



Public Defense Backup Center REPORT

VOLUME XV NUMBER 5

July 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

Miranda Is Constitutional

The United States Supreme Court did not—and Congress cannot—overrule *Miranda*. Some defense lawyers and others had feared that the current court would tamper with *Miranda*'s requirement that police give, before questioning suspects in custody, warnings about their rights to remain silent and have counsel. But on June 26, 2000, the court strongly—seven to two, in an opinion written by the Chief Justice—held that *Miranda v Arizona*, 384 US 436 (1966), is constitutionally based and governs the admissibility of custodial statements in state and federal courts alike. The court reversed a 4th Circuit decision that relied on 18 USC 3501, which had been enacted two years after *Miranda* but never relied upon by the government.

Noting that some of the high court's opinions following *Miranda* made exceptions to it, while others broadened its application, Chief Justice Rehnquist said, "These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable." The majority found no justification to violate the principle of *stare decisis* by overruling *Miranda*. In fact, the court observed, the voluntariness test that the statute sought to revive was more difficult for police and courts to conform to and apply than *Miranda*. In the words of one newspaper, Rehnquist's opinion "made it clear that a citizen's Fifth Amendment right not to be compelled to be a witness against himself or herself was nonnegotiable." (*Free Press* [Detroit, MI], 6/27/00.)

Justice Scalia, joined by Justice Thomas in dissent, felt the majority had claimed an improper, "immense and anti-democratic power." *Dickerson v United States*, No. 99-5525 (6/26/00).

NJ Enhanced Sentencing Scheme Struck Down

On the same day it issued *Dickerson*, the court decided a case with wide-ranging implications for enhanced sentencing schemes. The court voted five to four to strike down a New Jersey law that elevated the statutory punishment for a crime upon a finding by the sentencing court that the offense was motivated by racial animus. This "hate crime" scheme

violated the 6th and 14th Amendments because any factor, other than the historical fact of a defendant's prior conviction, that increases the maximum punishment for a crime must be submitted to the jury as an element of the charged offense. *Apprendi v New Jersey*, No. 99-478 (6/26/00). A digest of *Dickerson*, *Apprendi*, and other end-of-term decisions not included *infra* at p. 12 will appear in future issues of the *REPORT*.

Defendants' Mental Health Data Blocked

The New York State Mental Hygiene Legal Service (MHLS) for the 2nd Department and others have brought suit challenging how courts are notified that criminal defendants previously found incapacitated to stand trial have been deemed by a psychiatric facility to have regained the capacity to be prosecuted. The matter is pending in the United States District Court for the Southern District of New York. It has been certified as a class action concerning "all incapacitated criminal defendants who are currently confined to Mid-Hudson, or who will be confined to Mid-Hudson, for purposes of care and treatment, and who will be returned to the local criminal courts as fit to proceed." The plaintiffs assert that only a "Notification of Fitness to Proceed" form may be used, while the defendants (who include the Commissioner of the New York State Office of Mental Health) contend that fitness reports may also be submitted. These reports include mental health information about the person previously deemed to be incapacitated, such as "current mental status exam, observations regarding fitness, history of dangerousness, history relevant to fitness, current treatment, DSM IV diagnosis, and forensic psychiatric opinion" as well as other personal information like HIV status and sexual orientation. District Judge William H. Pauley III found that public

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disclosure of this information results in substantial and irreversible harm. Analyzing state statutes, he further found that the plaintiffs are likely to succeed on the merits in their quest for injunctive relief from having the defendants reveal confidential clinical information without legal authority. As a result, Judge Pauley issued a preliminary injunction on May 10, 2000. Only the Notification of Fitness to Proceed form, with no report attached, is to be provided to trial courts, defense attorneys, or district attorneys. Plaintiffs' lawyers are Valdi Licul and Dennis Feld of MHLS, and Laura R. Johnson of The Legal Aid Society. *Hirschfeld et al v Stone*, No. 99 Civ. 11693 (WHP) (5/10/00). A copy of the opinion is available from the Backup Center.

Eyewitness Identification a Hot Topic

The witness is sure the defendant is guilty. The defendant avows innocence. Courts have long called this a matter of credibility, leaving juries to decide who is "lying." But growing scientific evidence supports what defense teams have long known—an eyewitness who honestly believes that the right person has been charged can be very, very wrong. So the issue is not who is "lying" but whether the eyewitness's testimony constitutes proof beyond a reasonable doubt. Recent developments should bolster defense attorneys' resolve to intensely litigate eyewitness identification.

Witness Certain—But Wrong

Under the headline, "I Was Certain, But I Was Wrong," the *New York Times* published a June op-ed piece by a North Carolina homemaker who was raped in 1984. She identified her alleged attacker to police with certainty several times, but found out eleven years later—during which he was in prison—that she had pointed out the wrong person:

... The man I was so sure I had never seen in my life was the man who was inches from my throat, who raped me, who hurt me, who took my spirit away, who robbed me of my soul. And the man I had identified so emphatically on so many occasions was absolutely innocent. . .

The author, Jennifer Thompson, wrote the *Times* article in a vain hope that her experience would stop the Texas execution of Shaka Sankofa (Gary Graham), whose conviction was based on the testimony of one eyewitness. (*New York Times*, 6/18/00.)

Sankofa was killed on schedule, June 22. (*Times Union*, 6/23/00.) However, Thompson's article remains a poignant example of the need for changes in the criminal justice system. Stephen Bright, senior and founding member of The Southern Center for Human Rights in Atlanta, Georgia (see book review in Vol. XV, No. 4, of the *Backup Center REPORT*), opened his recent Congressional testimony with references to Thompson's words. (Testimony before the United States House of Representatives, Committee on the Judiciary, Sub-

committee on Crime, regarding the Innocence Protection Act of 2000, H.R. 4167, 6/20/00.) Bright's testimony is available online at the Center's web site: <http://www.schr.org>.

Jennifer Thompson's misidentification of Ronald Cotton as a rapist was the basis of a 1997 *Frontline* story. Interviews from that show are available on the Internet. In addition to a powerful story about the unreliability of eyewitness identification evidence (and the uses of DNA in exonerating the wrongfully convicted), the interviews provide insight into different views of the criminal justice system held by people brought into it—as victim and defendant—through no fault of their own. <http://www.pbs.org/wgbh/pages/frontline/shows/dna/>

A comparison of Thompson's remarks in the *Frontline* interview with her recent op-ed piece also provide insight into how she has widened her view of the tragedy to include Cotton. In 1997, she acknowledged a feeling of guilt when she saw Cotton on television, reunited with his family after 11 years of wrongful imprisonment, but added:

... We took away years of his life, which I am not trying to deny any of those things, but the same amount of years have been taken away from me. His bars were made of metal. My bars are emotional. My bars, I can't ever break them free. No one is ever going to give me any restitution. No one is ever going to hail me as someone who has survived 11 years of imprisonment. You can't see my bars, you can't see my prison, but they are there . . .

Three years later, Thompson wrote about Cotton not as a "competitor" for needed solace, but as a friend:

Mr. Cotton and I have now crossed the boundaries of both the terrible way we came together and our racial difference (he is black and I am white) and have become friends.

Public Defense Backup Center *REPORT*

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XV Number 5

July 2000

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

The *REPORT* is printed on recycled paper.

Although he is now moving on with his own life, I live with constant anguish that my profound mistake cost him so dearly. I cannot begin to imagine what would have happened had my mistaken identification occurred in a capital case.

NYSDA Supports Strong Advocacy on Eyewitness Evidence

The use of DNA to establish misidentification, as in the case of Ronald Cotton, has been receiving a great deal of very justified press coverage. The DNA section of the “Hot Topics” area of NYSDA’s web page (<http://www.nysda.org>) offers a sampling. But as Stephen Bright noted in his congressional testimony, there is no biological evidence to be tested in most cases, and a properly working adversary system is needed if injustice is to be avoided.

To that end, NYSDA provides information on the latest studies revealing ways in which eyewitness testimony can be calculatedly or mistakenly shaped to convict the wrong person. In the Eyewitness Evidence section of the NYSDA web site (<http://www.nysda.org>), under “Hot Topics”, defense teams can find out about new developments, browse a list of books, treatises, and articles, and click on a variety of links to academic studies and bibliographies. Also included on the site are links to the web pages of the best-known experts in the field of eyewitness examination, Elizabeth Loftus (Professor of Psychology, University of Washington) and Gary Wells (Professor of Psychology, Iowa State University). [Underlined items are links in the web version of the *REPORT*.]

Gary Wells is among the scheduled CLE presenters for the Association’s 33rd Annual Meeting and Conference; final preparations for the July 27-July 30 event were underway as this issue of the *REPORT* went to press.

NYSDA Represented at Indigent Defense 2000

The Association was represented on both sides of the podium at a recent national meeting about public defense. The Bureau of Justice Assistance, a program of the U.S. Department of Justice, invited 500 local and state leaders to Washington D.C. to discuss possible solutions to the problems plaguing public defense systems around the country. All 50 states and U.S. territories were represented by delegations of public defense lawyers, prosecutors, judges, and others with a policy-shaping interest in how public defense is provided. Among the delegations from New York State was a group consisting of: Deputy Chief Administrative Judge for Justice Initiatives Juanita Bing Newton; Schenectady County District Attorney and President-elect of the New York State District Attorney’s Association Robert Carney; Executive Director of the Center for Community Alternatives and NYSDA Board member Marsha Weissman; Executive Director of the Division of Parole Martin Cirin-

cione; and NYSDA Executive Director Jonathan E. Gradess. The heads of several defender offices across New York State also participated, including Susan Hendricks, Gary Horton, Frank Nebush, Michele Maxian, Lisa Schreibersdorf and Robin Steinberg.

NYSDA’s Managing Attorney, Charles F. O’Brien, was invited to do a presentation to attending delegates. He described the functions of the Public Defense Backup Center as a model for improving indigent defense services in other states.

1st Dept. Committee Hears that System is in Shambles

“... New York State’s public defense system—from one end of the state to the other—is in shambles. Many brave men and women in leadership positions try to administer the more than 100 systems existing in the 62 counties of New York. They deserve much credit and all of your support. They have been neglected by government at the federal, state and local levels...”

—Jonathan E. Gradess

In written testimony presented to the 1st Department’s Committee on the Representation of the Poor on June 14, 2000, NYSDA’s Executive Director decried high caseloads, lack of training, unconcern for client satisfaction, late entry into cases, and other problems with the current provision of public defense, not just in New York City but across the Empire State. Responding to the committee’s invitation to testify on specific points, Jonathan E. Gradess outlined his view of what is necessary to bring order and quality out of the existing chaos.

Independent Commission—a governing body for public defense should be conflict free:

- Any public defense commission should be made up of a diverse group of people experienced in serving the poor and familiar with mechanisms for delivering services.
- Such a commission should not be tied to the conflicting interests of the Executive, Judicial, or Legislative branches of government.
- It should be empowered to enforce standards of representation that include client satisfaction as a measure of performance.

Judicial Functions—the judiciary should have a temporary role, but not control:

- Conflicts of interest as to financial and temporal resources would pit the judiciary against itself if it administered public defense.
- Defense teams must not be placed in a situation where they have to choose between strong advocacy in a cli-

ent's case before a court and protecting resources for their public defense program controlled by that court.

- In the short term, judicial protection of public defense by way of support for standards, adequate funding and training, and other necessary resources for public defense is welcome.

Resource Center—providing investigators and social workers to work with 18-b lawyers would be a half-measure only:

- Assigned counsel lawyers do lack access to such services, which harms their clients.
- Many institutional public defense providers also have insufficient resources of this type.
- The real solution is that “New York needs a unified public defense system.”

In his testimony, Gradess set forth details of the crisis in public defense, from lack of training to lack of time for lawyers to find the facts and develop the theories that will allow them to properly prepare cases. He reminded the committee that the crisis results in clients who justifiably distrust their lawyers and good lawyers who can no longer afford to represent low-income clients. Gradess asked the committee to view its work in the context of the larger, state-wide problem, and to act as a beacon to bring light on this issue everywhere.

The full text of the submitted testimony is available in the “Hot Topics” area, Assigned Counsel Rates Section (under Reports and Legislative Proposals) of the Association’s web site: <http://www.nysda.org>. A printed copy is available from the Backup Center.

The Bronx Defenders Surveys Clients

The Bronx Defenders has adopted a direct, innovative approach to discovering clients’ feelings about their lawyers—ask them. The office has planned a series of surveys focusing on different client populations. The first survey, already completed, targeted hundreds of clients who had been charged with “quality of life” misdemeanors disposed of at the initial arraignment. The organization sought to learn how the clients felt, what they needed, and how to improve the legal services being provided.

An overwhelming number of clients were satisfied with The Bronx Defenders’s services. Every client surveyed had been interviewed by a lawyer, 97% of them had had the charges against them explained, and over 90% had had the chance to explain their story to their lawyer. On the other hand, 24% indicated afterward that they did not fully understand their plea agreement, 43% of those interviewed did not know how to contact their lawyers, and only a low number

of clients knew that The Bronx Defenders offers social service intervention and assistance even after clients’ cases have been disposed of.

The Quality of Life Crime Survey showed that clients care deeply about being heard by their lawyers and having the opportunity to tell their side of the story. The survey broke the targeted clients into three groups—those who had never before been arrested, those with between 2 and 9 prior arrests, and those who had been arrested 10 or more times. The Bronx Defenders asked each group to rank various issues in order of importance to them. Even clients with vast experience in the criminal system (those with 10 or more arrests) valued above all else the ability to share their story with their lawyers.

The results of the first survey have already led to changes in the way The Bronx Defenders provides defense services. To improve contact with the office and access to social services, The Bronx Defenders is now preparing a client information sheet which not only describes how to get in contact with the office, but also provides a guide to some available social services like shelters, food kitchens, the civilian complaint review board, and employment agencies. Another form being readied describes in detail how to pay the fines and perform the community service that this group of clients is commonly sentenced to.

The next phase will produce two more surveys, which will target long-term clients with misdemeanor and felony cases. The new survey instruments are designed to assess more broadly these clients’ experiences with their lawyers, the police, and the criminal justice system.

The Bronx Defenders has expressed hope that other offices will conduct similar surveys. “By seeing ourselves through our clients’ eyes, defenders can better provide the care and representation that indigent clients so clearly deserve.” A copy of the Quality of Life Crime Survey instrument is available from the Backup Center or directly from The Bronx Defenders. (Contact information for public defense offices is available on the “About NYSDA” area of the NYSDA web site, www.nysda.org; the survey is also posted on the site.)

BTSP 2000 Trains Trial Attorneys

Working with coaches from around the country, inexperienced trial lawyers from across the state learned in June that focusing on clients’ lives and jurors’ perceptions will improve defense representation. The Defender Institute Basic Trial Skills Program, a centerpiece of NYSDA’s year-round training efforts, guided participants through client interviews, brainstorming theories of defense, *voir dire* (using community members for a realistic exercise), examination of witnesses, and telling the client’s story in opening statement and closing argument. The program highlighted ways in which the lives of public defense clients affect their cases, and

therefore affect how public defense lawyers should handle those cases to be successful.

Outstanding lawyers were paired with experts with backgrounds in theater, mitigation, communications, and other disciplines to work with participants in live exercises and video reviews of their efforts for all stages of trial. The 11 attorney coaches were divided almost equally between those practicing locally and those from outside the state, assuring both a diversity of styles and a firm grounding in New York law. All but two of the communication coaches were from other states. The coaches encouraged attending lawyers to identify and build on personal strengths and helped them conquer individual weaknesses.

In evaluations, one participant said, "I had an expectation that the program would make me a better lawyer, but it didn't make me a 'better' lawyer, it *made* me a lawyer." Another described the Institute as "where I learned to become the lawyer I want to be."

The 55 participating lawyers came from 25 counties, from those with populations under 50,000 to those with populations in the millions. Nearly all those attending had little or no trial experience, with only nine percent having participated in more than five jury trials, and most having done zero to two bench trials. A majority of those attending were from legal aid and public defender offices, with not-for-profit contract providers and assigned counsel making up nearly 20% of the participants. The program provided MCLE credit.

New Ripples in Parole Scandal

In yet another development concerning an alleged parole-for-political-contributions scandal, a former state parole commissioner, Leo Levy, has been indicted. A 15-page indictment unsealed in Brooklyn federal court on June 12 charged Levy, an appointee of former Governor Mario Cuomo, with six counts of perjury and one count of obstruction of justice. Levy reportedly admitted in 1998 grand jury testimony that he had violated his oath of office by letting "impermissible factors" influence his decision to parole armed robber John Kim, whose parents had made campaign contributions to Governor George Pataki. (*Times Union* [AP], 6/13/00.)

Last August, press accounts indicated that former parole official Ronald Hotaling said during his guilty plea in federal court that he was under orders from superiors to inform Parole Board members that the governor's office was interested in Kim's release. The governor's office has denied any impropriety, and no one close to the governor has been charged. (*Times Herald-Record* [online]; *New York Post* [online], 8/17/99.)

Hotaling was the second person to be convicted in the scandal. Former parole commissioner Sean McSherry was convicted by a jury on Aug. 4, 1999, of federal charges including perjury and obstruction of justice for lying to a grand jury.

The investigation was said to be continuing (*Newsday* [online]; *New York Times*, 8/4/99.)

To date, there have apparently been no successful challenges by prisoners to denials of parole by panels of commissioners on which McSherry sat. The *REPORT* is aware of arguments made in some parole appeals that McSherry's presence on a panel tainted the results. The 3rd Department recently rejected a prisoner's *pro se* CPLR article 78 proceeding raising a bias issue as to a panel that included McSherry. The memorandum and order denying relief does not specify what bias was alleged. *Matter of Hernandez v McSherry*, 706 NYS2d 647.

Gerald Hayes Confirmed to County Court Bench

Poughkeepsie lawyer Gerald Hayes was nominated by the governor in April to serve as a Dutchess County Court Judge until the end of the year. The state senate confirmed the appointment on May 15. Hayes, who was a NYSDA member at the time of his appointment, has served as Senior Assistant Public Defender in the Dutchess County Public Defender Office. He reportedly plans to run in the November election for a full 10-year term on the county bench.

10 Million NYSID Numbers Won't Fit

As increasing numbers of people are included in the Computerized Criminal History (CCH) database of the state's Division of Criminal Justice Services (DCJS) through arrest and civil fingerprint checks, the numbering system created in 1980 is filling up. The last available New York State Identification (NYSID) number—9,999,999—is expected to be used sometime in August 2001. Likening the situation to the Y2K problem of last year, DCJS has instituted a "10 Million NYSID Number Project." It would present massive problems for DCJS and agencies that have an interface with the CCH system to expand the relevant numeric field of the current system to allow more digits. Therefore, DCJS will begin next year to re-use low-range NYSID numbers from files that have been purged. (For adult records, only numbers from purged files that contained strictly civil information will be reused; for juvenile records, numbers from files that have been purged due to age or because a disposition was favorable will be reused.) All criminal history records containing a reused NYSID number will include some disclaimer, such as, "This NYSID number was used previously and is now reassigned to this individual."

Reuse of numbers is a temporary solution to the 10 Million NYSID Number Problem. The entire CCH is migrating to a new computer system, which will provide for an expanded NYSID field and other improvements, beginning around 2003. The vigilance that is always necessary when reviewing rap sheets for accuracy may become even more important while the system is in flux. ☺

CONFERENCES & SEMINARS

Sponsor: National Child Abuse Defense & Resource Center
Theme: Child Abuse Allegations: 2000 and Beyond
Dates: September 14-16, 2000
Place: Kansas City, MO
Contact: NCADRC: PO Box 638, Holland OH 43528; tel (419)865-0513; fax (419)865-0526

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; web site <http://www.nysacdl.org>

Sponsor: National Association of Criminal Defense Lawyers
Theme: Making the Case for Life IV: Mitigation Evidence in Capital Cases
Dates: September 15-17, 2000
Place: Houston, TX
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org / www.nacdl.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: DUI Seminar: All the Nuts and Bolts
Dates: September 20-23, 2000
Place: Las Vegas, NV
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org / www.nacdl.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; web site <http://www.nysacdl.org>

Sponsor: New York State Association of Criminal Defense Lawyers and the Federal Public Defender Office for the Districts of Northern NY and VT
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; web site <http://www.nysacdl.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: October 14, 2000
Place: Utica, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 21, 2000
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Sponsor: National Association of Criminal Defense Lawyers
Theme: 2000 Fall Meeting and CLE
Dates: November 1-4, 2000
Place: New York City
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org / www.nacdl.org

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: November 16-19, 2000
Place: New Orleans, LA
Contact: NLADA: tel (202)452-0620; Fax: (202) 872-1031, e-mail: info@nlada.org; web site 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

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; web site www.nlada.org

Job Opportunities

The Hiscock Legal Aid Society in Syracuse, NY seeks a **Staff Attorney** to represent persons unable to afford counsel in criminal matters. The position involves handling a high-volume caseload. Required: demonstrated commitment to public interest law and to serving the indigent. New York bar admission preferred. Salary \$26,500+ DOE. Generous benefits. EOE, committed to serving and employing a diverse population; persons of color and bilingual persons encouraged to apply. Send cover letter and resume, including 3 references, to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202.

The federally funded Domestic Violence Project of the Hiscock Legal Aid Society also seeks a **Staff Attorney**. Responsibilities include: providing full service civil legal representation to victims of domestic violence, including orders of protection, divorce, custody, visitation, and support; conducting significant outreach and education, primarily within the African-American, Latina, and Southeast Asian communities. Salary, etc. same as above. Send cover letter and resume, including 3 references, to address above.

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 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

The US Dept. of Justice Civil Rights Division Criminal Section in Washington, DC, seeks a **Deputy Chief** to supervise case management and litigation activities of trial attorneys and support personnel and to personally participate in litigation to vindicate the rights of victims of police brutality, hate crimes, violence against reproductive health care providers and involuntary servitude. Required: JD degree, active member of the bar in any jurisdiction, 4 years post-JD experience, demonstrated experience supervising others, organizational abilities, and superb writing and editing skills. Federal and criminal trial work desirable. EEO/Reasonable Accommodation Employer. Drug screening required for final

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appointment. Salary GS-15 (\$84,638-110,028) DOE and current salary. Open until July 28. Send cover letter, current resume, writing sample, and current performance appraisal to: US Department of Justice, Civil Rights Division, Criminal Section, PO Box 66018, Washington DC 20035-6018.

The Brennan Center for Justice at NYU School of Law has an **Attorney** opening in its Democracy Program, which employs scholarship, litigation, legislative counseling, and public education to advocate on issues such as ballot access, judicial independence, and others. Required: excellent writing and analytical skills, superb academic record, evidence of outstanding achievement, imagination, and versatility, plus experience in litigation, lobbying, legislative drafting, public education, or scholarship. Salary CWE. EO/AA employer, actively recruits women, people of color, persons with disabilities, and lesbians and gay men. Send cover letter, resume, writing sample, and references to: Administrative Director, Brennan Center for Justice, 161 Avenue of the Americas, 5th Floor, New York NY 10013. No phone calls.

Prisoners' Legal Services of New York (PLS) seeks a **Managing Attorney** for its Plattsburgh office, **Staff Attorneys** for the Poughkeepsie and Plattsburgh offices, and a **Litigation Coordinator** and **Associate Director**, positions that may be located in any of the five PLS offices (Albany, Buffalo, Ithaca, Plattsburgh, or Poughkeepsie). Details have been published in prior issues of the *REPORT*. PLS, with 24 attorneys statewide, provides civil legal services to incarcerated persons in state prisons. Outstanding benefit package including health insurance, substantial leave time, 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. Send resume, writing sample, and list of 3 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.

The Center for Capital Litigation (CCL), formerly the Post-Conviction Defender Organization of South Carolina and the South Carolina Death Penalty Resource Center, is seeking

an experienced **Staff Attorney**. Outstanding recent graduates or those completing clerkships will be considered. CCL is a private non-profit corporation providing direct representation and consultation to indigent capital defendants and death-sentenced inmates primarily in South Carolina. CCL serves as counsel of record for numerous death-sentenced inmates in state capital post-conviction proceedings and in federal habeas corpus proceedings in South Carolina and elsewhere. On occasion, CCL represents capital defendants at trial. CCL also serves as a resource center for appointed counsel in capital cases. In its capacity as a resource center, the CCL has assisted appointed counsel by drafting pleadings, helping obtain necessary experts, and providing various resource materials. Duties: legal research, drafting pleadings, interviewing clients and witnesses, conducting discovery, and providing direct courtroom representation in state post-conviction and federal habeas corpus proceedings. Required: some familiarity with capital post-conviction procedures and death penalty jurisprudence (CCL will provide training opportunities), strong writing skills, ability to work well with troubled, disadvantaged clients. Salary DOE. Send statement of interest, resume, writing sample, and reference list to: Teresa L. Norris, Director, Center for Capital Litigation, PO Box 11311, Columbia, SC 29211. tel (803) 765-0650; fax (803) 765-0705

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Defense Practice Tips

Representing Clients in Federal and State Cases

by **Henriette D. Hoffman** and **Steven M. Statsinger***

Representation of a federal defendant who also has a state case involves many thorny sentencing issues, the answers to which will vary depending on which sovereign has primary jurisdiction, on whether the defendant has already been sentenced in state court, and, if so, on whether the state sentence has been served. This article explains the concept of “primary jurisdiction” and how it affects your ability to achieve the desired goal of concurrent sentences on your client’s state and federal offenses; reviews some of the case law relating to sentencing clients with state and federal cases; discusses United States Sentencing Guideline (USSG) 5G1.3, imposition of a sentence on a defendant subject to an undischarged term of imprisonment, and some of the situations that arise where application of 5G1.3 may be helpful; and discusses downward departures that a district court may grant when your client has a fully discharged sentence in state court and cannot benefit from 5G1.3.

Your Client Has State and Federal Cases Pending Simultaneously

The most common questions that arise when your client has state and federal cases that are pending simultaneously are tactical in nature. In this section, we attempt to address some of these tactical issues, on the assumption that your ultimate goal is to obtain concurrent sentences on the pending cases. To be successful at this, the first consideration is understanding which jurisdiction has “primary jurisdiction” over your client.

The jurisdiction, state or federal, that was the last to pick your client up from the street has “primary jurisdiction” over him. There are four basic variations on this theme:

- If your client was arrested by state authorities, and is then produced in federal court from state custody on a writ of habeas corpus ad prosequendum, he is considered to be “borrowed” by the federal system, and is not in federal custody;
- If your client was first arrested by state authorities, but the charges were dismissed, or he was bailed or paroled, and he is subsequently arrested and detained on federal charges, then the federal system has primary jurisdiction;

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- If your client was first arrested on federal charges, bailed, and then picked up by the state on a different case, the state has primary jurisdiction because it was the last jurisdiction to take your client into custody;
- If your client was first arrested on federal charges and was detained, but then is charged by the state and is produced in the state system on a writ, the federal system retains primary jurisdiction.

It is extremely important that you know who has primary jurisdiction over your client because primary jurisdiction can have a significant impact on your client’s sentence. Under 18 USC 3585(a), the federal sentence commences on the date your client is “received” into federal custody for “service of [the federal] sentence.” If the federal system has primary jurisdiction over your client, then that date is effectively the date sentence is imposed and, under 18 USC 3585(b), he will also get credit for the time he spent in custody awaiting sentencing. However, if the state has primary jurisdiction, not only will your client not be credited for time spent in federal prison awaiting sentence, but the federal sentence will not even commence on the date sentence is imposed. This is because the defendant has been “received” in federal custody only for the purpose of his prosecution and not for “service of sentence,” and he will first be returned to state custody. Unless you take affirmative steps to circumvent this problem, the Bureau of Prisons (the BPO) will only start crediting your client with federal time once he has completed any state sentence and has been returned to the federal system to start serving his federal sentence. And the courts will be powerless generally to help you out. *Thomas v Brewer*, 923 F2d 1361, 1368 (9th Cir 1991). Moreover, if the state has primary jurisdiction, the BOP will not pick up your client after the state sentence has been imposed so that he can start serving his federal time, even if the federal sentence was imposed first. See *Taylor v Reno*, 164 F3d 440, 444 (9th Cir 1998) *cert den* 119 SCt 2377 (1999) (discussing primary jurisdiction).

This area is particularly problematic because it is conventional wisdom that when a client has pending state and federal cases, it is generally best to dispose of the federal case—all the way through sentencing—first. Whether the conventional wisdom applies in your case of course depends on its particular facts and circumstances. But there are several good reasons for assuming it to be true in the ordinary case. State judges seem to be more inclined to impose concurrent sentences than are federal judges, and they are also more likely to let you know before the sentencing proceeding whether the sentence will be imposed concurrently. Also, under the Sentencing Guidelines, your client’s federal criminal history score may go up if he is sentenced in the state case first; it may even go up if he has been convicted in the state and is awaiting sentencing there. See USSG 4A1.2(a)(4).

If your client has pending state and federal cases with a promise of concurrent state time and the state has primary

jurisdiction, a common situation, there are two basic methods for ensuring that your client really ends up with concurrent sentences. The first is to have the state temporarily relinquish custody of your client by releasing him on his own recognizance. As long as your client has been ordered detained in federal court, he will be picked up by the federal authorities. The federal system will now have primary jurisdiction, and your client can safely be sentenced in federal court. After his federal sentencing, the state can writ him back for disposition of the pending case and imposition of the concurrent sentence or, if there is nothing in dispute in the state case, your client can even agree to have the state sentence imposed in absentia while he is serving his federal sentence.

If you cannot get the state to relinquish primary jurisdiction, but still want to have your client sentenced in federal court first, you will need the federal judge's help to get concurrent time. The most obvious solution to the problem, asking the judge to impose the federal sentence concurrently, will not work. The federal judge cannot run the federal sentence concurrent (or consecutive, for that matter), to a state sentence that has not yet been imposed. *United States v Clayton*, 927 F2d 491, 492 (9th Cir 1991). As far as the BOP is concerned, this is an invalid order and it will not be followed.

Instead, you should ask the federal judge to order that the federal sentence commence on the date of imposition. As of November 1999, the BOP has advised us that if the federal judge does so the BOP will start calculating the federal time from that date, even if the state has primary jurisdiction. Another option is to ask the state judge to recommend that the BOP designate the state prison system as the place of incarceration, which BOP can do under 18 USC 3621(b). To be on the safe side, it is best to have the judge make both statements. Also, remember that for the BOP's purposes what the court says on the record is not as important as what appears in the written judgment, since that is all the BOP sees. Make sure you obtain a copy of the judgment so that you can confirm that it contains the recommendations.

If you have reason to feel confident that the federal judge will impose a concurrent sentence, and the state sentence will not increase your client's criminal history score, there is no obvious disadvantage to having the state sentence imposed first. As long as the judgment in the federal case indicates that the federal sentence is to be concurrent to the state sentence the BOP will follow the judge's instructions in calculating your client's federal time. But again, make sure that you check the judgment. If it does not contain the court's order specifying a concurrent sentence, the BOP will treat the sentence as presumptively consecutive. See 18 USC 3584(a). There are many additional concerns that flow from this scenario, however, and they are addressed below.

Questions Relating to Sentence Credit When a Defendant Has Both State and Federal Cases

In addition to determining which sovereign has primary jurisdiction and how to maximize the possibility that your

client gets concurrent time on his state and federal sentence, a distinct set of questions relating to sentence credit arises when a defendant has been sentenced in a state case before his federal sentencing. Some of the more frequently encountered problems are discussed below.

Defendant Has an Undischarged Sentence at the Time the Federal Sentence Is Imposed

Section 5G1.3 of the Sentencing Guidelines governs the imposition of a sentence on a defendant subject to an undischarged term of imprisonment. An "undischarged" term is a sentence that the client is still serving at the time of the federal sentence. Subsection (a) mandates a sentence consecutive to the undischarged term of imprisonment "if the instant offense was committed while the defendant was serving a term of imprisonment (including work release, furlough, or escape status)." *United States v Kim*, No. 98-50203 (9th Cir 12/2/99). Subsection (b) applies and mandates a concurrent sentence if the undischarged term of imprisonment resulted from offenses that were fully included as relevant conduct in determining the offense level of the instant offense. See *Witte v United States*, __ US __, 115 S Ct 2199 (1995). In any other case, subsection (c), a policy statement, gives the district judge broad discretion to impose a concurrent sentence. It provides that "the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense." *United States v Kikuyama*, 150 F3d 1210 (9th Cir 1998).

If subsection (a) applies to your client, you may still argue that the applicable statute, 18 USC 3584(a), permits the imposition of a concurrent sentence, and the court therefore has the authority to depart from 5G1.3(a) and impose a concurrent sentence. See *United States v Schaefer*, 107 F3d 1280 (7th Cir 1997) (5G1.3(a) creates presumption in favor of consecutive sentence but district judge may depart); *United States v Mihaly*, 67 F3d 894 (10 Cir 1995) (5G1.3 does not preclude departure from Guidelines and sentencing concurrently). *United States v Whitely*, 54 F3d 85, 89 n.2 (2d Cir 1995) (court does not decide what effect 5G1.3(a) has on district court's discretion under 18 USC 3584(a) to impose concurrent or consecutive sentence).

If subsection (b) applies, the court should follow the application instructions in Application Note 2 and indicate in the judgment that the sentence is not a departure but that the defendant was credited under 5G1.3(b) with time served in state custody that will not be credited to the federal sentence under 18 USC 3585(b). The district court may not achieve the desired sentence by backdating the "commencement" of the federal sentence. The district court has no power to commence a federal sentence. *United States v Gonzalez*, 192 F3d 350 (2d Cir 1999); see also *Taylor v Reno*, *supra*, 164 F3d at 445-46.

Many cases will involve application of the discretionary subsection (c). In determining whether a “reasonable punishment” warrants a concurrent sentence, the district court should consider the factors set forth in 18 USC 3553(a), which include the need for the sentence imposed (A) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense”; (B) to afford deterrence; (C) to protect the public; and (D) to provide for rehabilitation. *United States v Garcia-Cruz*, 40 F3d 986, 987 (9th Cir 1994). Note 3 to the Commentary of 5G1.3(c) further provides that the district court should be “cognizant” of the type and length of the undischarged sentence; the time already served and the likely release date of the undischarged sentence; whether it was imposed in state or federal court; and any other relevant circumstance. See *United States v Kikuyama*, 150 F3d 1210, 1213 (9th Cir 1998).

A recent 2nd Circuit case has held that the district court has discretion under subsection (c) to run the federal sentence concurrent to an undischarged sentence for violation of probation, parole, or supervised release. This is so notwithstanding Note 6 to 5G1.3 which states that the sentence on the instant offense “should” be imposed to run consecutively to the term imposed for the violation of probation, parole or supervised release to achieve an “incremental” penalty. See *United States v Maria*, 186 F3d 65 (2d Cir 1999). The Circuit rejected the government’s argument that “should” was mandatory and held that unlike “shall,” which is mandatory, “should” implies, suggests, or recommends, but does not require. *Id* at 70. This principle applies whenever the defendant’s federal offense triggers a violation of his supervision. For example, it is relevant in any illegal reentry case where the defendant, who was deported after a prior conviction, reentered the United States illegally while his release status was still in effect. Under these circumstances, the fact of the reentry alone constitutes a violation of the defendant’s release status and will likely result in a violation of your client’s probation, parole or supervised release.

Defendant Has a Fully Discharged Sentence When the Federal Sentence Is Imposed

Where 5G1.3 does not apply because the defendant has fully served a prior state sentence, which accordingly is no longer “undischarged,” counsel should try to recapture custody time that will not be credited by the BOP under 3585 by moving for a downward departure, pursuant to USSC 5K2.0. The 2nd and 9th Circuits have recognized the validity of departures in cases where the government delay in taking the defendant into federal custody resulted in the loss of credit for time in detention or loss of the possibility of a concurrent sentence under 5G1.3(c). Another scenario where a retroactive concurrency downward departure may be appropriate is where 5G1.3(b) would have required a concurrent sentence if your client’s state sentence had not been fully discharged. Even though the state sentence has fully ex-

pired, a downward departure may be warranted by analogy to 5G1.3(b).

Downward Departure for Detention That Will Not Be Credited to Any Sentence

This problem arises in the context of illegal reentry cases where the defendant is serving a state sentence and has been discovered by the INS, but the government does not transfer him to federal custody and charge him with illegal reentry until after expiration of the state sentence. For example, the defendant in *United States v Montez-Gaviria*, 163 F3d 697 (2d Cir 1998), served eight months in state custody on an INS detainer after discharge from his state sentence and before he was taken into federal custody. Under these circumstances, a district court can downwardly depart under 5K2.0 to compensate the defendant for the period of time he was in custody solely because of the federal government’s delay in transferring him to federal custody and for which the BOP will not credit him under 3585(b). What the district court cannot do is backdate the “commencement” of a federal sentence on the illegal reentry case because determinations of when a defendant’s sentence begins and whether he should receive credit for prior time spent in custody are solely the province of the BOP. *Id* at 700-701.

Downward Departure Where Government Delay Deprives Defendant of Possibility of a Concurrent Sentence Under 5G1.3(c)

Another factual variation involves aliens charged with illegal reentry who are discovered by the INS in state custody but not brought into federal custody until near or after the end of their state sentences. Thus, unlike the defendant in the above scenario, the defendant is getting credit towards his state time. But the delay in federal prosecution results in a lost opportunity of getting concurrent time on the federal sentence. For example, in *United States v Sanchez-Rodriguez*, 161 F3d 556 (9th Cir 1998) (*en banc*), the INS was aware that the defendant had illegally reentered and was in state custody, but the government delayed in filing charges and bringing the defendant into federal court. The defendant was indicted on the illegal reentry case before this state prison term was over and before the state sentence had fully expired, but he lost 10 months of possible concurrent time because of the government’s delay. On this record, the 9th Circuit acknowledged that departure was permissible to compensate the defendant for the lost opportunity to serve more of his state term concurrent with the federal term. *Id* at 564.

Retroactive Concurrency Departures Where Federal Prosecution Is Related to Conduct in Prior State Prosecutions

When a defendant’s federal offense is based on conduct underlying a discharged prior state offense which has been taken into account as relevant conduct on the federal offense,

(continued on page 31)

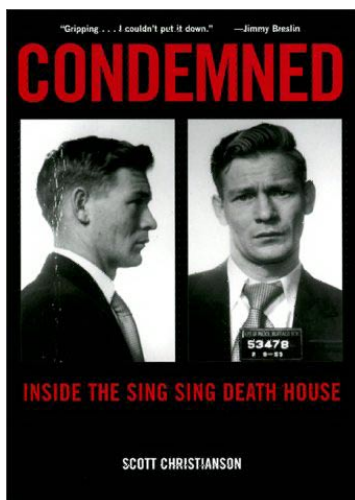
Book Review

Condemned: Inside the Sing Sing Death House

By Scott Christianson
NYU Press
166 pages; \$24.95

by Barbara DeMille*

Scott Christianson's *Condemned*, dedicated to Jonathan Gradesh (and, one assumes, to his work assuring adequate defense for the indigent), is a picture book. Not a coffee table



book, but a record, culled from files taken from the Death House at the Ossining Correctional Facility, more popularly known as Sing Sing. Built in 1825, Sing Sing has long been a synonym for horror: slave labor in prison-operated marble quarries in the nineteenth century; water torture, whipping; starvation and disease; and in 1891, the introduction of the electric chair.

With access to records opened to the New York State Education Department in 1977, Chris-

tianson presents the photographs of the people who worked there, were imprisoned there, and who routinely died there. Not from torture—unless you count walking to your known death torture—not from starvation or overwork but chosen by the citizens of New York: those citizens convinced from 1891 through 1963 that death should be the reward for someone who'd killed someone else.

The pictures, routine front and side views taken upon arrival, of the sane, the deranged, the retarded, the guilty and innocent, many of them young, nearly all of them poor and poorly educated, haunt. Their story is in their eyes: puzzled, disoriented, exhausted, resigned, defiant, numb.

According to Christianson:

Under today's stricter rules of evidence . . . a large percentage of the prisoners in the Sing Sing Death House probably would not have been sentenced to die. Court records reveal many who were questioned without a

defense lawyer present, held for long periods under harrowing conditions, convicted on the basis of coerced confessions, identified in one-man line-ups, or nailed by illegally obtained evidence that was not excluded as fruit from a poisonous tree. Many non-white defendants were convicted by all-white juries from which blacks and all other persons of color had been deliberately barred. Youthful first-time offenders were sent to their deaths without any mitigating evidence presented in their favor; severely retarded, mentally ill, or seemingly insane persons were held criminally responsible and killed.

The manner of killing was efficient. A fitting subtitle for this book could be *How to Conduct Murder in Cold Blood*. The Death House, constructed as a "prison within a prison" in 1922 after several failed escape attempts, was neat, hygienic, and medically up-to-date. It contained thirty-nine cells, six of which radiated from a central staging area known as the Dance Hall, where the "living bodies," as they were commonly called, were held immediately prior to walking to the chair. Multiple executions were not uncommon. Thursday night was routinely execution night.

Against the stark documentation, the mechanical process of death, Christianson introduces the human: a list of the possessions left behind in Ethel Rosenberg's cell; final letters to their children by both Julius and Ethel; an ungrammatical, impassioned plea to the warden by Helen Fowler, convicted and sentenced to die for the murder of her abusive, alcoholic husband, pleading mitigating circumstances, dependent children, and possible perjury at her trial. Lewis Lawes, warden of the Death House from 1920 to 1941, administered the death penalty with all efficiency while simultaneously lecturing and writing extensively against it. About 1% of those who murder are executed he claimed; twenty executions in one year did not indicate a mere twenty murders in New York State.

I'd like to know more about Warden Lawes, as I want to know more about Helen Fowler and each and every one of these impersonal photographs of the condemned. A failing as well as a strength of this book is its sparse exposition. By presenting the archival material in all of its banality—one is strongly reminded of Hannah Arendt's phrase "the banality of evil"—Christianson gives me chills. The sheer succession of black and white pictures and documents, presented unemotionally, cumulatively, appall.

But each of these condemned is a story and a story barely told. A deeper, more thorough exposition of cases, procedures, and most of all, the feelings of not only the condemned and their relatives but also those hired to do the will of the state is waiting within this brief text to be told. On the strength of what Christianson *has* done, I hope he will in time proceed, dig deeper, probe further, flesh out more detail, give us perhaps the experience of being human and living and waiting within an inexorable killing machine. ☪

*Barbara DeMille is a freelance writer with a Ph.D. in English Literature from the State University of New York at Buffalo. She has published several scholarly articles, and her work was also heard on Northeast Public Radio, WAMC, from 1993 to 1995, as well as having appeared in many magazines and newspapers including the New York Times and Christian Science Monitor.

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

Habeas Corpus (Federal)

HAB; 182.5(15)

Edwards v Carpenter, No. 98-2060, 4/25/00

The respondent entered a guilty plea to aggravated murder and robbery and was sentenced to life imprisonment with parole eligibility after 30 years on the murder charge. On direct appeal, represented by new counsel, the respondent raised only the issue that he should have been eligible for parole after 20 years rather than 30. The Ohio Court of Appeals affirmed, and the respondent did not appeal to the Ohio Supreme Court. After unsuccessfully seeking state postconviction relief *pro se*, the respondent, again with new counsel, filed an application to reopen his direct appeal on the ground that his original appellate counsel was constitutionally ineffective in failing to raise a challenge to the sufficiency of the evidence. The application was dismissed because the respondent failed to show, as Ohio law required, good cause for filing after the 90-day period allowed. The state high court affirmed. A *habeas corpus* writ was granted by the federal district court and upheld by the Court of Appeals.

Holding: A procedurally defaulted ineffective assistance of counsel claim can serve as cause to excuse the procedural default of another *habeas* claim only if the *habeas* petitioner can satisfy the "cause and prejudice" standard with respect to the ineffective assistance claim itself. *Coleman v Thompson*, 501 US 722, 750 (1991). The principles of comity and federalism underlie the exhaustion doctrine. The procedural default rule protects the integrity of that doctrine. *O'Sullivan v Boerckel*, 526 US 838, 848 (1999). The respondent may be able to meet on remand the cause-and-prejudice standard with regard to the ineffective assistance claim, having chosen to date to argue that it was not applicable. Reversed and remanded.

Dissent: [Breyer, J] "*Why* [emphasis in original] should a prisoner, who may well be proceeding *pro se*, lose his basic claim because he runs afoul of state procedural rules governing the presentation to state courts of the 'cause' for his not having followed state procedural rules for the presentation of his basic federal claim?"

Habeas Corpus (Federal)

HAB; 182.5(15)

Slack v McDaniel, No. 98-6322, 4/26/00

Holding: The petitioner's *habeas* claims arising from his Nevada conviction were filed in federal district court before the Antiterrorism and Effective Death Penalty Act (AEDPA) became effective. Under AEDPA, an appeal of the dismissal of a *habeas* petition may only be taken where a certificate of appealability is issued, which requires a substantial showing of the denial of a constitutional right. 28 USC 2253(c). The petitioner sought to appeal after the AEDPA became effective, and must meet its requirements, as an appeal is a distinct step in litigation. *Hohn v United States*, 524 US 236, 241 (1998). The state's contention that no appeal lies from dismissals based on procedural grounds is rejected. The AEDPA's language codifies with modification the standard of *Barefoot v Estelle* (463 US 880, 884 [1983]). Where dismissal was on procedural grounds, a certificate of appealability can issue if a prisoner shows that jurists of reason would find debatable both whether the petition stated a valid claim that a constitutional right had been denied and whether the district court's procedural ruling was correct.

The petitioner had filed a 1991 federal *habeas* petition, then sought to return to state court to exhaust further issues. The district court dismissed the petition without prejudice in an order specifically granting leave to file an application to renew once all state remedies were exhausted. When the petitioner refiled, the new petition was improperly dismissed as a second or successive petition. The ruling in *Rose v Lundy*, 455 US 509, 520 (1982) that petitions containing both exhausted and unexhausted claims must be dismissed "contemplated that the prisoner could return to federal court after the requisite exhaustion." Concern about undue delay from repeated filing of mixed petitions can be countered by other means, such as state procedural bars and the federal rules vesting courts with flexibility to prevent vexatious litigation. See Fed. Rules Civ. Proc. 41(a) and (b). Decision reversed, case remanded.

Concurrence in Part: [Stevens, J] Pre-AEDPA law should govern appeals of *habeas* cases brought in federal district court before the act's effective date.

Dissent in Part: [Scalia, J] The petitioner's inclusion of new unexhausted claims in his postexhaustion petition rendered it second or successive.

Retroactivity (General)

RTR; 329(10)

Sex Offenses (Corroboration)

SEX; 350(2)

Carmell v Texas, No. 98-7540, 5/1/00

The petitioner was convicted of multiple sexual offenses occurring from 1991 to 1995 involving his stepdaughter, 12 to 16 years old, before 1993, Texas law specified that a sexual offense complainant's testimony could not support a conviction unless corroborated or reported to someone within six months of the offense. However, a complainant's testimony alone was sufficient if the complainant was under 14 at the time of the offense. The statute was amended in 1993 to allow the complainant's testimony alone to support a con-

US Supreme Court *continued*

viction where the complainant was under 18. The petitioner claimed that four counts against him were based solely on the testimony of the complainant, who was not under 14 at the time, and did not meet the statute's exceptions. The Texas appellate courts rejected this argument.

Holding: The petitioner's convictions on the counts at issue cannot be sustained. Among the types of criminal laws prohibited by the *Ex Post Facto* Clause of the US Constitution are those that alter the legal rules of evidence so that less, or different, testimony is required than at the time of the offense. *Calder v Bull*, 3 Dall 386, 390 (1798) (Chase, J). A law reducing the quantum of evidence required to convict an accused subverts the presumption of innocence by making it easier to meet the threshold for overcoming that presumption. The decision in *Collins v Youngblood* (497 US 37 [1990]) did not cast out this category of *ex post facto* protection. The decision in *Hopt v Territory of Utah* (110 US 574 [1884]) allowing retroactive application of a statute enlarging the class of persons competent to be witnesses does not control here. Judgment reversed, case remanded.

Dissent: [Ginsberg, J] *Ex post facto* analysis does not depend on the wisdom of the challenged statute. The statute in question views the testimony of older sexual assault victims in the same light as that of accomplices. It restricts how the state may prove its case without in any way affecting the burden of persuasion. A change in such an evidentiary rule does not constitute an *ex post facto* violation.

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

Discrimination (Gender) DCM; 110.5(30)

United States v Morrison, Nos. 99-5; 99-29, 5/15/00

After a female student at Virginia Polytechnic Institute alleged that two male students had raped her and that one of them made offensive comments about the act and, publicly, about sex acts with women generally, a school-conducted hearing was held about the allegations under a Sexual Assault Policy. One of the males was found guilty of sexual assault and suspended for two semesters. This sentence by the university's judicial committee was upheld by the dean. However, when a court challenge to the ruling was threatened, a second hearing was held, under an Abusive Conduct Policy, because the Sexual Assault Policy had not been widely circulated among students. The male was found guilty of "using abusive language" and received the same suspension as before. A school administrator set aside the punishment as excessive when compared to other violations of the Abusive Conduct Policy. The female student dropped out and sued both males under 42 USC 13981, and the school for violations of Title IX of the Education Amendments of 1972, 20 USC 1681-1688. The United States intervened. The

district court dismissed all claims. The Court of Appeals *en banc* upheld the district court's dismissal of the claims under 13981. (The Title IX claims, one of which was ordered held in abeyance pending other decisions, were not included in the grant of *certiorari*.)

Holding: Congress lacked authority to provide the civil remedy included in 13981 for persons injured by crimes of violence motivated by gender against their attackers. The Commerce Clause of the federal constitution does not support congressional regulation of "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Nor is the remedy authorized by Congress's remedial power under §5 of the 14th Amendment, which is limited to state conduct and cannot reach individual conduct. *Civil Rights Cases*, 109 US 3, 11 (1883). Disparate treatment by the states of gender-based claims does not sufficiently distinguish the instant case from *Civil Rights Cases*. The civil remedy under 13981 is not aimed at counteracting and redressing state conduct, but individual conduct. Judgment affirmed.

Concurrence: [Thomas, J] The "substantial effects" test encourages the view that the Commerce Clause has no limits; the court should replace that test with one more consistent with the original understanding of congressional power.

Dissents: [Souter, J] The legislative record here is more voluminous than that compiled in support of Title II of the Civil Rights Act of 1964, which was upheld against Commerce Clause challenges in *eg Heart of Atlanta Motel, Inc. v United States* (379 US 241 [1964]). [Breyer, J] The Commerce Clause provides an adequate basis for this statute.

Federal Law (General) FDJ; 166(20)

Fraud (General) FRD; 176(10)

Fischer v United States, No. 99-116, 5/15/00

The petitioner was convicted of defrauding an organization receiving benefits under a federal assistance program (18 USC 666[a][1][A]), and of paying kickbacks to one of its agents. 18 USC 666(a)(2). The organization was a participant in the Medicare program. The Court of Appeals upheld the convictions.

Holding: The federal bribery statute prohibits defrauding organizations that receive, under a federal program, benefits over \$10,000 in a one-year period. 18 USC 666(b). An organization is not a beneficiary of a federal program merely because the organization receives federal funds. The program's structure, operation, and purpose must be examined to see if the federal funds are designed to guard, aid, or promote the well-being of the organization, to provide useful aid to the organization, or to give the organization financial help in time of trouble. Medicare payments are made not just to reimburse for the treatment of qualifying individuals but to help the hospital make available and maintain a certain level and quality of care. *See* 42 CFR 413.9(b)(2). Because one beneficiary of an assistance program (qualify-

US Supreme Court *continued*

ing patients) can be identified does not foreclose the existence of others. The government has a legitimate and significant interest in prohibiting fraud or bribery involving Medicare providers. *Cf Salinas v United States*, 522 US 52 61 (1997). Judgment affirmed.

Dissent: [Thomas, J] Hospitals do not receive “benefits” from the federal government, but merely payments for costs pursuant to a market transaction.

Federal Law (General)	FDL; 166(20)
Parole (Revocation)	PRL; 276(40)
Retroactivity (General)	RTR; 329(10)

Johnson v United States, No. 99-5153, 5/15/00

The Sentencing Reform Act of 1984 eliminated most forms of parole and substituted supervised release, a form of postconfinement monitoring overseen by the court rather than the Parole Commission. The petitioner was sentenced in 1994 to imprisonment followed by a term of supervised release. When, in 1995, he violated conditions of his release, the district court ordered an 18-month prison term to be followed by an additional 12 months of supervised release without stating upon what authority the added period of supervision was given. The 6th Circuit Court of Appeals affirmed.

Holding: The *Ex Post Facto* Clause, US Const, Art. I, §9, bars application of a law that inflicts a greater punishment than was provided for the crime when committed. *Clader v Bull*, 3 Dall. 386, 390. Postrevocation sanctions are to be treated as part of the penalty for the initial offense. *Eg United States v Wyatt*, 102 F3d 241, 244-245 (CA7 1996). If the added period of supervision here was imposed on the basis of 18 USC 3583(h), which was added in 1994, an *ex post facto* issue would exist. But there is no indication that Congress intended 3583(h) to be applied retroactively. At the time of the petitioner’s conviction, 3583(e) authorized a court to revoke supervised release and require that some or all of the term of supervised release be served in prison without credit for time already spent on release. This portion of the statute provides authority for imposition of a further period of supervision after imprisonment for violation of release terms. Judgment affirmed.

Concurrence in Part: [Kennedy, J] A portion of the court’s opinion raises more issues than it resolves about 18 USC 3583(a).

Concurrence in Judgment: [Thomas, J] A textual analysis is sufficient, further discussion as to congressional purpose is unnecessary.

Dissent: [Scalia, J] The plain language of the statute should be applied. The revocation of supervised release cancels it. There is no authorization for a new term to replace the one that has been revoked.

New York State Court of Appeals

Domestic Violence (General)	DVL; 123(10)
Evidence (Hearsay)	EVI; 155(75)

People v Clark, No. 57, 5/4/00

Holding: The Appellate Division modified a County Court order by reinstating a count of the indictment charging first-degree criminal contempt for violation of an order of protection. The written order, coupled with a trooper’s testimony that the judge informed the defendant that the order was issued for the protection of the defendant’s wife, established that the defendant had sufficient notice of the prohibited conduct and to whom it related. Notice of the conduct prohibited by an order of protection may be given orally, in writing, or in combination. The evidence here is sufficient to support all the elements of the charge stemming from the alleged violation of the order. *See People v McCowan*, 85 NY2d 985, 987. The trooper’s testimony was not inadmissible hearsay, as it was offered “not for the truth of its content but to evidence the fact that the statement was made” (*People v Davis*, 58 NY2d 1102,1103; *see also*, Prince-Richardson, Evidence § 8-105 [Farrell 11th ed]).” Order affirmed.

Misconduct (Judicial)	MIS; 250(10)
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People v Brown, No. 61, 5/4/00

Holding: “Order affirmed for reasons stated in the memorandum of the Appellate Division (262 AD2d 570).”

Accomplices (Principal)	ACC; 10(30)
Due Process (Vagueness)	DUP; 135(35)
Homicide (Murder [Intent])	HMC; 185(40[p])

People v Couser, No. 62, 5/4/00

The defendant was charged with “commanding” from his jail cell a “hit” on a material witness. When the “hit men” failed to locate the witness, they killed one of the witness’s family members. The defendant was indicted for first-degree murder. County Court dismissed the second count of the indictment, finding the definition of the term “command” to be speculative, violating 8th Amendment constitutional standards. The Appellate Division reinstated that count.

Holding: A defendant’s criminal responsibility for first-degree murder can be based upon the conduct of another when that defendant “commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter.” Penal Law 125.27[1] [a] [vii]. Section 20 contains the definition of “criminal liability for the conduct of another,” which may occur when someone “solicits, requests, commands, importunes, or intentionally aids

NY Court of Appeals *continued*

[another] person to engage in [criminal] conduct.” Penal Law 20.00. This defendant argued that because the aggravating factors that trigger the death penalty are the same aggravating factors that delineate first-degree murder, the statutory aggravating factors must be scrutinized under the 8th Amendment even though he cannot be exposed to a death sentence. Not sentenced to death, the defendant has standing to make a standard due process vagueness assertion. The word “command” does not suffer from vagueness (see *People v Foley*, __ NY2d __ No. 17), as it has a commonly accepted meaning—“to direct authoritatively.” Sufficient evidence was presented to the grand jury to support this count. Order affirmed.

First Department

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

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories]) (Motions to Suppress [CPL Article 710]) (Plain View Doctrine) (Warrantless Searches [Plain-view Objects]) SEA; 335(15[f]) (45) (53) (80[k])

People v Mena, Nos. 2919; 2920, 1st Dept, 2/3/00

After a jury trial, the defendant was convicted of second-degree murder and pled guilty to third-degree criminal possession of a controlled substance.

Holding: The prosecution did not meet its burden at the suppression hearing of showing that the arresting detective’s warrantless search of the locked, impounded car fell within the plain view exception, the only theory relied upon by the prosecutor at the hearing. See *Arizona v Hicks*, 480 US 321 (1987). The narcotics found in the vehicle—the basis for the defendant’s indictment for third-degree criminal possession of a controlled substance—should have been suppressed. Introduction of the drugs as evidence in the defendant’s murder trial was harmless error. There was overwhelming evidence of guilt, including testimony from an eyewitness who knew the defendant. The drugs represented a minor portion of the motive-related evidence, which was only one component of the prosecutor’s case. Judgment (murder) affirmed; judgment (drugs) reversed, motion to suppress granted, indictment dismissed. (Supreme Ct, Bronx Co [Massaro, JJ])

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

Parker v New York State, No. 259, 1st Dept, 2/17/00

Holding: The state sought a protective order, but failed to demonstrate that a specific public interest would be adversely affected so as to exempt from disclosure under the public interest privilege the documents at issue. See *Matter of World Trade Center Bombing Litig. v Port Auth.*, 93 NY2d 1, 8. An *in camera* review revealed that inmates’ names from command logs and correctional officers’ social security numbers from incident reports constituted the only sensitive or confidential information in the requested documents which might harm the public interest if disclosed. See *Cirale v 80 Pine St. Corp.*, 35 NY2d 113). Order modified to redact inmates’ names and officers’ social security numbers, and otherwise affirmed. (Ct of Claims, New York Co [Marin, JJ])

Counsel (Competence/Effective Assistance/Adequacy) (Malpractice) COU; 95(15) (23)

Sentencing (Appellate Review) (Determinate Sentencing) (Hearing) SEN; 345(8) (30) (42)

Biegen v Rooney, No. 286, 1st Dept, 2/17/00

Holding: The court correctly granted the defendants’ motion for summary judgment in an action for legal malpractice, in which the plaintiff claimed that he had been erroneously advised as a criminal defendant about the nature of the reduction in sentence that he would receive for “good behavior.” Public policy considerations bar malpractice actions arising from negligent representation in criminal proceedings where the plaintiff cannot assert innocence. “[T]he causal effect, or lack thereof, of the alleged malpractice on the plaintiff’s conviction is irrelevant.” (*Malpeso v Burstein & Fass*, 257 AD2d 476).“ The plaintiff’s claim is founded on baseless speculation that his indeterminate sentence of 35 months to nine years would have been reduced to a determinate sentence of 35 months if the court had been made aware of the good behavior issue. Judgment affirmed. (Supreme Ct, New York Co [Cohen, JJ])

Defenses (Defense of Others) (Justification) (Mistake of Fact or Law) DEF; 105(10) (37) (40)

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

Witnesses (General) WIT; 390(22)

People v Degondea, No. 1972, 1st Dept, 2/17/00

The defendant was convicted of murder. He had offered the justification defense that he thought the deceased undercover officer and others at whom he fired were drug dealers trying to rob him.

First Department *continued*

Holding: This case was remitted earlier for a reconstruction hearing to determine the substance of jurors' *voir dire* statements as to whether they were biased. *People v Degondea*, 256 AD2d 39, 41-42. Independent review of the transcript showed that the defendant did not establish by a preponderance of the evidence that the juror at issue expressed a bias that would have precluded that juror from rendering an impartial verdict. CPL 270.20[1][b]; see *People v Fernandez*, 81 NY2d 1023, 1024. The juror, a friend of a police captain, said at the hearing that he would be uncomfortable hearing a case involving a police officer, but did not remember if he had said so during *voir dire*. He was "pretty sure" that he had been *voir dired* about his ability to be impartial and had "probably said he could be." The prosecutor said that he routinely asked jurors about their impartiality; defense counsel thought the juror's tone when responding to that question indicated that the friendship would affect the juror's ability to sit fairly. The totality of the record shows no error in the court's refusal to excuse the juror for cause. *People v Smith*, 232 AD2d 209 *lv den* 89 NY2d 946.

The refusal to instruct the jury on the use of deadly physical force in defense of a third person was harmless error. See *People v Albino*, 65 NY2d 843. The defense did not show diligence in seeking to secure the attendance of an expert pathologist; the requested adjournment was properly denied. Judgment affirmed. (Supreme Ct, New York Co [Leff, JJ])

Civil Practice (General) CVP; 67.3(10)

**Murray v N.Y.C. Housing Authority, No. 2466,
1st Dept, 2/24/00**

Holding: The plaintiff informed the defendant housing authority on at least two occasions that the door to her public housing apartment bathroom had come off its hinges. Months later, the door was not still not fixed and was usually kept leaning on a bathroom wall. The plaintiff slid the door into the bathroom doorway for privacy while babysitting her grandsons and the door fell, striking her. The Appellate Term of the Supreme Court erred when it reversed the order of the Bronx County Civil Court granting the defendant-appellant's motion for summary judgment. The sole proximate cause of the plaintiff's injuries was the plaintiff's action, not the housing authority's negligence. Reversed. (Supreme Ct, Appellate Term, Bronx Co, reversing Civil Ct, Bronx Co [Samuels, JJ]).

Dissent: [Mazzarelli, JJ] Factual issues exist as to whether a reasonable person would attempt to reposition a door to assure privacy while using a bathroom and whether the plaintiff's injuries flowed from the defendant's failure to repair the door.

Insanity (Civil Commitment)

ISY; 200(3)

**Application of Consilvio v Diana W., No. 3034,
1st Dept, 2/24/00**

Holding: The respondent was admitted to a psychiatric hospital upon being found unfit to stand trial and diagnosed with chronic paranoid schizophrenia with acute psychotic features. At a retention hearing, a doctor testified about the respondent's continuing delusions (*eg* that a balloon was protecting her). The doctor opined that the respondent (who had failed, prior to arrest, to seek treatment for a fractured ankle and suffered weight loss while homeless) would be a danger to herself and others if released. The respondent's friend testified that the respondent could live with him if released, that he knew of no evidence that she posed a danger, that he would report any expressions by the respondent of a desire to hurt herself or others, and that the respondent seemed over-medicated at the hospital. The respondent testified that she wanted to leave the hospital and would seek follow-up therapy and medication, but denied having a psychiatric history and mental illness. The court erred when it granted an order of release. The petitioner demonstrated by clear and convincing evidence that the respondent is mentally ill, in need of continued care and treatment, and that she is a danger to herself and/or others. *Matter of Ford v Daniel R.*, 215 AD2d 294, 295. Order reversed. (Supreme Ct, New York Co [Freedman, JJ])

Counsel (Competence/Effective Assistance/Adequacy)

COU; 95(15)

Witnesses (Defendant as Witness)

WIT; 390(12)

People v Mason, No. 62, 1st Dept, 2/29/00

Holding: The court, at the behest of defense counsel, initially prohibited the defendant from testifying. The defendant told the jury, following defense counsel's first summation, that the judge had prevented him, against his will, from testifying and that the closing argument of defense counsel was inaccurate. The court then allowed the defendant to testify. The prosecution and the defense gave second summations. The defendant had the right, under the state and federal constitutions, to testify in his own behalf. See US Const 14th Amend; NY Const, Art I, § 6; *People v Harami*, 93 AD2d 867, *Spradling v Texas*, 455 US 971, 973 (1982). The fundamental decision to testify is one of a few options that defendants retain authority to choose among after accepting the assistance of counsel. *People v White*, 73 NY2d 468, 478 *cert den* 493 US 859. The gravity of the error, and the fact that it led the court to deviate from the order of trial prescribed by CPL 260.30, precludes a finding that the errors were harmless beyond a reasonable doubt. See *eg People v Criminals*, 36 NY2d 230, 237. Counsel's misunderstanding of the law led directly to the defendant's prejudice. Judgment re-

First Department *continued*

versed, remanded for new trial. (Supreme Ct, New York Co [Corriero, JJ])

Dissent: [Saxe, JJ] The court adequately corrected its initial error when it allowed the defendant to testify following his outburst in court. The gravity of the error should be considered in light of the “overwhelming” nature of the evidence against the defendant and considered harmless.

Burglary (Elements) (Evidence) BUR; 65(15) (20)

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

People v Perez, No. 65, 1st Dept, 2/29/00

Holding: The court erred by dismissing a grand jury indictment for third-degree burglary on the grounds that the prosecutor did not produce evidence necessary to satisfy the necessary element of “intent to commit a crime” under Penal Law 140.20. The prosecution’s evidence, assessed in the light most favorable to the prosecution, was sufficient to sustain an indictment for third-degree burglary. The defendant was seen walking back and forth in front of closed premises three times before he illegally entered them, running toward them just after the store next door had closed, and walking inside the premises’ loading dock area just before he was found in the inner office, where a shopping bag of candies had been moved near the exit. The evidence supported an inference that he harbored criminal intent beyond just positioning himself inside.

The prosecutor did not err in his charge to the grand jury. The prosecutor’s duty under CPL 190.25(6) is satisfied “where the Grand Jury has been provided with sufficient information to intelligently decide whether a crime has been committed and whether legally sufficient evidence established the material elements of the crime (*People v Goetz*, 68 NY2d 96, 115).” The lack of an instruction on the legal definition of intent was not fatal, as the meaning of the term was obvious and needed no explanation. *See People v Levens*, 252 AD2d 665, 666 *lv den* 92 NY2d 927. Order reversed. (Supreme Ct, Bronx Co [Williams, JJ])

Freedom Of Information (General) FOI; 177(20)

Application of Lugo v Galperin, No. 413, 1st Dept, 2/29/00

Holding: The petitioner’s Freedom of Information Law (FOIL) application was properly denied. The petitioner believed that confessions or statements existed in the prosecutor’s file bearing upon the crimes for which the petitioner was convicted. The belief was based upon a book about a prosecution that was closely related to the petitioner’s own case. An assistant prosecutor said that he had conducted a diligent search of the file and did not find the requested

documents. This satisfied the respondent’s FOIL obligations. *See Matter of Swinton v Records Access Officers*, 198 AD2d 165. Order affirmed. (Supreme Ct, New York Co [McCooe, JJ])

Second Department

Evidence (Sufficiency)

EVI; 155(130)

People v Alston, No. 98-08308, 2nd Dept, 3/06/00

Holding: The defendant was convicted of fourth-degree criminal possession of a weapon based on possession of a dangerous instrument with intent to use it unlawfully against another. Penal Law 265.01(2). There was no showing that the pellet gun was loaded, fired, or capable of being fired, so the evidence adduced by the prosecutor was not sufficient to support a finding that the defendant’s actions satisfied all of the necessary elements of the crime. *See Matter of Angel Q.*, 194 AD2d 793. Judgment reversed, indictment dismissed. (Supreme Ct, Queens Co, [Rios, JJ])

Counsel (Conflict of Interest)

COU; 95(10)

Family Court (General)

FAM; 164(20)

Matter of Child Welfare Administration, Legal Aid Society of the City of New York, No. 99-08274, 2nd Dept, 3/06/00

A petition was filed in Family Court alleging that the respondent had abused his children. The Legal Aid Society of the City of New York (Legal Aid) was appointed Law Guardian and represented the two children through the fact-finding hearing. Upon the completion of the fact-finding hearing, but before a determination had been reached, the Family Court, *sua sponte*, relieved Legal Aid from its representation of one of the children, citing a conflict of interest if Legal Aid continued as Law Guardian for both children.

Holding: The Family Court improvidently exercised its discretion when it removed Legal Aid from the representation of one of the children. There was no evidence of a conflict of interest, or that Legal Aid had failed to diligently represent both children (*see Matter of Rosenberg v Rosenberg*, 261 AD2d 623, 624), and the record shows zealous and effective representation of both. Order reversed. (Family Ct, Kings Co [Elkins, JJ])

Discovery (Procedure [Enforcement]) DSC; 110(30[a])

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

Matter of Levitov v Cowhey, No. 00-01675, 2nd Dept, 3/06/00

Holding: In a CPLR article 78 proceeding, the Attorney General is ordered to produce defense exhibits from the

Second Department *continued*

prior criminal case of *People v Monroe Parker*. The petitioners had clearly demonstrated a clear legal right to the relief sought, as is required for the remedy of mandamus. See *Matter of Legal Aid Socy. v Scheinman*, 53 NY2d 12, 16. The Supreme Court lacked the discretion to deny the petitioners' application for the exhibits since one of the petitioners was a defendant in the prior case, in which all had been acquitted. All those defendants had filed a designation pursuant to CPL 160.50(1)(d) requesting that the sealed exhibits be provided to counsel for the petitioners. The exhibits in question were not subject to seal pursuant to CPL 160.50, and the Attorney General is not entitled to possession of them simply because the defendants introduced the exhibits during cross examination of prosecution witnesses in the prior trial. Petition granted to the extent indicated.

Guilty Pleas (Vacatur) GYP; 181(55)
Identification (Lineups) IDE; 190(30)
People v Puckett, Nos. 98-04419; 98-04422,
2nd Dept, 3/13/00

Holding: The defendant pled guilty to two counts of first-degree robbery. The lineup procedure as to one indictment was unduly suggestive. See *People v Owens*, 74 NY2d 677. Further proceedings are required as the prosecution had no opportunity to seek to establish the existence of an independent source for the store patron's in-court identification of the defendant. Since the defendant pled on the condition that he receive concurrent sentences, both judgments must be reversed. See *People v Clark*, 45 NY2d 432. Judgments reversed, pleas vacated, matter remitted. (Supreme Ct, Queens Co [Rotker, JJ])

Homicide (Murder [Definition]) HMC; 185(40[d])
People v Warren, Nos. 97-00747, 97-10149,
2nd Dept, 3/13/00

The defendants in these two cases were convicted of two counts each of first-degree murder and other charges after an incident in which each killed one victim by pre-arranged plan.

Holding: The defendants attempted to bootstrap challenges to their non-capital judgments by using the heightened scrutiny given to death penalty cases; a sentence of life without parole is not similarly irrevocable. The multiple-killing provision of Penal Law 125.27 should be interpreted to permit a first-degree murder conviction to rest upon evidence of accessorial liability. That the statute refers to the liable actor in the singular does not show legislative intent not to extend it to accessories, as General Construction Law 35 says that words in the singular include the plural. The

second-degree murder statute, which unquestionably includes accessorial liability, is also worded in the singular. Penal Law 125.25. That the legislature created separate rules for first-degree felony murder limiting accessorial liability raises the inference that the legislature did not intend to limit normal rules of accessorial liability. The governor's approval memorandum, indicating that the extent of a defendant's participation in the murder could be a mitigating factor, shows that the legislature intended to permit accessories to be prosecuted for first-degree murder. The statute's accomplice liability provision does not violate the federal constitution. See *Enmund v Florida*, 458 US 782 (1982). Penal Law 125.27(1)(a)(viii), referring to actions committed during the same transaction, is not unconstitutionally vague if read in the light of CPL 40.10(2), which clarifies the meaning of "same criminal transaction." See *People v Nelson*, 69 NY2d 302. Judgments affirmed. (County Ct, Dutchess Co [Dolan, JJ])

Homicide (Murder [Evidence]) HMC; 185(40[j])
People v Benjamin, No. 95-08978, 2nd Dept,
3/20/00

Holding: The evidence presented by the prosecutor was sufficient to support a finding that the defendant doctor caused the fatal wound of a woman during an abortion procedure, then failed to adequately monitor the patient, who had been anesthetized and sedated and who bled profusely in the recovery room. This evidence supports a determination that the defendant consciously disregarded a grave and very substantial risk of death, in circumstances that evince a depraved indifference to human life. See Penal Law 125.25(2); *People v Register*, 60 NY2d 270, 274. The verdict of guilt of second-degree murder was not against the weight of the evidence. Judgment affirmed. (Supreme Ct, Queens Co [Hanophy, JJ])

Third Department

Guilty Pleas (Withdrawal) GYP; 181(65)
Sex Offenses (Sentencing) SEX; 350(25)
People v Clark, No. 11357, 3rd Dept, 1/6/00

After pleading guilty to sexual assault and criminal contempt, in separate matters involving the same complainant, the defendant orally moved *pro se* at sentencing to withdraw his guilty pleas. Both motions were denied.

Holding: On the basis of the record, the defendant was not denied effective assistance of counsel and was adequately apprised of the consequences of his guilty pleas. A failure to inform a defendant of direct consequences may undermine the voluntariness of a plea. See *People v Ford*, 86 NY2d 397. The Sex Offender Registration Act (SORA) (Cor-

Third Department *continued*

rection Law article 6-c) is not intended punish, but to protect communities. *People v Kearns*, 253 AD2d 768, 770 *lv gnted* 93 NY2d 973. The SORA consequences for the defendant are “collateral” as opposed to “direct,” and a failure to fully inform the defendant about the SORA consequences of his sexual assault plea would not undermine the voluntariness of the plea. Judgment affirmed. (County Ct, Albany Co [Breslin, JJ])

Admissions (Voluntariness) ADM; 15(35)

Evidence (Sufficiency) EVI; 155(130)

Sentencing (Concurrent/Consecutive) (General) SEN; 345(10) (37)

People v May, No. 76860, 3rd Dept, 1/6/00

Holding: The defendant’s inculpatory statements to police, made while under the influence of morphine in the hospital following an auto accident unrelated to the offense, were properly admitted into evidence. The prosecution satisfied its obligation to prove that, in the totality of the circumstances, the statements were voluntary. *See People v Anderson*, 42 NY2d 35, 38. The evidence presented at the trial, including the defendant’s statements about a bite mark on his penis, was sufficient to support the element of “contact” necessary for the charge of forcible sodomy. Actual penetration is not essential under Penal Law 130.00(2). *See People v Herring*, 227 AD2d 658, 661 *lv den* 88 NY2d 986. The defendant’s restraint and transportation of the complainant, which followed one rape and preceded the additional rape and sodomy, were not merely incidental to and inseparable from the sexual assaults, so that review of whether the kidnapping charge merged with the sex offenses is not necessary. *See People v Salimi*, 159 AD2d 658 *lv den* 76 NY2d 742. It was not error to allow the child complainant and her parents to address the court over objection at sentencing. The defendant had an adequate opportunity to refute any aggravating factors that might have influenced the sentence. *People v Redman*, 148 AD2d 966 *lv den* 74 NY2d 745. The imposition of consecutive sentences for the charges was supported by the facts. Judgment affirmed. (County Ct, Warren Co [Moynihan, Jr., JJ])

Narcotics (Evidence) NAR; 265(20)

Witnesses (Experts) WIT; 390(20)

People v Czarnowski, No. 11425, 3rd Dept, 1/13/00

The court denied the defendant’s pre-trial motion to dismiss the indictment for criminal possession of a controlled substance on the ground that the prosecution had failed

to obtain a chemical analysis of the pills the defendant was charged with possessing

Holding: The motion to dismiss was properly denied. The statutory requirement that alleged drugs be tested (CPL 715.50 [1]) only requires analysis of drugs that are actually seized by the police. Here, the controlled substances had been found secreted in a pharmacy where the defendant worked and returned to stock by the supervising pharmacist. The fact that the police never actually seized the drugs in question and could not test them did not preclude the prosecution from offering testimony about the nature and amount of the drugs in question. The nature and quantity of contraband may be shown circumstantially. *People v Houston*, 72 AD2d 369, 379. The supervising pharmacist properly relied on package inserts and pharmaceutical reference manuals not in evidence, data of a type ordinarily accepted by experts in the field (*see People v Sugden*, 35 NY2d 453, 459), when testifying about the chemical composition of the pills in question. She also properly gauged the quantity of drugs involved by filling a vial the same size as the one found secreted with the type of pills previously identified, counting them and weighing them. Judgment affirmed. (County Ct, Broome Co [Smith, JJ])

Instructions To Jury (General)

ISJ; 205(35)

People v Oquendo, No. 10345, 3rd Dept, 1/27/00

During the robbery of a liquor store the defendant pushed a clerk against the wall and thrust his hand, covered with a black glove and wrapped with a white cloth, into the clerk’s stomach. The defendant stated that he had a gun. The jury twice asked for clarification regarding the “display” element of first-degree robbery.

Holding: The court did not err in its use of a modified passage from *People v Lopez* (73 NY2d 214, 220-221) to instruct the jury. “It may be proper in a charge to the jury *** to quote from prior opinions where the quoted language artfully expresses general and well-recognized legal principles.” *People v Hommel*, 41 NY2d 427, 429. The court properly qualified its use of the example from *Lopez* as an “illustration only.” Furthermore, even if the facts of *Lopez* are “strikingly similar” to those in the present case, any prejudice was adequately dissipated by a curative instruction and alternative hypothetical. *People v Johnson*, 171 AD2d 532, 533 *lv den* 77 NY2d 996. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Confessions (Voluntariness)

CNF; 70(50)

Juries and Jury Trials (Voir Dire)

JRY; 225(60)

People v Koury, No. 11000, 3rd Dept, 1/27/00

The defendant testified that as to his confession, no threats were made by the police and he never asked for an attorney or to leave the police interview. Despite this, he

Third Department *continued*

claimed that he was “scared into signing” a false confession because he gets “nervous real easy” and that the court erred in excluding proffered testimony from his mother to prove this.

Holding: Even expert testimony is precluded when offered to establish a defendant’s interrogative suggestibility that purportedly made that defendant susceptible to giving a false confession. *People v Green*, 250 AD2d 143, 146 *lv den* 93 NY2d 873. In *People v Lea*, 144 AD2d 863, 864 *lv den* 73 NY2d 857, expert testimony was properly excluded which evidenced that the defendant was deferential and that he was intimidated by the interrogation room atmosphere. The expert testimony in those cases was not sufficiently relevant to outweigh the confusion that introducing a new issue into trial would create, and the expert opinion lacked the degree of certainty that would give it probative force. The court here properly excluded the lay opinion of the defendant’s mother.

Although the court stated in preliminary instructions that each side would have only 15 minutes to question prospective jurors, it was made clear that the attorneys could go beyond their allotted time if they were asking relevant, non-repetitive questions. Defense counsel never objected to these preliminary guidelines, nor requested additional time. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Evidence (Hearsay) (Weight) **EVI; 155(75) (135)**

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

Trial (Verdict [Inconsistent Verdicts]) **TRI; 375(70[a])**

People v Demand, No. 79788, 3rd Dept, 1/27/00

While involved in a street altercation the defendant shot and killed the decedent, who was watching the fight.

Holding: The court did not err in excluding at trial an oral statement made to police by a bystander. The statement did not satisfy the present sense impression hearsay exception. The statement was made at least seven minutes after the incident was over, and did not meet the requirement that the statement be made “substantially contemporaneously” with the observation, not after the described event had concluded. *People v Vasquez*, 88 NY2d 561, 575. The bystander’s written statement was provided five months prior to trial, and any delay did not violate the defendant’s right to a fair trial. Although the prosecution disclosed the bystander’s at-the-scene oral statement only on the eve of the trial, this did not contribute to the verdict or hamper the defense. See *People v Vilardi*, 76 NY2d 67, 77-78. The verdict was also not against the weight of the evidence. All eight eyewitnesses testified that they observed the defendant or someone matching his description break away from the fight, pull a gun and wave it in the air. At least three people said they saw the defendant pull a gun and fire it in the decedent’s direction. The 18-year-old defendant’s youth, lack of violent

criminal history, and unstable and trouble upbringing were carefully considered by the court. The 25-years-to-life sentence need not be reduced in the interest of justice. Judgment affirmed. (County Ct, Schenectady Co [Eidens, JJ])

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

Parole (Revocation [General]) **PRL; 276(40[a]) (45[d])**
(Revocation Hearings
[Evidence])

Matter of Graham v NYS Division of Parole,
No. 84336, 3rd Dept, 2/3/00

Holding: The petitioner appellant, after being returned to custody on a parole violation, filed an administrative appeal challenging the decision that he be held until his maximum sentence expired. When the Parole Board’s Appeal Unit failed to rule on the appeal, the petitioner sought *habeas corpus* relief. The court converted that proceeding to one under CPLR article 78, and dismissed it. The petitioner commenced a second proceeding, which was also dismissed. The Appeal Unit’s failure to rule on the administrative appeal did not invalidate the parole revocation process. See *Matter of Lord v State of N.Y. Executive Dept./Bd. Of Parole*, ___ AD2d ___, 695 NYS2d 461 *lv den* 94 NY2d 753. There was no prejudice, because the petitioner’s administrative remedy was deemed exhausted after four months, allowing immediate judicial review. See 9 NYCRR 8006.4(c). The record does not support the contention that the petitioner was entitled to a reduction of time for accepting responsibility (9 NYCRR 8005.20[c]) where he contested the charge throughout the hearing. Gaps in the transcript, attributable to inaudible portions of the tape recording, are not so significant as to preclude meaningful review. See *Matter of Locke v Senkowski*, 254 AD2d 553. Judgments affirmed. (Supreme Ct, St. Lawrence Co [Demarest, JJ])

Parole (Release [Eligibility]) **PRL; 276(35[c])**

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

Matter of Jones v Coombe, No. 84674, 3rd Dept,
2/3/00

The petitioner appellant, serving a sentence for rape, unsuccessfully brought a CPLR article 78 challenge to the Time Allowance Committee’s withholding of good-time allowance credits.

Holding: Decisions affecting good-time credits are not to be reviewed so long as they are not contrary to law. See Correction Law 803 (4). The TAC properly based its decision denying the credits on the whole of the inmate’s institutional experience. See *Matter of Amato v Ward*, 41 NY2d 469, 473-474. The petitioner had participated in a behavior intervention program and some sex offender counseling, but refused to sufficiently participate in and complete other recommended

Third Department *continued*

programs. In light of the petitioner's refusal to complete sex offender and aggression counseling programs, the TAC's decision was not irrational. *Matter of Staples v Goord*, __ AD2d __, 695 NYS2d 190 *lv den* __ NY2d __ (11/23/99). Judgment affirmed. (Supreme Ct, Albany Co [Bradley, JJ])

Sentencing (Restitution) SEN; 345(71)

Parole (Revocation Hearings [Due Process]) PRL; 276(45[b])

People ex rel. Tyler v Travis, No. 84837, 3rd Dept, 2/3/00

Holding: The failure of the Parole Board's Appeals Unit to issue a timely ruling on the petitioner appellant's appeal of his parole revocation did not invalidate the revocation process. See *Matter of Lord v State of N.Y. Executive Dept./Bd. of Parole*, __ AD2d __, 695 NYS2d 461 *lv den* 94 NY2d 753. The petitioner was not prejudiced because, under 9 NYCRR 8006.4(c), he had a right to immediate judicial review of the revocation decision if the Appeals Unit failed to rule on his appeal within four months. The petitioner is also not entitled to a 12-month time assessment because there is no mention of such a bargain in the hearing records. The Administrative Law Judge unequivocally told the petitioner that the 12-month assessment was a recommendation to the board, which the board had the power to review. Application of the 1997 amendments to 9 NYCRR 8005.20(c) did not violate the *ex post facto* doctrine. See *People ex. rel. Kelly v. New York State Div. of Parole*, __ AD2d __, 694 NYS2d 378. Judgment affirmed. (Supreme Ct, Franklin Co [Lahtinen, JJ])

Possession of Stolen Property (Elements) (Evidence) PSP; 288.5(10) (15)

Witnesses (Experts) WIT; 390(20)

People v Burt, No. 78488, 3rd Dept, 3/02/00

The defendant was convicted of fourth- and fifth-degree criminal possession of stolen property.

Holding: An Assistant District Attorney called as an expert witness in the field of computers to give his opinion as to the value of the computer the defendant was alleged to possess was unqualified to testify about the value of used computer equipment. Many of the witness's alleged qualifications (he was a networking administrator for his office and a member of a development team concerning automatic record retrieval systems) were unrelated to the value of used computer equipment. The witness was not competent because he had no knowledge derived from either formal training or long observation and actual experience. See *Price v New York City Hous. Auth.*, 92 NY2d 553, 559. Alone, this error would require only reduction of the conviction to fifth-

degree possession of stolen property. However, after the complainant testified about his identifications of the defendant at a pretrial lineup and voice identification procedure, a police officer testified even more extensively about those same procedures. This can only be considered improper bolstering, and was not harmless error. See *People v Malloy*, 22 NY2d 559, 567. Judgment reversed, new trial ordered. (County Ct, Albany Co [Breslin, JJ])

Arrest (Identification) ARR; 35(15)

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

People v Tejada, No. 11303, 3rd Dept, 3/16/00

The defendant was a passenger in a car that was stopped for traffic infractions. The officer ran a license and warrant check on the names given to him by the occupants of the car, none of whom possessed identification. The defendant was arrested and was found with over 1/2 ounce of cocaine.

Holding: The defendant, a Caucasian Hispanic male 5 feet 11 1/2 inches tall weighing about 241 pounds, gave his name as Pedro J. Tejada, birth date Feb. 17, 1967. The warrant search revealed that Pedro Tejada, a black or Hispanic male 5 feet 9 inches tall, weighing 150 pounds, with a birth date of Feb. 10, 1967, had outstanding arrest warrants. A fingerprint analysis confirmed that the defendant was not the same Pedro Tejada that had outstanding arrest warrants. Given the exact match between the first and last names, the fact that the defendant is Hispanic, the seven-day discrepancy in birth dates and the defendant's lack of identification, the officer reasonably believed that the defendant was the subject of the warrant despite the height and weight difference. The arrest of a person who is mistakenly thought to be someone else is valid if the arresting officer (a) has probable cause to arrest the person sought, and (b) reasonably believes the person arrested was the person sought, and reasonableness is determined by the totality of the circumstances. *United States v Glover*, 725 F2d 120, 122 *cert den* 466 US 905. Judgment affirmed. (County Ct, Sullivan Co [Ledina, JJ])

Appeals and Writs (General (Judgments and Orders Appealable) (Preservation of Error)) APP; 25(35) (45) (63)

Guilty Pleas (General) GYP; 181(25)

People v Holland, Jr., No. 11454, 3rd Dept, 3/23/00

The defendant pled guilty to rape and two counts of sodomy in satisfaction of an eight-count indictment. He was sentenced to consecutive jail terms. He was subsequently

Third Department *continued*

assessed as a level III risk pursuant to the Sex Offender Registration Act.

Holding: The defendant did not preserve for review a claim that his waiver of the right to appeal was involuntary. During his plea, while represented by counsel, the defendant acknowledged his waiver of the right to appeal. On the date of the plea he signed a written waiver stating that the waiver was knowingly and intentionally executed after enough time to discuss the waiver with counsel. Given the sufficiency of the allocution the court was not required to ascertain whether the defendant was taking medication at that time. *See People v Millis*, __ AD2d __, 697 NYS2d 757 *lv den* 94 NY2d 826. The waiver of the right to appeal encompassed any claim regarding the severity of the sentence. *See People v Ennis*, 254 AD2d 642 *lv den* 92 NY2d 1048. The issue of the defendant’s risk level assessment is not properly before the Appellate Division as part of the direct appeal. *See People v Fitzgerald*, 249 AD2d 630. Judgment affirmed. (County Ct, St. Lawrence Co [Nicandri, JJ])

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

Speedy Trial (General) **SPX; 355(30)**

People v Townsend, No. 11592, 3rd Dept, 3/23/00

On Oct. 26, 1998, a felony complaint was filed against the defendant charging criminal sale of a controlled substance based upon the allegation that he sold two packages of cocaine to an undercover police officer on July 24, 1997. The trial court granted the defendant’s motion to dismiss the indictment.

Holding: An unreasonable delay in prosecution denies a defendant due process and may mandate dismissal of the indictment even absent actual prejudice. *See People v Lesiuk*, 81 NY2d 485. There are five factors relevant to determining whether due process has been violated: (1) extent of delay; (2) reason for delay; (3) nature of the charge; (4) length of incarceration; and (5) possibility of prejudice resulting from the delay. *See People v Singer*, 44 NY2d 241, 253. The 15-month delay here was unreasonable under the circumstances. The police had completed their investigation within minutes of the alleged sale. The felony complaint was prepared and sworn to the next day. The delay may have deprived the defendant of the opportunity to determine the existence of any witnesses to the alleged sale, which occurred on a busy street. The prosecution did not establish good cause for the delay. The court discounted the explanation that the delay was a good-faith effort to protect the undercover officer’s identity. An investigating officer stated that only a delay of a few weeks was required. Order affirmed. (County Ct, Broome Co [Smith, JJ])

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

People v Samuels, No. 10848, 3rd Dept, 3/30/00

The defendant and two codefendants were alleged to have sold cocaine to an undercover officer. At a *Mapp* hearing, the detective sergeant testified that he was the supervisor of the undercover officer and monitored the transaction. It is undisputed that the supervising officer could not see the defendant and the co-defendant from the time they entered a parking lot until they reemerged following the sale. The supervising officer acknowledged that he never heard the voice of the defendant. The trial court denied defendant’s motion for suppression. The defendant then pled guilty.

Holding: The prosecution failed to show that the sergeant who ordered the defendant’s arrest had probable cause to believe that the defendant committed the crime of loitering (Penal Law 240.36), the crime for which the defendant was arrested. Mere presence at an illegal transaction, in the absence of overt criminal activity or furtive conduct, does not provide probable cause to arrest. *See People v Martin*, 32 NY2d 123, 125. The plea must be vacated, the order denying suppression of evidence obtained as a result of the illegal arrest reversed, and the action restored to its preplea status. Judgment reversed. (County Ct, Columbia Co [Leaman, JJ])

Fourth Department

Defenses (Justification) **DEF; 105(37)**

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

**People v Mercer, No. KA 97-5434, 4th Dept,
12/30/99**

Holding: The court erred in failing to instruct on the defense of justification to charges of second -degree escape and fourth-degree criminal mischief. The defendant testified that after arrest, and during transportation, the police officers taunted and beat him. Following such aggression the defendant feared for his life and escaped. The evidence reasonably supports the theory that escape was justified when viewed in the light most favorable to the defendant. It was reversible error for the court not to grant the charge. *See People v Maher*, 79 NY2d 978, 982. Judgment reversed. (County Ct, Oneida Co [Donalty, JJ])

**Search and Seizure (Electronic
Searches) (Motion to Suppress)** **SEA; 335(30) (45)**

**People v Darling, No. KA 98-5350, 4th Dept,
12/30/99**

Fourth Department *continued*

The police obtained an eavesdropping warrant which specified “the telephone line and instruments numbered (315) 422-2003” along with the address and the name of the line’s owner. The police attempted to attach the wiretap device and learned that the number had been changed. The police attached the device to the new number, which was listed to the same residence, was still the sole line running into the house, and had the same owner. Information obtained from the phone was used to get a search warrant. The defendant was found to be in possession of ½ kilo of cocaine.

Holding: The court erred in allowing the defendant to suppress the evidence obtained through the wiretap on the grounds that any eavesdropping was limited to the original phone number. The court also erred in allowing suppression of evidence due to lack of probable cause to support the search warrant. The change in telephone number did not change the description in the eavesdropping warrant application because the new number remained the sole telephone line assigned to the same person at the same address. The eavesdropping warrant’s purpose was to intercept conversations on the telephone line at that residence, not at that phone number. A change in telephone number only could not have affected the efficacy of alternative investigative techniques. *United States v Bascaro*, 742 F2d 1335, 1348 *reh den* 749 F2d 733 *cert den sub nom Hobson v United States*, 472 US 1017. The communications were lawfully intercepted, and may be used to provide probable cause for a search warrant. The court also erred in holding that the failure to specify a location affects the validity of a search warrant. The police sought authorization to search the defendant in Onondaga County. The particular location is irrelevant. Order reversed. (Supreme Ct, Onondaga Co [Brunetti, JJ])

Accusatory Instruments (General) ACI; 11(5)

Juries (Challenges) JRY; 225(10)

People v Hagenbuch, No. 98-5540, 4th Dept, 12/30/99

Holding: It was not an abuse of discretion for the trial court to deny defense challenges for cause to two jurors who had evinced sympathy towards children. They had not evinced a state of mind that would preclude them from rendering an impartial verdict in a case involving charges of first-degree rape, sexual abuse, and related charges. *See People v Torpey*, 63 NY2d 361, 366 *rearg den* 64 NY2d 885; CPL 270.20 [1] [b].

The time frames in the indictment are not overly broad. All the relevant circumstances will be considered on a case-by-case basis in determining whether the time frames in an indictment are specific enough. *People v Keindl*, 68 NY2d 410, 419 *rearg den* 69 NY2d 823. Considering the age of the com-

plainants and the nature of the offense, one-month time frames are specific enough. *See People v Sulkey*, 195 AD2d 1026, 1027 *lv den* 82 NY2d 759. The defendant argued that count 13 of the indictment is duplicitous. On its face it alleged one act for each of two counts. However, at trial the complainant testified to three instances of sexual contact. Later, upon motion by the defendant, the judge dismissed one count of sexual abuse. The remaining count thus charged three offenses, violating the rule that each count of an indictment must charge only one offense. *See* CPL 200.30 [1]; 200.50 [3]. The remaining count of sexual abuse must be dismissed. Judgment modified, and as modified, affirmed. (County Ct, Onondaga Co [Mulroy, JJ]).

Guilty Pleas (General) (Vacatur) GYP; 181(25)(55)

Sex Offenses (Juveniles) (Sodomy) SEX; 350(12)(30)

Sentencing (Excessiveness) SEN; 345(33)

People v Harris, KA 99-470, 4th Dept, 12/30/99

The defendant was arrested on felony complaints charging him with a 1997 third-degree sodomy and possessing a sexual performance by a minor, and on two misdemeanors. He agreed to waive indictment and be prosecuted by a superior court information (SCI) for two 1993 second-degree sodomies, and one count of possessing a sexual performance by a child. He later pled guilty to second-degree sodomy, third-degree sodomy, and possessing a sexual performance by a minor.

Holding: The defendant’s convictions under the SCI were invalid because the waiver of indictment was invalid. Offenses named in a waiver of indictment “may include any offense for which the defendant was held for action of a grand jury and any . . . offenses properly joinable therewith” (CPL 195.20).” Neither of the sodomy counts in the waiver of indictment and neither of the sodomy counts in the SCI were the same as the sodomy count in the felony complaint. Nor were they properly joinable under CPL 40.10(2) and 200.20(2)(a), as argued by the prosecution. The defendant’s alleged 1998 possession of illegal depictions of children is not the same criminal transaction as the 1993 sodomies. The waiver as to the second-degree sodomy counts was invalid, and the defendant’s convictions of sodomy in the second and third degrees under the first and second counts of the SCI must be reversed and dismissed. The sentence for possessing a sexual performance by a child was not unduly harsh. Judgment modified, and as modified, affirmed. (County Ct, Cayuga Co [Corning, JJ])

Speedy Trial (Cause for Delay) (Statutory Limits) SPX; 355(12) (45)

Kerry V.M. v Chautauqua County Attorney, No. CAF 99-540, 4th Dept, 12/30/99

Fourth Department *continued*

Family Court detained the defendant without a fact-finding hearing for six days, stating no reason.

Holding: Family Court Act 340.1(1) provides in part “[if] the respondent is in detention and the highest count in such petition is less than a class C felony the fact-finding hearing shall commence no more than three days after the conclusion of the initial appearance.” This statute was designed “to reduce the number of excessive and unnecessary juvenile detentions,” and therefore its provisions will be construed strictly. *See Matter of Erick B.*, 200 AD2d 447. The defendant was denied a fact-finding hearing within three days of being detained. The court’s failure to make appropriate findings based on the record when it adjourned the fact-finding did not satisfy the provision that a fact-finding hearing may be adjourned up to three days for “good cause shown.” Family Court Act 340.1(5). The facts of the case did not provide good cause for the three-day adjournment. That the third day of the detention was a holiday would have allowed only one extra day. *See General Construction Law 20*. Order reversed, petition dismissed. (Family Court, Chautauqua Co [Harley, JJ])

Subpoenas & Subpoenas Duces Tecum (Enforcement) (Issuance) SUB; 365(5) (10)

Livingston v State of New York, No. CA 99-3302, 4th Dept, 12/30/99

Holding: The court properly granted the claimant’s motion for issuance of subpoenas for four nonparty inmate witnesses. The court also properly ordered the claimant to pay the attendance fees and travel expenses pursuant to CPLR 8001. The respondent argued in opposition that three of the four subpoenas were unnecessary. It argued the application of Civil Rights Law 79(3)(a), but also that it was premature to evaluate the burden that the subpoenas would place on the state because it was not clear where the inmates would be housed when they came to testify. Therefore, the court did not err by not addressing the applicability of the Civil Rights Law to the claimant’s motion. Order affirmed. (Court of Claims, Erie Co [NeMoyer, JJ])

Motion (Pretrial) MOT; 255(30)

Plea Bargain (General) PLE; 284(10)

People v Rumph, No. KA 99-5236, 4th Dept, 12/30/99

As part of a plea agreement on a prior case, the defendant was advised that he would receive a certain sentence, but that the court was not limited to that sentence if he were arrested again before sentencing. Such an arrest occurred. The court held a hearing to give the defendant an opportu-

nity to show that the arrest had no foundation. The court determined that there were sufficient facts regarding involvement in the new crime to justify a higher sentence. When the defendant was indicted on the instant charge, he unsuccessfully moved for probable cause and suppression hearings.

Holding: Although the defendant’s pretrial motions did not contain the requisite factual predicates the court exercised its discretion to entertain the motions. The court erred in denying the defense motions on the ground that the defendant was collaterally estopped based on the earlier hearing. The issues had not been fully litigated earlier. Collateral estoppel means that an issue of “ultimate fact” has been determined by a final judgment. *Ashe v Swenson*, 397 US 436, 443(1970). The issue addressed in the earlier hearing is not the *sine qua non* (*see People v Goodman*, 69 NY2d 32, 38) of the pretrial motions. That testimony elicited in the earlier hearing may be relevant in the requested pretrial hearings is not dispositive. Judgment reversed, plea vacated, and matter remitted for a merit determination of the pretrial motions. (County Ct, Monroe Co [Marks, J on motions; Sirkin, J at plea and sentence.]

Driving While Intoxicated (Driver’s License Revocation or Suspension) (Prior Convictions) DWI; 130(10) (20)

Guilty Pleas (General) GYP; 181(25)
People v Root, KA 99-5295, 4th Dept, 12/30/99

The defendant initially pled guilty to one count of felony driving while intoxicated and one count of first-degree aggravated unlicensed operation of a motor vehicle. He challenged the convictions on grounds of factual insufficiency on appeal.

Holding: Despite *People v Lopez* (71 NY2d 662, 665), which requires defendants to move to vacate a guilty plea or to vacate a judgment of conviction in order to challenge the factual sufficiency of the plea allocution on appeal, the defendant here may directly challenge the factual sufficiency of the count of unlicensed operation even in the absence of a formal post-allocution motion. The court failed to make further inquiry when the defendant denied an essential element of the crime. This charge was legally insufficient in any event. The special information said the defendant was convicted in 1984 of driving while intoxicated, but he proved that the conviction was for driving while ability impaired, resulting in a suspension that was not in affect at the time of this arrest. The aggravated unlicensed operation count must be dismissed. Judgment modified, and as modified, affirmed. (County Ct, Genesee Co [Noonan, JJ])

Burglary (Elements) BUR; 65(15)

Trespass (Elements) TSP; 374(10)

Fourth Department *continued*

People v Hudson, KA 97-5205, 4th Dept, 2/16/00

The defendant was convicted of petit larceny and second-degree criminal trespass. While unofficially separated from his wife, the defendant entered her domicile and removed a television set. He contended that because neither he nor his wife had filed for divorce or separation, and had not entered into a formal separation agreement, the domicile and the television set constituted marital property in which they held a joint interest, so that the proof was legally insufficient to establish illegal entry into the residence or wrongful taking of the television.

Holding: The Domestic Relations Law 236(B)(1)(c) definition of marital property only applies to certain matrimonial actions described in Domestic Relations Law 236(B)(2). "The fact of marriage, standing alone, does not automatically vest property rights in the assets or estates of the other spouse' *Cappiello v Cappiello*, 110 AD2d 608, 609, *aff'd* 66 NY2d 107 *rearg den* 67 NY2d 647." That the defendant forced entry into the residence without the permission of his wife, who leased the apartment, is legally sufficient to establish that he was "not licensed or privileged to do so." Penal Law 140.00 (5). That the defendant's wife leased the television set gave her a superior right of possession. Penal Law 155.00 [5]. Judgment affirmed. (County Ct, Monroe Co [Egan, JJ])

Defenses (Justification) DEF; 105(37)

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

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

People v Barber, No. KA 97-5378, 4th Dept, 2/16/00

Holding: The defendant, who lived in an upstairs flat, was convicted of murder for killing a man in the flat below where the defendant's girlfriend operated a daycare center. The court properly rejected the defendant's request for a jury charge that he had no duty to retreat, because the downstairs flat was not his dwelling (*see* Penal Law 140.00 [3]) and because the fatal shot was fired after the decedent was incapacitated. The defendant's challenge to wiretap evidence obtained against him lacked merit. Specific facts in the wiretap application detailed why normal investigative procedures were dangerous and unlikely to succeed where an informant had been unable to obtain information about the telephone distribution network of the operation from which he purchased drugs. The claim that police misrepresented the facts to get the warrant was unpreserved. The defendant lacked standing to argue that the wiretap evidence was illegal because the police failed to sufficiently minimize the interception of third party conversations. Several other issues were unpreserved or lack merit.

However, a prospective juror who admitted pro-prosecution bias should have been excluded from the jury. The

juror told the court that the juror assumed a person who was arrested and brought to court was guilty. After saying yes to an inquiry whether he would follow the court's instructions, the juror said his presumption of guilt was strong and "probably" would not be dispelled. *See People v Blyden*, 55 NY2d 73, 77-78. Judgment reversed, new trial granted. (Supreme Ct, Erie Co [Tills, JJ])

Dissent: [Scudder, JJ] The record supports a determination that the juror's general beliefs would not prevent him from rendering an impartial verdict.

Defenses (Mistake of Fact or Law)

DEF; 105 (40)

People v Grinage, No. KA 98-5221, 4th Dept, 2/16/00

Holding: The court erred when it failed to instruct the jury about the elements of the defense of mistake of fact as to second-degree murder and second-degree possession of a weapon based on knowing possession of a loaded firearm. The defendant's testimony that he thought the handgun was unloaded supported the defense. *See* Penal Law 15.20(1)(a). The prosecutor's argument that the law required the defendant to establish that the mistake of fact be "reasonable," and the caselaw supporting it (*People v Reynoso*, 231 AD2d 454 *lv den* 89 NY2d 928, 1040), are rejected. *See People v Rypinski*, 157 AD2d 260, 262-263. Judgment modified, new trial granted on designated counts. (Supreme Ct, Erie Co [Tills, JJ])

Sentencing (Resentencing)

SEN; 345(70.5)

People ex rel Hill v Kelly, No. KAH 98-5639, 4th Dept, 2/16/00

The appellant, who had been convicted of burglary, had his original sentence of three to six years vacated as being illegal. He received a new sentence of two to six years. After serving three years, he filed for habeas relief saying that he should be released.

Holding: CPL 430.20[4][a] states in relevant part that when a new sentence imposed for the same offense is less than or equal to the vacated sentence, the new sentence will be deemed to have been served in its entirety "where the time served by the defendant on the vacated sentence is equal to or greater than the term or maximum term of the new sentence." The word "term" in the statute does not refer to a "minimum term," as contended by the appellant. It is defined as the "term of the new definite or determinate sentence' (CPL 430.20[4])." Because the appellant received not a definite or determinate sentence, but an indeterminate sentence, he will be entitled to release only when he serves the maximum term of the new sentence. Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, JJ])

Fourth Department *continued*

Guilty Pleas (Vacatur) GYP; 181(55)

People v Muccigrosso, 99-597, 4th Dept, 2/16/00

Holding: The court did not abuse its discretion when it refused to vacate the defendant’s guilty plea. *See* CPL 220.60(3). At sentencing, the defendant had been granted relief from civil disabilities (*see* Correction Law 702[1]) but the court had failed to sign the certificate. This does not present a question of law or issue of fact for appellate review. *See* CPL 470.15(1). The relief sought is mandamus, so the defendant’s remedy would be to file a suit under CPLR article 78. Judgment affirmed. (County Ct, Erie Co [DiTullio, JJ])

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

Sentencing (Modification) SEN; 345(55)

People v Remelt, KA 99-628, 4th Dept, 2/16/00

Holding: Despite the fact that the prosecution used its first eleven challenges against women, the defendant failed to make a *prima facie* showing of illegal discrimination. Of the first 28 venire people 20 were women; at the time the objection was made (at the conclusion of the selection process of the second panel), two of the three jurors selected were women. No inference of discrimination was created. *See People v Childress*, 81 NY2d 263, 266.

The court’s decision to exclude a defense expert witness who would have testified about the defendant’s mental state at the time of the charged murders was not an abuse of discretion. *See People v Cronin*, 60 NY2d 430, 433. The court’s instruction to the jury included a hypothetical criticized by the defense, but the hypotheticals in jury instructions cannot be read “alone and in a vacuum.” *People v Fields*, 87 NY2d 821, 823. The court, after initially sentencing the defendant to concurrent sentences, could not, 48 hours later, change the sentences to consecutive claiming that the change was merely a “clarification.” *See* CPL 430.10. The sentence had already commenced, because while the defendant was still in the local jail, the state corrections department had arranged for him to be housed there due to state prison overcrowding. *Cf People v Baghai-Kermani*, 221 AD2d 219, 220. Judgment modified and as modified, affirmed. (Supreme Ct, Monroe Co [Mark, JJ])

Defenses (Affirmative Defenses Generally) DEF; 105(2)

Kidnapping (General) (Instructions) KID; 235(17) (20)

People v Brown, No. KA 99-649, 4th Dept, 2/16/00

Holding: The defendant, the biological mother of an adopted child, was charged with, *inter alia*, second-degree kidnapping (Penal Law 135.20). She asserted that she was a relative of that child pursuant to Penal Law 135.00(3), entitling her to a statutory affirmative defense. Penal Law 135.30 says that, “[I]n any prosecution for kidnapping, it is an affirmative defense that (a) the defendant was a relative of the person abducted, and (b) his [or her] sole purpose was to assume control of such person.” The biological mother of an adopted child was not a relative of the child within the meaning of the statute. Under Domestic Relations Law 114, a court approving an adoption shall direct that the adoptive child thereafter “be regarded and treated in all respects as the child of the adoptive parents.” Penal Law 135.30 was intended to provide an affirmative defense to someone with at least potential legal rights to the abducted child. The court here erred in determining that the grand jury proceedings were defective because the prosecutor failed to instruct on that affirmative defense. Order reversed, motion denied, matter remitted. (County Ct, Erie Co [Drury, JJ])

Dissent: [Lawton, JJ] The majority, in seeking to discern the intent of Penal Law 135.30, places too much emphasis on the status of the adoptive parents compared to those of the defendant. The defendant acting to be reunited with her biological child was favorably disposed toward him, so that the evils that the kidnapping statute seeks to address were not present.

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

Motions (General) (New Trial) MOT; 255(17) (25)

People v Sherk, No. KA 99-655, 4th Dept, 2/16/00

Holding: The court erred in denying without a hearing the defendant’s motion pursuant to CPL 440.10(1)(h) to vacate his conviction on the ground that he was denied his constitutional right to effective assistance of counsel. His submissions tended to substantiate all the essential facts needed to support his claim. CPL 440.30 (4)(b). The defendant asserted that trial counsel failed to relay to him a plea offer that the defendant would have accepted. The defendant’s sworn statement supports the contention that the defendant was denied meaningful representation (*see People v Alexander*, 136 Misc2d 573, 584-585), raising a factual issue that requires a hearing. Order reversed, matter remitted for a hearing. (County Ct, Erie Co [D’Amico, JJ])

Attempt (Defenses) (General) ATT; 50(5) (7)

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

People v Prescott, 2nd, KA No. 99-660, 4th Dept, 2/16/00

Fourth Department *continued*

The defendant tried to start a neighbor's vehicle and was charged with, *inter alia*, attempted driving while intoxicated *per se*, attempted driving while intoxicated, and attempted first-degree aggravated unlicensed operation of a motor vehicle. His motion to dismiss those counts was granted.

Holding: The court erred in determining that it is legally impossible to attempt the crime of DWI. *People v Campbell* (72 NY2d 602, 605) said that there could be no attempt to commit second-degree assault because one could not have a specific intent to cause an unintended injury. DWI is a strict liability crime not because it proscribes a result, even an unintended one as in *Campbell*, but because it proscribes particular conduct. See *People v Saunders*, 85 NY2d 339, 343. *Saunders* said that the strict liability crime of criminal possession of a weapon proscribes particular conduct and so is distinguishable from the 'result-based' culpability crime in *Campbell*. The specific intent required for an attempt is not always incompatible with imposing penal responsibility for an attempt to commit a strict liability offense. This reasoning applies to DWI, which is also predicated upon direct conduct.

Unlike DWI, first-degree aggravated unlicensed operation of a motor vehicle explicitly requires mental culpability, so a different analysis applies. The core crime, *ie* operating a vehicle with knowledge or reason to know that the privilege to do so has been suspended or revoked, requires mental culpability. The elements that make it a strict liability crime are the aggravated circumstances that elevate the crime's severity. See *People v Fullan*, 92 NY2d 690, 693-694. Because strict liability attaches to an aggravating circumstance, not the proscribed act, the defendant is not being punished for an unintended criminal act. *People v Miller*, 87 NY2d 211, 218. Order reversed, motion denied, counts reinstated, matter remitted for further proceedings. (County Ct, Steuben Co [Furfure, JJ])

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

Trial (Presence of Defendant [Trial in Absentia]) **TRI; 375(45)**

People v Lucious, No. KA 99-700, 4th Dept, 2/16/00

Holding: The court questioned prospective jurors outside the defendant's presence. A defendant's fundamental statutory right to be present at all material stages of trial extends to the impaneling of the jury. See *People v Velasco*, 77 NY2d 469, 472. The recurring issue of whether a defendant has the right to be present during sidebar discussions relating to the qualifications of jurors or prospective jurors depends on the subject matter of the discussions. The right to be present is not violated where the sidebar discussions relate to juror qualifications such as physical impairments, family obligations, or work commitments. See *People v*

Camacho, 90 NY2d 558. But a sidebar discussion that concerns a juror's background, bias, or hostility, or ability to weigh the evidence objectively, is a material stage of the trial at which a defendant has a right to be present. See *People v Antommarchi*, 80 NY2d 247, 250. Generally, where a prospective juror was excused by stipulation of the parties, by defense counsel's peremptory challenge, or otherwise as a result of defense counsel's discretionary decision, the *Antommarchi* violation will result in a reversal. See *People v Davidson*, 89 NY2d 881, 883. But where the prospective juror was excused by the court based on a challenge for cause or the prosecutor's peremptory challenge, the violation will be deemed harmless error. No determination can be made on this record as to whether there was an *Antommarchi* violation and, if so, whether reversal is required. The prosecution conceded that the defendant was absent from sidebar discussions, but argued that the record was silent as to waiver. Critical information is missing as to what happened following the sidebar discussions, when dispositions or rulings were made with respect to each juror's service. Case held, decision reserved, matter remitted for reconstruction hearing on this issue. The defendant's remaining contentions lack merit. (Supreme Ct, Monroe Co [Mark, JJ])

Defenses (Affirmative Defenses) **DEF; 105(2) (37)**
(Justification)

Obscenity (General) **OBS; 270(17)**

People v Fraser, No. KA 99-719, 4th Dept, 2/16/00

The defendant, a licensed social worker, downloaded child pornography in connection with research he was conducting to develop therapeutic treatment methods for Internet child pornographers. He was convicted of possession of an obscene sexual performance by a child and possession of a sexual performance by a child.

Holding: Construing the terms of the statute to "effect the objects of the law" (Penal Law 5.00), the court is held to have properly charged the jury that, for purposes of Penal Law 263.00 (4), a "photograph" may include a computer graphic image. It is impossible for the legislature to consider all societal and technological changes that may occur and the effect they may have upon the regulated conduct. *Rutledge v State*, 745 So2d 912, 916 (Ala). The court did not err in denying requests to charge the affirmative defense set forth in Penal Law 235.15 (1). Given the nature and extent of the harm to children involved in pornography, the compelling state interest in eradicating the market for such material, and the *de minimis* value of it for scientific or educational purposes, it is a reasonable legislature determination not to allow a person charged with possession of child pornography to assert the affirmative defense protecting the use of obscene material for scientific, educational, or governmental purposes. Nor did the court err in denying application of the "mistake of law" justification defense set forth in Penal Law 15.20 (2) (a). This is not a case where an individual demon-

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strated an effort to learn what the law was and relied on the validity of the law only to have it determined that there was a mistake in the law itself. *People v Marrero*, 69 NY2d 382, 390. Judgment affirmed. (County Ct, Oneida Co [Donalty, JJ])

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

People v Thorn, No. KA 99-5310, 4th Dept, 2/16/00

Holding: The court denied the defendant’s challenges for cause to four prospective jurors, three of whom should have been excused. The defendant exercised peremptory challenges to excuse the jurors in question and exhausted his peremptory challenges, so the improper denial constitutes reversible error. See CPL 270.20 [2]; *People v Sumpter*, 237 AD2d 389, 391 *lv den* 90 NY2d 864. Juror D expressed concern that her impartiality might be affected by the fact that her son was a police officer. Jurors H and T both expressed misgivings that they could impartially consider lesser-included charges to murder in the case of a shooting. Juror H testified that it would be “hard,” but that he “would try” to follow the court’s instruction. Juror T also acknowledged that he would “have a hard time” following the court’s instruction on lesser-included offenses. Neither jurors H nor T was questioned further. None of the uncertain responses of the three prospective jurors concerning their impartiality was remedied by an unequivocal statement that the juror’s prior state of mind would not influence the juror’s verdict. See *People v Blyden*, 55 NY2d 73, 77-78. The uncertain, equivocal responses were insufficient in the absence of express and unequivocal declarations that preconceptions would be put aside and an impartial verdict rendered solely on the evidence. *People v Burdo*, 256 AD2d 737, 740. Judgment reversed, new trial granted. (County Ct, Seneca Co [Bender, JJ])

Instructions to Jury (Intoxication) ISJ; 205(40)

Retroactivity (General) RTR; 329(10)

People v Gerstner, No. KA 97-5092, 4th Dept, 3/29/00

Holding: The court erred in submitting to the jury an annotated verdict sheet distinguishing the two counts charging driving while intoxicated without defense counsel’s review and consent. See *People v Damiano*, 87 NY2d 477, 483. Counsel’s consent may not be inferred from his silence where the record contains no indication that he had the opportunity to review the verdict prior to its submission to the jury. The statute (CPL 310.20[2]) has been amended to allow the submission of annotated verdict sheets similar to the one used here, but the amendment does not apply retroactively to this trial. See L 1996, ch 630, § 3; *People v Richardson*, 234 AD2d 952 *lv den* 89 NY2d 988. The prosecutor

offered proof of an unindicted act of driving while intoxicated. The defendant’s contention that this violated his fundamental right to be tried and convicted of only those crimes charged in the indictment is without merit. Cf *People v George*, 255 AD2d 881. The charge to the jury eliminated any danger that the defendant was convicted of an unindicted act or that different jurors convicted him based on different acts. *People v Whitfield*, 255 AD2d 924 *lv den* 93 NY2d 981. Following his trial conviction of two counts of felony DWI, the defendant pled guilty to an unrelated charge of felony DWI with the understanding that his sentence would run concurrently with the sentence imposed upon his prior conviction. Because the prior conviction is reversed, the subsequent conviction must be also. See *People v Fuggazzatto*, 62 NY2d 862. Judgment reversed, new trial granted on counts one and two. (Supreme Ct, Monroe Co [Affronti, JJ])

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

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

People v Robinson, No. KA 97-5319, 4th Dept, 3/29/00

Pursuant to CPL 730.30(1) the court ordered the defendant, who was representing himself, to undergo a psychiatric examination. Prior to competency being determined the defendant cross-examined a psychiatrist at the pre-trial competency hearing.

Holding: The court erred in allowing the defendant to represent himself by actively participating in the hearing before a finding of mental capacity was made. The right of defendants to act as their own counsel is dependent upon a finding of mental capacity to stand trial. See *People v Meurer*, 210 AD2d 934, 935 *lv den* 85 NY2d 940. Decision reserved and matter remitted to Supreme Court for a reconstruction hearing to determine the defendant’s competency at the time of trial. (Supreme Ct, Erie Co [Tills, JJ])

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

Guilty Pleas (Withdrawal) GYP; 181(65)

People v Pittman, No. KA 98-5578, 4th Dept, 3/29/00

Holding: The defendant pled guilty to second-degree attempted criminal possession of a weapon. Prior to sentencing, he made a *pro se* motion to withdraw his plea alleging, *inter alia*, that he was not provided with *Brady* material prior to the plea and that defense counsel was ineffective. At the court’s urging, defense counsel discussed the merits of the defendant’s motion, making factual assertions contrary to those in the defendant’s motion papers. The court erred when it did not assign a different attorney to represent the defendant before it determined the motion to withdraw the

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plea. *See People v Burton*, 251 AD2d 1020. New counsel should be assigned and a *de novo* determination made of the motion to withdraw the plea. Case held, decision reserved, matter remitted. (Supreme Ct, Erie Co [Buscaglia, JJ])

Admissions (Voluntariness) ADM; 15(35)

Search And Seizure (Search Warrants [Suppression]) SEA; 335(65[p])

People v Rodriguez, No. KA 98-5628, 4th Dept, 3/29/00

Holding: Although the instant search warrant application did not request nor authorize nighttime execution, it was executed at night. The court correctly denied the defendant's motion to suppress physical evidence found as a result, because technical violations of Criminal Procedure Law 690.30 and 690.35 do not implicate 4th Amendment rights. The search warrant application requested execution "without notice." A "no knock" provision has been held to supply a basis for a nighttime search. *See People v Harris*, 47 AD2d 385, 388-389. Violations of nighttime search provisions are statutory, not constitutional. *United States v Searp*, 586 F2d 1117, 1124 *cert den* 440 US 921. The warrant was supported by probable cause because the affiants established that several of the confidential informants were credible and reliable and that their basis of knowledge was through personal observation. *See People v Griminger*, 71 NY2d 635, 638-639.

The court correctly found that the defendant's statements to the police were voluntary and therefore did not create a "substantial risk that the defendant might falsely incriminate himself." CPL 60.45 [2] [b] [i]. Police saying that cooperation may help a defendant does not render a resulting statement involuntary. *See People v Huntley*, 259 AD2d 843 *lv den* 93 NY2d 972. The defendant forfeited his right to challenge the prosecution's alleged failure to comply with the notice provisions of CPL 710.30 by seeking to suppress the statements (*see People v Robinson*, 225 AD2d 1095 *lv den* 88 NY2d 884) and by pleading guilty. *See People v Taylor*, 65 NY2d 1, 3-4, 6-7. Defense counsel's failure to make a motion to preclude did not constitute ineffective assistance of counsel where there is no demonstration of the absence of strategic or other legitimate explanations for counsel's failure to so move. *People v Rivera*, 71 NY2d 705, 709. Judgment affirmed. (County Ct, Onondaga County [Burke, JJ])

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

Discovery (Matters Discoverable) (Right to Discovery) DSC; 110(20) (33)

Motions (Suppression)

MOT; 255(40)

People v Carrier, No. KA 99-802, 4th Dept, 3/29/00

Holding: The court correctly denied the defendant's motion to suppress a document he had shown to a police investigator who stopped by the defendant's house. The defendant had previously said he would talk to the investigator after discussing the matter with an attorney. There is no indication that the defendant made an unequivocal request for an attorney, had retained a lawyer, or had been taken into custody. He spontaneously and voluntarily gave the document to the investigator. *See People v Kaye*, 25 NY2d 139, 142-144.

The defendant was not entitled as a matter of law to inspect the investigative "packet" that the investigator reviewed before testifying at the suppression hearing. While an adverse party has the right to inspect anything used to refresh the recollection of a witness while the witness is testifying, a court may exercise its discretion to prevent a "roving tour" through the prosecutor's files when the documents are part of pretrial preparation. *People v Gissendanner*, 48 NY2d 543, 551. The defendant's request to cross-examine the complainant regarding prior bad acts had no basis in fact and was properly denied. The court correctly excluded extrinsic evidence regarding the complainant's ability to recall events because defense counsel thoroughly cross-examined the complainant concerning his memory impairment. *People v Alexander*, 204 AD2d 996 *lv den* 84 NY2d 822. The court attendant contact with a member of the jury was not improper because the attendant merely performed an administrative duty not requiring the presence of the court or the defendant. *People v Bonaparte*, 78 NY2d 26, 30-31. Judgment affirmed. (County Ct, Ontario Co [Henry, Jr., JJ])

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

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

People v Dorsey, No. KA 99-853, 4th Dept, 3/29/00

The defendant was convicted of criminal sale of a controlled substance and two counts of criminal possession of a controlled substance. The court's *Sandoval* ruling did not constitute an abuse of discretion. *See People v Sandoval*, 34 NY2d 371, 378. The jury instructions as a whole informed the jurors that it was their function to determine whether the defendant possessed and sold cocaine. *See People v Bennett*, 144 AD2d 564, 565 *lv den* 73 NY2d 889. The court erred in sentencing the defendant as a second felony offender. The North Carolina conviction of accessory after the fact, as defined by the North Carolina statute, is the equivalent of third-degree hindering prosecution, (Penal Law 205.55), a misdemeanor. The prosecution contends that a "transcript of plea" indicates that the defendant was convicted of accessory after the fact to murder, but the statute upon which the indictment is drawn necessarily defines and measures the

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crime. *People v Olah*, 300 NY 96, 98. The statute is violated when a defendant is an accessory after the fact to any felony. The exception set out in *People ex rel Gold v Jackson* (5 NY2d 243, 245-246) is not applicable. Judgment modified, sentences imposed under counts one and two vacated and remitted for resentencing. (County Ct, Monroe Co [Egan, JJ])

Guilty Pleas (General) GYP; 181(25)

People v McCawley, No. KA 99-943, 4th Dept, 3/29/00

The defendant pled guilty to two counts of second-degree burglary.

Holding: The court erred in accepting the defendant's guilty plea without conducting further inquiry to determine whether the defendant, whose statements during allocution raised the affirmative defense that he was lawfully in the victim's home, was fully aware of the defense and waived it. See *People v Lopez*, 71 NY2d 662, 666. The defendant is entitled to raise this issue on appeal despite his failure to move to withdraw the plea or vacate the judgment of conviction. Judgment reversed, plea vacated, matter remitted for further proceedings on the superior court information. (County Ct, Herkimer Co [Kirk, JJ])

Confessions (Huntley Hearing) CNF; 70(33) (50)
(Voluntariness)

Evidence (Sufficiency) EVI; 155(130)

People v Orso, No. KA 99-1015, 4th Dept, 3/29/00

The defendant and co-defendant, wearing masks, entered an unlocked home and obtained \$60 from a 13-year-old by threatening him with a hammer. The homeowner/ father came home and was struck and injured by the defendant, who was convicted of two counts of first-degree burglary, first-degree robbery and two counts of second-degree robbery. The defendant was sentenced as a persistent felony offender to 25 years to life on each count, to run concurrently.

Holding: The defendant's claim that his statement to police was involuntary due to psychological coercion and sleep deprivation is without merit. Cf *People v Miller*, 244 AD2d 828. He did not testify at the *Huntley* hearing that the police promised to release him if he confessed, nor testify that he was tired. The hearing court did not credit the defendant's testimony that the police threatened to arrest his girlfriend if he did not confess and that he was not given *Miranda* warnings. The absence of the defendant's girlfriend as a witness at the *Huntley* hearing did not prejudice the defendant, so there was no ineffective assistance of counsel for failing to call her. See *People v Eldridge*, 224 AD2d 983. The court erred in convicting the defendant of first-degree robbery

under an indictment alleging that \$60 was forcibly taken from the homeowner by threat with a hammer. However, the evidence established that the son was so threatened. The prosecution having chosen to specify a fact to support a material element of the crime, they were not at liberty to present evidence affirmatively disproving it. *People v Roberts*, 72 NY2d 489, 497. Judgment modified, first-degree robbery conviction reversed and dismissed. (Supreme Ct, Onondaga Co [Brunetti, JJ])

Sentencing (Concurrent/Consecutive) SEN; 345(10) (33)
(Excessiveness)

Sex Offenses (Sodomy) SEX; 350(30)

People v Hutzler, No. KA 99-2126, 4th Dept, 3/29/00

The defendant was convicted and sentenced to consecutive terms of two to seven years on two counts of sodomy and a one-year concurrent term for endangering the welfare of a child.

Holding: The defendant was not denied effective assistance of counsel by his attorney's failure to pursue the possibility of calling the complainant's friends as impeachment witnesses. Counsel told the court the friends would only offer general reputation testimony. The defendant's contention is only "retrospective second-guessing" of counsel's decision. *People v Penwarden*, 258 AD2d 902. The attorney presented a credible defense, including an alibi, and presented 10 witnesses both to support the defense and to call into question the victim's credibility, providing meaningful representation. See *People v Baldi*, 54 NY2d 137, 147. The court's denial of a defense motion to dismiss the indictment for lack of specificity, thereby failing to narrow the time frame beyond the bill of particulars, did not prevent the defendant from adequately preparing a defense. See *People v Watt*, 81 NY2d 772, 774.

The defendant had no criminal history, and, while maintaining his innocence, expressed remorse for the pain suffered by the complainant's family. Many letters were submitted on his behalf, attesting to his character. See *People v Sinclair*, 231 AD2d 926, 926-927. The sentence is unduly harsh and severe. Judgment modified; terms of incarceration to run concurrently. (Supreme Ct, Erie Co [Rossetti, JJ])

Attempt (General) ATT; 50(7)

Judgment (Vacating) JGT; 220(20)

Homicide (Murder) HMC; 185(40)

People v Slater, No. KA 99-5010, 4th Dept, 3/29/00

The defendant was convicted of, *inter alia*, attempted murder, kidnapping, unlawful imprisonment, and reckless endangerment.

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Holding: The finding that the defendant committed attempted murder based upon his having attempted to run over the complainant with his automobile is inconsistent with the finding that the defendant committed reckless endangerment. He could not have intended to kill the complainant by attempting to run over her, and, at the same time, recklessly create a grave risk of her death by the same act. *See People v Gallagher*, 69 NY2d 525, 529. His contention that the conviction of unlawful imprisonment must be reversed because it is an inclusory concurrent count of second-degree kidnapping is not preserved for review. The court's instructions to the jury contained the "now-supplanted and disfavored phrase 'substantial step' (*People v Hernandez*, 93 NY2d 261, 272)" rather than the now-accepted phrase "dangerously near" (*see People v Acosta*, 80 NY2d 665, 670-671). However, the charge as a whole adequately conveyed the proper legal standard to the jury. Judgment modified, attempted murder and reckless endangerment convictions reversed, new trial granted on those counts. (County Ct, Onondaga Co [Mulroy, JJ])

Other Courts

**Driving While Intoxicated (General
(Rehabilitation))** **DWI; 130(17)(22)**

**Parole (Board/Division of Parole)
(Release [Consideration for])** **PRL; 276(3) (35[b])**

Defense Practice Tips *(continued from page 11)*

5G1.3(b) is not applicable. Counsel should therefore request a downward departure by analogy to 5G1.3(b). At least two circuits have upheld departures in this situation. *United States v O'Hagen*, 139 F3d 641 (8th Cir 1998) (district court can depart to give defendant credit for time served on expired state sentence); *United States v Blackwell*, 49 F3d 1232, 1240-42 (7th Cir 1995) (district court may downwardly depart, by analogy to 5G1.3, where defendant's state sentence completed; rationale of 5G1.3(b) to avoid double punishment equally applicable to defendant who had fully discharged prior term).

The 2nd Circuit has expressly left open the validity of a departure to effectuate a federal sentence concurrent with a discharged state sentence where the conduct of the state sentence has been taken into account as relevant conduct in the federal sentence. *United States v Werber*, 149 F3d 172, 178 (2d Cir 1998); *United States v Whitely*, 54 F3d at 91-92 (downward departure may be necessary to give "semblance" of reasonable incremental punishment). Counsel should argue

Lichtel v Travis, Index No. 1351/00, Supreme Ct Albany Co, 4/18/00

The petitioner brought a CPLR article 78 proceeding after appearing before the Parole Board four times without obtaining release. She had been sentenced in 1994 to concurrent terms of one to 15 years for charges including second-degree manslaughter after a 14-year-old boy was killed by her car. The petitioner had been accompanied while drinking by an off-duty police officer who was to act as a designated driver. The accident occurred after that person gave back the petitioner's keys.

Holding: The Parole Board, after reviewing the petitioner's current good behavior, revisited the accident and refused to accept the petitioner's explanation as to why she had been driving. Her reply that she had decided while sober to have a designated driver, and drove only after that person tried to seduce her and then told her to drive herself home when she rejected him, was interpreted by the Board as a denial of responsibility and culpability. The petitioner's entire record supports her early release. The only negative material is a 1994 letter from the district attorney saying that the petitioner's "'premature return to the community would adversely effect [sic] local citizens' confidence in the criminal justice system.'" The Board's determination under these circumstances "is so irrational as to border on impropriety." It is not enough to parrot the language of Executive Law 259-i. The petitioner's plea was obviously made in the expectation of early release, the judge having said, "it does no honor and no help to this deceased child to destroy another life." Ordered that petitioner be released under parole supervision with reasonable conditions. (Connor, J) ⚖

that a downward departure is permissible under *Koon v United States*, 116 SCt 2035 (1996), which makes clear that, with the exception of a few forbidden factors, any factor can be the basis of a departure if it takes the case out of the Guideline heartland. A retroactive concurrency departure is therefore not categorically prohibited and should be analyzed as an "unmentioned" factor warranting departure in an exceptional case. *See id* at 2045.

The BOP is helpful in answering questions about these types of problems, and its staff is very knowledgeable. Henry J. Sadowski, regional counsel for the Northeast Region of the BOP, has prepared a comprehensive memo setting out the BOP's current policies in this area. [Ed. note: *The memo referred to is now available at the BOP web site: www.bop.gov. It is several steps "down" on the site—on the home page, click on BOP Directory, then on Central Office, Washington, D.C., then on Office of General Counsel, then on Frequently Asked Questions, then (under Sentencing/Designation) on How do Federal and State sentences interact when the Federal defendant is under State primary jurisdiction? A printed copy is available from the Backup Center.* ⚖

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