violation of probation, was sentenced as a second felony offender to 6 to 12 years. His plea agreement provided that if he attended a drug treatment program and avoided being rearrested he would be permitted to withdraw his plea and to plead guilty to a misdemeanor with a sentence of probation; he failed to meet the conditions.

**Holding:** The defendant contended that the plea was induced by a promise that the court could not have lawfully kept because the promised misdemeanor disposition would have been unlawful under CPL 220.10(5)(a)(iii) which requires a felony plea in that situation. A plea taken in violation of the bargaining limitations of CPL 220.10 need not be considered a complete nullity subject to automatic vacatur without regard to procedural considerations. See *Matter of Kisloff v Covington*, 73 NY2d 445, 452. This claim requires preservation, which is not found here. If the claim were reviewed, the defendant would be found to have not established his entitlement to vacatur of his plea. It could not be said that the plea was "induced" by an unfulfilled or unfulfillable promise where the defendant breached the plea conditions and was therefore sentenced on his original felony plea. The plea agreement clearly warned the defendant of the consequences of failure to fulfill the agreement, and the court properly rejected the defendant's excuses. The sentence was excessive. Order modified to reduce the sentences

to 4½ to 9 years, and otherwise affirmed. (Supreme Ct, Bronx Co [Alvarado, JJ])

**Trial (Prejudicial Publicity)** **TRI; 375(40)**

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

### **People v Boss, Nos. M7380, M7486, 1st Dept, 12/16/99**

The defendants were indicted for first-degree murder for the Feb. 4, 1999 death of Amadou Diallo. The defendants moved for removal of the action from Bronx County to Westchester County or to another county outside the City of New York.

**Holding:** Under CPL 230.20(2), a change of venue is a means of providing the opportunity for a fair trial. The motion for additional time to seek the change of venue is entertained although it was addressed to the trial court. The motion relied upon a recently completed public opinion survey; a poll conducted close in time to the projected trial date is more probative than one conducted near the inception of the case because it allows a determination of whether passions have cooled. *Groppi v Wisconsin*, 400 US 505, 510 (1971).

The prospective jurors of Bronx County and the rest of New York City had been subjected to an "endless repetition of the notion that the two undisputed facts, namely that 41 shots were fired and that Mr. Diallo was unarmed, conclusively established defendants' guilt...." Criminal defendants have the right to a fair trial that is not dominated by a "wave of public passion" (*Irwin v Dowd*, 366 US 717, 728 [1961]) and is not overwhelmed by press coverage. *Murphy v Florida*, 421 US 794, 798 (1975). Polls showed that, as a result of publication of several advertisements and articles proclaiming the defendants' guilt, the majority of Bronx and New York City residents were not impartial. Especially in light of the public clamor that preceded the indictments, the case cannot be tried in Bronx county, where jurors would be under enormous pressure to reach a verdict demanded by public opinion. Petitioners' motion granted, action removed to Albany County. Prosecution's cross-motion denied. (Supreme Ct, Bronx Co)

## Second Department

**Instructions to Jury (Burden of Proof) (General) (Theories of Prosecution and/or Defense)** **ISJ; 205(20) (35) (50)**

### **People v Dorbilles, No. 98-00865, 2nd Dept, 11/1/99**

**Holding:** A detailed charge on the issue of identification is desirable, but is not required as a matter of law. See *People v Whalen*, 59 NY2d 273, 279. A general instruction on weighing the credibility of the witnesses, explaining that identification must be proven beyond a reasonable doubt, is an

**Second Department** *continued*

accurate statement of the law. The court's charge here was adequate. The claim that the court erred in refusing to allow the defendant to recall the complaining witness is unpreserved for review. *See* CPL 470.05(2). (Supreme Ct, Queens Co [Robinson, JJ])

**Ethics (Defense)**

**ETH; 150(5)**

**Matter of Spain, No. 98-06151, 2nd Dept, 11/1/99**

**Holding:** The respondent admitted all but one of the factual allegations contained in the petition, but denied that he was guilty of any professional misconduct. The Special Referee sustained all three charges and the Grievance Committee moved to confirm that report. The charges included conviction of a serious crime within the meaning of Judiciary Law 90(4) (d) and 22 NYCRR 691.7(b). The respondent was held in criminal contempt (Judiciary Law 750[A][1]) during a 1993 trial for which a fine was imposed, and that determination was upheld in the Appellate Division in 1995. The Court of Appeals denied leave to appeal. These facts were also the basis for the charge that the respondent engaged in conduct adversely reflecting on his fitness to practice law (Code of Professional Responsibility DR 1-102[A][7], 22 NYCRR 1200.3[a][7]) and prejudicial to the administration of justice (DR 1-102[A][5], 22 NYCRR 1200.3[a][5]). The respondent failed to report his conviction to the Appellate Division within 30 days as required by law, and claimed that it is not widely understood that criminal contempt is a crime that must be reported. Respondent censured.

**Search and Seizure (Search Warrants Suppression)**

**SEA; 335(65[p])**

**People v Perez, No. 98-11559, 2nd Dept, 11/1/99**

**Holding:** The court correctly suppressed certain physical evidence and the defendant's statements to law enforcement officials. The defendant had standing to challenge a search warrant naming commercial premises of which he was the manager, as he had a reasonable expectation of privacy in those premises. *See gen Mancusi v De Forte*, 392 US 364 (1968). The instant search was illegal in that the decision to apply for the warrant was prompted by information obtained during a prior illegal search in which the police searched a two-story building which they knew was not the one-story building targeted in the original warrant. Evidence seized upon an alleged plain view observation during that illegal search gave rise to the instant warrant. *See People v DelRio*, 220 AD2d 122, 131. Statements made by the defendant were in response to police questioning prompted by observations made during the initial illegal search. *See Murray v United States*, 487 US 533 (1988). Order Affirmed. (Supreme Ct, Queens Co [Demakos, JJ])

**Double Jeopardy (Collateral Estoppel)** **DBJ; 125(3)**

**Probation and Conditional Discharge (General) (Revocation)** **PRO; 305(18) (30)**

**People v Hilton, No. 99-01026, 2nd Dept, 11/1/99**

The defendant was indicted for offenses arising from alleged sexual molestation of a child while on probation from a previous criminal conviction. A violation of probation petition was filed based on the same alleged conduct. Because the prosecution failed to sustain its proof at a hearing before a different judge, the petition was dismissed. As a result, the first count of the indictment charging first-degree sexual abuse was dismissed on the ground that the prosecution was collaterally estopped from further litigating the question of whether the defendant sexually abused the complainant.

**Holding:** The court erred in dismissing the first count. The doctrine of collateral estoppel is highly flexible in nature. *See Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147. "[T]he correct determination of guilt or innocence is paramount in criminal cases" and collateral estoppel was inapplicable because "[s]trong policy considerations militate against giving issues determined in prior litigation preclusive effect in a criminal case, and indeed we have never done that before." *People v Fagan*, 66 NY2d 815, 816. The prosecution's incentive to litigate in a felony prosecution would presumably be stronger than in a probation violation proceeding. Judgment reversed, count reinstated. (Supreme Ct, Queens Co [Rotker, JJ])

**Appeals and Writs (Notice of Appeal)** **APP; 25(60)**

**Sentencing (Credit for Time Served)** **SEN; 345(15)**

**Matter of Nickolay v Nassau County Sheriff's Dept, Nos. 98-10941, 99-04098, 2nd Dept, 11/8/99**

**Holding:** The petitioner initiated proceedings pursuant to CPLR article 78 to compel the Nassau County Sheriff's Department (Proceeding No. 1) and the Commissioner of the New York State Department of Correctional Services (DOCS) (Proceeding No. 2) to credit 61 days of good time to the time he had served. The court denied both petitions. The notices of appeal are treated as premature notices of appeal from the respective judgments. *See* CPLR 5520[c]. The petitioner failed to establish that the certification provided by the Sheriff pursuant to Correction Law 600-a was improper (*see* Penal Law 70.30[3]; *see also Matter of Hawkins v Coughlin*, 72 NY2d 158), or that DOCS improperly calculated the good behavior time to be credited to him (*see* Correctional Law 803[1]; Penal Law 70.40[1][b]). Judgment affirmed. (Supreme Ct, Nassau Co [Honorof, JJ])

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## Second Department *continued*

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**Guilty Pleas (Alford Plea)** GYP; 181(5)

**Parole (Board/Division of Parole)  
(Minimum Period of Imprisonment)** PRL; 276(3) (20)

**Matter of Silmon v Travis, No. 98-11703, 2nd Dept,  
11/8/99**

In 1993 the defendant was convicted of first-degree manslaughter by way of an *Alford* plea (see *North Carolina v Alford*, 400 US 25 [1970]) and was sentenced to five to 15 years imprisonment. After a June 1997 hearing the New York State Board of Parole denied the defendant's request for release, citing the serious and brutal nature of the crime and the defendant's lack of remorse and insight. The lower court annulled the Parole Board's determination as arbitrary and capricious and directed a *de novo* hearing.

**Holding:** An *Alford* conviction is no different than any other and may be used against the defendant. The record shows that the Parole Board considered the full record—the defendant's hearing testimony, institutional achievements, criminal record, and release plan—before rendering its discretionary determination. Where made in accordance with the statutory factors, such determinations are not subject to judicial review. See *Matter of Heitman v New York State Bd. of Parole*, 214 AD2d 673. This record indicates that the Parole Board acted in accordance with the statutory requirements, so there is no basis to disturb its discretionary determination on appeal. See *Matter of Putland v Herbert*, 231 AD2d 893. Order reversed, petition denied, proceeding dismissed. (Supreme Ct, Westchester Co [Leavitt, JJ])

**Dissent:** [Friedmann, JJ] It is illogical and palpably unjust for our penal system to accept an *Alford* plea, and then allow the Parole Board to insist that the defendant admit guilt as a condition of parole.

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**Trial (Public Trial)** TRI; 375(50)

**People v Gonzalez, No. 96-07359, 2nd Dept,  
11/22/99**

The court excluded the defendant's wife and child from the courtroom during the testimony of an undercover officer.

**Holding:** The defendant was denied his right to a public trial. See US Const 6th Amend; Civil Rights Law 12; Judiciary Law 4; *People v Jones*, 47 NY2d 409, cert den 444 US 946. During the *Hinton* hearing (see *People v Hinton*, 31 NY2d 71, cert den 410 US 911), the defendant argued against closure, stating that his wife and child had been attending the proceedings and so should not be excluded. To properly exclude these individuals from the courtroom, the prosecution was required to present evidence that they threatened the safety of the undercover officer. See *People v Glover*, \_\_\_NY2d\_\_\_ [8/26/99]. Although the undercover officer was to immediately return to the area in which the defendant was arrested, nothing in the record shows, nor did the court find, that the

defendant's wife and child posed a threat to the officer. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Fisher, JJ])

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

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

**People v Villacci, No. 97-04342, 2nd Dept, 11/22/99**

An undercover officer initiated conversation with the defendant and co-defendant indicating he wanted \$10 worth of cocaine. The defendant went along with the codefendant's suggestion to try to purchase it at another codefendant's grocery store. The officer then gave the defendant \$10 in prerecorded buy money. There was no proof that the defendant was either promised or received any benefit.

**Holding:** In determining whether to grant an instruction on the agency defense, a court must review the evidence in the light most favorable to the defendant and give the instruction if there was "some evidence, however slight, to support the inference that the supposed agent was acting, in effect, as an extension of the buyer." *People v Argibay*, 45 NY2d 45, 55 cert den 439 US 930. Here, the buyer initiated the contact with the defendant, who was just walking down the street at the time, and indicated that he wanted to purchase "two nicks" of crack-cocaine. The defendant merely went along with a co-defendant's suggestion as to where to purchase drugs—exhibiting no salesman-like behavior himself—and the undercover buyer provided the defendant with \$10 in prerecorded buy money to make the purchase, with no evidence that the defendant was promised or received any benefit from the transaction. There was sufficient evidence that the defendant may have acted as an agent of the buyer. See *People v Alvarez*, 235 AD2d 484. The court erred in denying the defendant's request for an agency charge. See *People v Metuxrakis*, 254 AD2d 304. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rios, JJ])

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**Discrimination (Race)** DCM; 110.5(50)

**Juries and Jury Trials (Challenges)  
(Voir Dire)** JRY; 225(10) (60)

**People v Miller, No. 98-00277, 2nd Dept, 11/22/99**

During voir dire, defense counsel used peremptory challenges to remove four white prospective jurors. The prosecutor raised a reverse-*Batson* objection. See *Batson v Kentucky*, 476 US 79 (1986). In offering facially race-neutral explanations, counsel indicated that one of the challenged prospective jurors was a "little overweight," and "seemed a little unhealthy," so that she might be unable to sit through a week or more of testimony.

**Holding:** The court properly denied the defendant's peremptory challenge to that prospective juror, finding that the explanation proffered by counsel was a mere pretext

**Second Department** *continued*

offered in an effort to conceal a racially discriminatory intent. See *People v Hawthorne*, 80 NY2d 873. The racially motivated use of peremptory challenges by either the defense or the prosecution violates the Equal Protection Clause of both the state and federal constitutions. See *Hernandez v New York*, 500 US 352. The determination of the court is entitled to great deference on appeal and, as it is supported by the record, will not be disturbed. Judgment affirmed. (Supreme Ct, Kings Co [Martin, JJ])

**Confessions (Evidence) (Huntley Hearing)** CNF; 70(30) (33)

**Evidence (Rebuttal)** EVI; 155(123)

**People v Bennett, No. 96-10681, 2nd Dept, 11/29/99**

**Holding:** Defense counsel was granted permission at trial to introduce evidence of allegedly false prior statements by the defendant to prove that the defendant's confessions were also false, since the defendant was a "person with a propensity to make grandiose statements about himself." The court also ruled that the prosecution could, in rebuttal, introduce the defendant's *Huntley* hearing testimony (see *People v Huntley*, 15 NY2d 72) that his confessions were true. As a result, the defendant chose not to introduce his prior allegedly false statements. The ruling did not deprive him of his constitutional right against self-incrimination and his right to present a defense. Evidence offered in rebuttal must counter some affirmative fact which the defendant attempted to prove. See *People v Blair*, 90 NY2d 1003. The prosecution's rebuttal would have countered the defendant's argument that his confessions were false. See *People v Grant*, 256 AD2d 418. Judgment affirmed. (Supreme Ct, Kings Co [Marrus, J at hearing; Juviler, J at trial and sentence])

**Discrimination (Race)** DCM; 110.5(50)

**Juries and Jury Trials (Challenges) (Voir Dire)** JRY; 225(10) (60)

**People v Smith, No. 97-03078, 2nd Dept, 11/29/99**

After the first round of jury selection, the prosecutor peremptorily challenged four prospective black jurors. Defense counsel asked for race-neutral reasons for the challenges. One of the jurors was ordered seated after the prosecutor was unable to show a race-neutral reason for the challenge. Race-neutral reasons were given for two other challenges. The prosecutor noted that the fourth prospective juror was a postal worker and said that based on her past experience she did not relate well to such jurors. The court accepted the prosecutor's reason over defense counsel's ob-

jection. Of two later prosecution challenges of black jurors, one was disallowed as pretextual.

**Holding:** To meet a *Batson* challenge, concerns regarding a prospective juror's employment must be related to the factual circumstances of the case and the qualifications of the juror to serve on that case. *People v Russo*, 243 AD2d 658. The prosecutor here made no effort to explain how employment as a postal worker related to the facts of the case or the juror's qualifications. The prospective juror's employment was not a legitimate basis upon which to base exclusion from the jury. *People v Richie*, 217 AD2d 84, 88. The prosecutor's challenge to this prospective juror was part of a pattern of intentional discrimination against black prospective jurors, which resulted in the court rejecting two of the prosecutor's other peremptory challenges. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Pincus, JJ])

**Alibi (General)** ALI; 20(22)

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

**People v Henry, No. 97-05259, 2nd Dept, 11/29/99**

**Holding:** The defendant's conviction followed a robbery on Aug. 10, 1995, at a little after midnight. Defense counsel presented only one witness, the defendant's girlfriend, who stated that she was with the defendant the entire day and night on Aug. 10, 1995. She testified that on the evening of Aug. 10, 1995, they were supposed to go see the opening of a movie, but stayed home because they could not get a babysitter. Defense counsel's questions focused on the night of Aug. 10, 1995, resulting in testimony as to the defendant's whereabouts almost 24 hours after the crime. "Inasmuch as the witness' testimony went to the heart of the alibi, counsel's error undermined the defense." (*People v Cabrera*, 234 AD2d 557, 558...) "Notwithstanding counsel's competency in other aspects of the case, "the representation provided was not 'adequate or effective in any meaningful sense of the words...'" The defendant was denied effective assistance of counsel. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Katz, JJ])

**Death Penalty (Right to Counsel) (States [New York])** DEP; 100(140) (155[gg])

**Defense Systems (Compensation Systems [Attorney Fees])** DFS; 104(25[b])

**Matter of Renfroe v Demakos, No. 99-04388, 2nd Dept, 11/29/99**

CPLR article 78 proceeding in the nature of mandamus to compel the respondent, a Justice of the Supreme Court, Queens County, to award the petitioner \$81,094.05 for representation, as lead counsel (see, Judiciary Law 35-b[2]), of a defendant in a capital case (*People v James Gordon*).

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## Second Department *continued*

**Holding:** The record indicates that the petitioner did not act merely as James Gordon's advisor during his trial, but as Gordon's attorney. The petitioner selected jurors, prepared motions and an opening statement, conducted hearings pursuant to *People v Sandoval* (34 NY2d 371) and *People v Molineux* (168 NY 264), and cross examined witnesses. Neither the petitioner's designation as lead counsel nor the hours he worked on this case is disputed. He has demonstrated a clear legal right (see *Matter of Legal Aid Soc. of Sullivan County v Scheinman*, 53 NY2d 12, 16) to compensation at the rate of \$175 per hour plus expenses. Petition granted.

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**Death Penalty (Right to Counsel) (States [New York])** DEP; 100(140) (155[gg])

**Defense Systems (Compensation Systems [Attorney Fees])** DFS; 104(25[b])

**Matter of Morea v Demakos, No. 99-04389, 2nd Dept, 11/29/99**

CPLR article 78 proceeding in the nature of mandamus to compel the respondent, a Justice of the Supreme Court, Queens County, to award the petitioner \$64,414.76 as compensation for his representation, as associate counsel (see Judiciary Law 35-b[2]), of a defendant in a capital case (*People v James Gordon*).

**Holding:** The record indicates that the petitioner did not act merely as an advisor to James Gordon during his trial, but as his attorney. See *Matter of Renfroe v Demakos*, \_\_\_AD2d\_\_\_ [decided herewith]. Neither the petitioner's designation as associate counsel nor the hours he worked on this case is disputed. He has demonstrated a clear legal right (see *Matter of Legal Aid of Sullivan County v Scheinman*, 53 NY2d 12, 16) to compensation at the rate of \$150 per hour plus expenses. Petition granted.

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**Sentencing (Persistent Felony Offender)** SEN; 345(58)

**People v Garcia, No. 97-04343, 2nd Dept, 12/6/99**

**Holding:** The court erred in sentencing the defendant as a persistent felony offender under Penal Law 70.10(2). The record does not indicate what conduct or circumstances the court relied upon in determining whether the history and character of the defendant and the nature and circumstances of the offense were such that extended incarceration and lifetime supervision would best serve the public interest. Such determination is the second prong of the analysis required by CPL 400.20(1)(b). *People v Oliver*, 96 AD2d 1104, 1105 *aff'd* 64 NY2d 973. The court's conclusory recitation at sentencing that it had reviewed the presentence report, counsel's comments, and the defendant's conduct during trial did not fulfill the statute's mandate. See *People v Smith*,

232 AD2d 586, 587. Sentence vacated, matter remitted for resentencing. (Supreme Ct, Queens Co [Naro, JJ])

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**Evidence (Rebuttal)**

EVI; 155(123)

**People v Mancuso, No. 96-11278, 2nd Dept, 12/6/99**

**Holding:** The prosecution was allowed to introduce the defendant's arrest photograph as rebuttal evidence after the close of the defense case, and to recall a detective to say that the photo accurately depicted the defendant's appearance and clothing at arrest. The defense efforts to rebut that evidence were denied. The precluded testimony would have tended to disprove affirmative facts which the prosecution sought to prove by its rebuttal evidence. The defendant should have been allowed to offer surrebuttal. See CPL 260.30(7). The court ruling was error. See *People v Harris*, 57 NY2d 335 *cert den* 460 US 1047. Judgment reversed, new trial ordered. (Supreme Ct, Richmond Co [Kuffner, JJ])

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**Accusatory Instruments (General)**

ACI; 11(10)

**Matter of Jadoo v Griffin, No. 99-09313, 2nd Dept, 12/13/99**

**Holding:** The petitioner sought article 78 relief in the nature of prohibition to prevent his prosecution in Queens County under a superseding indictment. He had been tried under a 6-count indictment, and the jury acquitted him of attempted murder but hung as to the remaining assault and robbery charges (first-degree and attempt first-degree of each), and a weapons possession charge. A mistrial was declared as to the remaining five counts. Without the court's permission, the prosecutor then filed a superseding indictment, adding second-degree assault and attempted robbery charges. Where the trial court did not dismiss the original indictment or authorized re-presentation to the grand jury, the prosecution was limited to retrying the petitioner on the same accusatory instrument. See CPL 40.30(3), (4); *Matter of De Canzio v Kennedy*, 67 AD2d 111. Petition granted, superseding indictment dismissed, original indictment reinstated.

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**Search and Seizure (Electronic Searches)** SEA; 335(30)

**People v Fiore, No. 97-01060, 2nd Dept, 12/13/99**

**Holding:** The County Court granted suppression of evidence derived from a pen register order and eavesdropping warrant. The 2nd Department ruled that codefendants Amiel and Andriello lacked standing to challenge the surveillance, and otherwise affirmed. The Court of Appeals reversed the 2nd Department ruling as to the codefendants. A prosecution motion for reargument of the appeal as to the remaining codefendants was held in abeyance. That motion is now granted, the 2nd Department order of Jan. 26, 1998 is recalled and vacated, and the motions of all defendants to

**Second Department** *continued*

suppress the evidence are denied. The surveillance was conducted in compliance with the statutory requirements of CPL article 705. See *People v Martello*, \_\_ NY2d \_\_ [7/9/99]. In *People v Kramer* (92 NY2d 529), the Court of Appeals noted that *People v Bialostok* (80 NY2d 738) should not be construed as a per se template requiring all pen register devices capable of intercepting and recording conversations to be classified as eavesdropping devices. The pen register usage in this case did not require the issuance of an eavesdropping warrant, as the digital and audio functions of the equipment were sufficiently discrete, and the susceptibility to misuse sufficiently remote. Reargument granted, suppression denied. (County Ct, Rockland Co [Nelson, JJ])

**Search and Seizure (Electronic Searches)** SEA; 335(30)

**People v Kramer, Nos. 96-09132, 97-00398, 97-00400, 2nd Dept, 12/13/99**

The County Court found the defendants had standing to challenge pen register orders, and, in an amended order adhering to that ruling, granted the motions of three codefendants to dismiss certain counts of the indictment. The court suppressed all evidence from the subject pen register orders and eavesdropping warrant. The 2nd Department reversed and denied suppression. The Court of Appeals reversed and remitted the matter. Suppression is denied.

**Holding:** Two orders authorizing the installation of pen register devices on four telephone lines at defendant Daniel Kramer's home were issued in 1995. The equipment used had the capacity to intercept both digital and audio signals, but when set in digital mode, blocked audio signals from being transmitted to the pen registers. An eavesdropping warrant was issued as a result of evidence obtained via the pen registers. At that point, the equipment was modified to begin recording conversations, enabling the prosecution to develop evidence of illegal gambling operations and a scheme to fix harness races. On the prior appeal, the prosecution specifically argued that *People v Bialostok* (80 NY2d 738) should not be applied to pen registers installed after CPL article 705 became effective. The Court of Appeals recently found that pen register surveillance conducted in strict compliance with that statute is not controlled by *Bialostok*. *People v Martello*, 93 NY2d 645. *Martello* did not announce a new rule of law, but merely clarified the issue of when *Bialostok* applies. *Martello* can therefore be applied retroactively to the instant appeal. In any event, suppression would be denied under *People v Kramer*, 92 NY2d 529, 541. Order reversed, suppression denied. (County Ct, Westchester Co [Lange, JJ])

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

**People v Nash, No. 97-01939, 2nd Dept, 12/13/99**

**Holding:** The defendant was convicted of possession of a weapon. He correctly contended that the erroneous denial of his challenge for cause to a prospective juror constitutes reversible error because he exhausted all of his peremptory challenges before the completion of jury selection. See CPL 270.20(2); *People v Torpey*, 63 NY2d 361, 365. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Ruchelsman, JJ])

**Evidence (Hearsay)**

EVI; 155(75)

**People v Robinson, No. 97-06939, 2nd Dept, 12/13/99**

**Holding:** The court erred in refusing to admit testimony about an admission against penal interest. The testimony indicated that the declarant had said she "got her brothers and them" to kill the decedent because he had taken a gold chain and had raped her. The declarant was unavailable as a witness because she invoked her right against self-incrimination. She must have been aware at the time she made the statement that it was against her penal interest. The reference in the statement to the missing gold chain demonstrated a familiarity with the facts of the crime, in light of evidence that the female perpetrator asked the decedent about a chain before an accomplice shot the decedent. There was independent evidence that the declarant and the female perpetrator had the same nickname, and an eyewitness identified the declarant to authorities as the female perpetrator; this independent evidence established the trustworthiness and reliability of the statement, which qualified as an admission against penal interest under *People v Thomas*, 68 NY2d 194, 197 *cert den* 480 US 948. The error cannot be deemed harmless. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Jones, JJ])

**Confessions (Miranda Advice)**

CNF; 70(45)

**Evidence (Sufficiency)**

EVI; 155(130)

**In the Matter of Cheikh F, No. 98-06162, 2nd Dept, 12/20/99**

The decision and order of this court dated Oct. 4, 1999 is amended by deleting the words "and the matter is remitted to the Family Court, Kings County, for a new fact-finding and dispositional hearing if the presentment agency be so advised" and substituting therefor the words "and the petition is dismissed." Motion for leave to appeal to the Court of Appeals from the decision and order as amended is denied.

**Accusatory Instruments (Variance of Proof)** ACI; 11(20)

**Rape (Evidence)**

RAP; 320(20)

**People v Chin, No. 98-11374, 2nd Dept, 12/20/99, 700 NYS2d 477**

## Second Department *continued*

The defendant was charged with first-degree rape. The indictment (as amplified by a bill of particulars), prosecution opening statement, and testimony of the complainant alleged that the defendant had sexual intercourse with the complainant after rendering her unconscious by hitting her, causing her head to strike a bed and wall.

**Holding:** Under Penal Law 130.35(2), the victim must be incapable of consent by reason of being physically helpless. The medical evidence failed to corroborate the complainant's testimony that she was struck or lost consciousness. Over objection, the prosecutor then elicited testimony regarding "dissociative amnesia" and "psychoneurological shock" to explain the complainant's alleged unconsciousness. The prosecutor's mid-trial variance in its theory deprived the defendant of his fundamental right to fair notice of the charges against him and an opportunity to present a meaningful defense. *See People v Grega*, 72 NY2d 489. Judgment reversed. (Supreme Ct, Queens Co [Eng, JJ])

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### Freedom of Information (General) FOI; 177(20)

#### In the Matter of Gerace v Mandel, No. 99-01078, 2nd Dept, 12/20/99, 700 NYS2d 739

**Holding:** The petitioner sought certain criminal history reports and the court granted disclosure. The rap sheets, compiled by the Division of Criminal Justice Services, are exempt from disclosure under the Freedom of Information Law. *See Matter of Woods v Kings County Dist. Attorney's Off.*, 234 AD2d 554. Under the facts of this case, the extensive redaction of the rap sheets ordered by the court would improperly require the respondent to "prepare" records. (Public Officers Law 89[3]) and still would not effectively address privacy concerns. *See Public Officers Law 87(2)(b)*. Judgment reversed. (Supreme Ct, Kings Co [Held, JJ])

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### Civil Practice (General) CVP; 67.3(10)

### Discovery (General) DSC; 110(12)

#### Hudson v City of New York, No. 99-01085, 2nd Dept, 12/20/99, 700 NYS2d 67

The plaintiff filed an action to recover damages for the wrongful death of the plaintiff's decedent, who died of asthma-related causes while incarcerated in the defendant's correctional facility. The plaintiff unsuccessfully moved to strike the defendant's answer pursuant to CPLR 3126(3).

**Holding:** For approximately three years, the defendant failed to respond to requests for disclosure of, *inter alia*, the decedent's incarceration records, the names and addresses of eyewitnesses, accident reports, and any statements of witnesses. The defendant disobeyed two court orders requiring disclosure of this information, offering no valid ex-

cuse for its defaults. The defendant's willful and contumacious conduct may be inferred from its repeated failures to comply with disclosure orders and the inadequate excuses offered for its failure to comply. The court improvidently exercised its discretion in refusing to strike the defendant's answer. *See Espinal v City of New York*, \_\_ AD2d \_\_ (2nd Dept 9/27/99). Order reversed, with costs, answer stricken, matter remitted for an inquest on damages. (Supreme Ct, Kings Co [Schneier, JJ])

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### Counsel (Anders Brief)

COU; 95(7)

#### People v Jackson, No. 96-10834, 2nd Dept, 12/27/99, 700 NYS2d 755

**Holding:** The defendant's motion to withdraw his guilty plea was denied. On appeal, assigned counsel submitted an *Anders* brief (*Anders v California*, 386 US 738 [1984]) and moved to be relieved as counsel. Independent review of the record shows that arguable issues exist regarding, *inter alia*, the denial of defendant's motion to withdraw his guilty plea. Counsel is relieved and directed to turn over all papers in his possession to new assigned counsel. *See People v Gonzalez*, 47 NY2d 606. (County Ct, Suffolk Co [Corso, JJ])

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### Counsel (Competence/Effective Assistance/Adequacy)

COU; 95(15)

#### People v Hedrington, No. 97-06414, 2nd Dept, 12/27/99, 700 NYS2d 760

**Holding:** As the prosecution correctly conceded, the defendant was deprived of the effective assistance of counsel where trial counsel failed to object to the prosecution's violation of a stipulation that they not introduce certain physical evidence at trial. *See People v Benevento*, 91 NY2d 708. Judgment reversed, new trial ordered. (Supreme Ct, Richmond Co [Rooney, JJ])

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### Evidence (Sufficiency)

EVI; 155(130)

### Family Court (General)

FAM; 164(20)

#### Matter of Bianca W., No. 98-11285, 2nd Dept, 12/27/99, 700 NYS2d 497

The appellant was adjudicated a juvenile delinquent upon robbery, attempted robbery, larceny, and possession of stolen property charges as well as criminal mischief, attempted assault, and menacing.

**Holding:** There was no evidence on the record demonstrating that the appellant participated in the robbery or was even aware that it took place. The evidence established only that the appellant kicked and punched the complainant during a scuffle. It could not be inferred that the appellant

**Second Department** *continued*

shared her sister's larcenous intent. The presentment agency failed to prove beyond a reasonable doubt that the appellant acted with the requisite mental culpability required for the property-related charges. See *Matter of John G.*, 118 AD2d 646. Order of disposition modified, and as modified, affirmed. (Family Ct, Kings Co [McLeod, JJ])

<b>Assault (Evidence)</b>	<b>ASS; 45(25)</b>
<b>Juries and Jury Trials (Voir Dire)</b>	<b>JRY; 225(60)</b>
<b>Sentencing (General)</b>	<b>SEN; 345(37)</b>

**People v Wheeler, No. 97-10638, 2nd Dept,  
1/10/00, 701 NYS2d 442**

The defendant was convicted of second-degree assault.

**Holding:** A court may set time limits on attorneys' voir dire of prospective jurors as long as there is a fair opportunity to ask relevant and material questions. See *People v Jean*, 75 NY2d 744. Here, prospective jurors responded to the court's questionnaire and the court followed up with relevant questions when necessary. The court did not require that counsel question prospective jurors in the order in which they were questioned by the court, so there is no merit to the claim that the defense was denied an opportunity to question a prospective juror with regard to her experience as a crime victim when time ran out before that juror was questioned.

The uncontradicted testimony established that the defendant repeatedly punched the complainant, who suffered a broken nose, had two of her teeth knocked out and a third pushed into her gums, and was rendered unconscious. The evidence was legally sufficient to establish the defendant's guilt beyond a reasonable doubt.

Setting the expiration date of an order of protection 12 years after the conviction was error. The defendant was sentenced to a determinate sentence of seven years; the maximum duration of the order of protection was 10 years. See CPL 530.13(4). Judgment modified, and as modified, affirmed. (County Ct, Westchester Co [Dillon, JJ])

<b>Discovery (Matters Discoverable)</b>	<b>DSC; 110(20)</b>
<b>Misconduct (Prosecution)</b>	<b>MIS; 250(15)</b>

**People v Dudley, No. 97-04347, 2nd Dept, 1/10/00,  
703 NYS2d 489**

**Holding:** The trial court erred in failing to sanction the prosecution for failure to provide the defendant with his arrest photograph. See CPL 240.20(1)(d). The failure prejudiced the defendant. *People v DaGata*, 86 NY2d 40. Judgment reversed. (Supreme Ct, Queens Co [Eng, JJ])

<b>Juveniles (Delinquency-Procedural Law)</b>	<b>JUV; 230(20)</b>
<b>Speedy Trial (Cause for Delay)</b>	<b>SPX; 355(12)</b>

**Matter of Yusef B., No. 98-09052, 2nd Dept,  
1/10/00, 702 NYS2d 314**

**Holding:** The Family Court properly dismissed a juvenile delinquency petition since a fact-finding hearing was not held within 60 days of the respondent's initial appearance in court. See Family Court Act 340.1(2). The 25 days during which a warrant was outstanding were properly included in calculating the 60-day period, as there was a failure to exercise due diligence in securing the respondent's presence. See *Matter of Michael C.*, \_\_ AD2d \_\_, 690 NYS2d 460. The presentment agency was aware that the respondent spent nights at his mother's home, yet the agency did not visit there, failing to demonstrate that all known leads as to the respondent's whereabouts were exhausted. There is no merit to the claim that 21 days should have been excluded as time necessary for the administrative processing of the warrant; there is no "blanket exception for reasonable administrative delay." *People v Luperon*, 85 NY2d 71, 72. Order affirmed. (Family Ct, Kings Co [Pearce, JJ])

<b>Juveniles (Persons in Need of Supervision)</b>	<b>JUV; 230(110)</b>
<b>Prior Convictions (Collateral Consequences)</b>	<b>PRC; 295(2)</b>

**Matter of Ejiro A., No. 99-01380, 2nd Dept,  
1/10/99, 701 NYS2d 622**

**Holding:** Evidence adduced at the dispositional hearing was insufficient to demonstrate by a preponderance of the evidence that the appellant was in need of supervision, treatment, or confinement. See *Matter of Kyung C.*, 169 AD2d 721. Although the appellant's probationary term has expired, the adjudication of delinquency may have collateral consequences; the appeal is not rendered academic. See *Matter of Denise M.W.*, 122 AD2d 556. Order of disposition reversed, fact-finding order vacated, petition dismissed, and the appellant's record sealed. (Family Ct, Kings Co [Lauria, JJ])

<b>Appeals and Writs (General)</b>	<b>APP; 25(35)</b>
<b>Guilty Pleas (Errors Waived by)</b>	<b>GYP; 181(15)</b>

**People v Brathwaite, No. 96-10777, 2nd Dept,  
1/18/00, 703 NYS2d 191**

Pursuant to a plea agreement, the defendant executed a written waiver of his right to appeal and was convicted of criminal possession of a controlled substance. On appeal, he

## Second Department *continued*

claimed the trial court improperly denied his motion to controvert the search warrant and suppress the evidence recovered thereunder, because the state failed to establish the knowledge and reliability of the informant. The defendant also challenged his sentence as violative of the constitutional proscription against cruel and unusual punishment and as harsh and excessive.

**Holding:** The defendant's plea and waiver of his right to appeal were knowingly, voluntarily, and intelligently made, and the waiver was intended to cover all aspects of the case. See *People v Muniz*, 91 NY2d 570. Accordingly, the waiver included the search warrant issues and the challenge to the bargained-for sentence. He does not claim that the sentence violates or exceeds the statutory scheme, but challenges the severity of it, which is a waivable claim. See *People v Lococo*, 92 NY2d 825, 826-827. Judgment affirmed. (Supreme Ct, Kings Co [Gary, JJ])

**Guilty Pleas (Errors Waived By)** GYP; 181(15)

**Sentencing (Appellate Review)** SEN; 345(8)

**People v Miles, No. 98-08310, 2nd Dept, 1/18/00,  
703 NYS2d 491**

**Holding:** Review of the defendant's claim that his enhanced sentence is harsh and excessive is precluded by his knowing, voluntary, and intelligent general waiver of the right to appeal. Such claims are encompassed in the appeal waiver provided that the defendant is informed that a maximum sentence could be imposed if he or she fails to comply with the conditions of the plea agreement. See *People v Lococo*, 92 NY2d 825. Any suggestion otherwise in *People v Prescott* (196 AD2d 599) and its progeny is not to be followed. The defendant's general waiver of the right to appeal does not encompass the claim that the court failed to conduct an adequate inquiry into the validity of his post-plea arrest on an unrelated crime before imposing an enhanced sentence, since it was based on post-plea conduct. The defendant did not raise this issue before the sentencing court or move to vacate his plea, however, so it is unpreserved for appellate review. In any event, the court properly imposed an enhanced sentence based on the defendant's undisputed violation of two conditions of the plea, *ie*, that he return to court on the sentencing date and cooperate with probation. See *People v Yu*, 204 AD2d 129. Judgment affirmed. (Supreme Ct, Kings Co [Buchter, JJ])

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

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

**Matter of Damien H., No. 99-07137, 2nd Dept,  
1/18/00, 701 NYS2d 912**

**Holding:** Non-party NYS Office of Children and Family Services appealed by permission the denial of its application to quash a subpoena. A court cannot order disclosure of an "unfounded" report of child abuse under Social Services Law 422(4)(e). Social Services Law 422(5). However, it was proper for the Family Court to order an *in camera* review of the report based on the respondent's particularized showing that it may contain exculpatory material. Cf *Pennsylvania v Ritchie*, 480 US 39 (1987). After reviewing the report, the court should disclose, with appropriate redactions, evidence "that is both favorable to the accused and material to guilt or punishment." *Ibid*. Order affirmed. (Family Ct, Queens Co [Friedman, JJ])

**Sentencing (Persistent Felony Offender)** SEN; 345(58)

**People v Brown, No. 97-09179, 2nd Dept, 1/31/00,  
704 NYS2d 83**

**Holding:** The defendant was found to be a persistent felony offender. Penal Law 70.10(2). The trial court's conclusory recitation at sentencing that it had reviewed the defendant's background and record was insufficient to fulfill the requirement that the court set out on the record the reasons for finding that the defendant's history and character, and the nature and circumstances of the criminal conduct, warrant extended incarceration and lifetime supervision. See *People v Smith*, 232 AD2d 586, 587; CPL 400.20(1)(b). Judgment reversed. (Supreme Ct, Kings Co [Starkey, JJ])

**Counsel (Choice of Counsel)** COU; 95(9.5) (10)  
**(Conflict of Interest)**

**Matter of Jason C., No. 99-06903, 2nd Dept,  
1/31/00, 702 NYS2d 613**

**Holding:** Although individuals' right to representation by counsel of their choice is not absolute, the right yields only to an overriding competing public interest, and any restriction imposed on that right should be carefully scrutinized. See *Matter of Abrams (John Anonymous)*, 62 NY2d 183. The disqualification of the retained attorney simultaneously representing the father and mother in this proceeding was improper. There was no proper inquiry into the existence of any actual or potential conflict of interest warranting disqualification. See *Matter of Legal Aid Society of Orange County v Patsalos*, 185 AD2d 926. The parents must make a knowing and intelligent decision about whether to continue the dual representation after being advised of possible effects on their legal rights. See *Prodell v State of New York*, 125 AD2d 805, 806. In the event that they fail or refuse to indicate their position on the matter, then the Family Court may disqualify the attorney. Order reversed, matter remitted for a hearing. (Family Ct, Queens Co [Bogacz, JJ]) ⚖

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