



# Public Defense Backup Center REPORT

VOLUME XV NUMBER 9

November 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

### Plea Bargaining Representation Found Deficient

Defense counsel's role in plea bargaining is a vital—perhaps *the* vital—part of representation in many cases. The American Bar Association (ABA) has said that a court should not accept a guilty plea “where it appears the defendant has not had the effective assistance of counsel.” *Standards for Criminal Justice Pleas of Guilty* (3rd ed.), Standard 14-1.4(d). See also National Legal Aid and Defender Association, *Performance Guidelines for Criminal Defense Representation* (1994) Guideline 6.1 *et seq.* Recent court decisions have emphasized the necessity of effective representation of a client during plea negotiations.

### Anatomy of a Plea Bargain

Murder, arson, and a lawyer's failure to give advice on a plea offer became a formula for disaster for a homeless Queens man. Edwin Smith was charged with setting fire to the vacant building where he once lived, resulting in the death of a fire officer. Smith was initially represented by a legal aid lawyer, but his case was soon transferred to a private attorney who volunteered to represent him. Plea offers were made by the prosecutor and discussed by the judge several times during the case. Nevertheless, Smith went to trial and received a sentence of 17 years to life. On a post-conviction motion, he raised an ineffectiveness claim against his attorney for failing to advise him on whether to accept or reject the plea offers. After a hearing on the motion in Queens Supreme Court, Justice Hanophy, following *Boria v Keane* (99 F3d 492 [2d. Cir. 1996]), held that: “counsel's failure to discuss with the defendant the advisability of accepting or rejecting the plea bargain, particularly when accepting the offer was clearly in the defendant's best interest, deprived the defendant of his constitutionally required advice of counsel in violation of the defendant's State and Federal constitutional right to effective assistance of counsel.” Hanophy pointed out that a trial court cannot fill in gaps in defense counsel's representation by advising the defendant. Moreover, the failure of a criminal defense lawyer to advise a client is not a strategic decision or legitimate defense strategy, Hanophy noted. (*New York Law Journal*, 10/31/00.) A copy of the opinion in *People v Edwin Smith*, Queens Sup. Ct. 11/1/00 is available from the Backup Center.

### 2nd Circuit Finds Ineffective Assistance for “Persistent” Problem

Arrested for first-degree robbery, Ronald Mask was offered a plea bargain with a sentence of 10 years to life—the best offer possible for a persistent violent felony offender (PVFO) with two prior convictions. Mask rejected the offer and chose to go to trial. After he was convicted, but before sentencing, it was discovered that he was *not* a PVFO, due to the timing of one of his previous cases. The judge therefore sentenced him to 20 to 40 years. In a post-conviction motion, Mask claimed that his attorney was ineffective for failing to tell him the correct minimum sentence that the prosecutor could legally offer and for failing to correct the assertions that Mask was a persistent violent felon, so that that Mask's belief as to the minimum available plea was erroneous. After unsuccessful efforts in state courts, Mask filed a habeas corpus petition in federal district court. Judge Denny Chin decided that “while Mask's trial counsel may have been a fine courtroom attorney, his failure to determine accurately Mask's potential sentencing exposure was an egregious error.” The habeas petition was conditionally granted, unless the respondents agree to either reduce Mask's sentence to a term of eight to sixteen years [which he has said he would have accepted] or grant him a new trial. Chin's decision was affirmed by the 2nd Circuit in an opinion noting that: “Nowhere in the state court decision does the court refer to the correct standard for assessing ineffectiveness claims—that petitioner is required to demonstrate only “*reasonable probability*” that “but for counsel's unprofessional errors, the result of the proceeding would have been different” [emphasis in original]. *Mask v McGinnis*, No 99-2071 (2d Cir. 11/15/00).

### NYSDA Supports Parent-Child Privilege

The New York State Law Revision Commission hosted a roundtable discussion of its controversial proposal for enactment of a so-called parent-child privilege in New York.

### Contents

- 1 Defender News
- 4 Immigration Practice Tips
- 5 Job Opportunities
- 6 Conferences & Seminars
- 7 Case Digest:
  - 7 Court of Appeals
  - 9 First Department
  - 10 Fourth Department

Abandoning its longstanding recommendation that the Legislature enact a true parent-child privilege, the Law Revision Commission now proposes that prosecutors be statutorily authorized to compel parents to testify about admissions made to them by their children, at least when a parent's testimony is deemed necessary to the state's case and is not obtainable from an alternative source. Among the 30 attending the meeting on Nov. 3, 2000 at Brooklyn Law School was NYSDA staff attorney Al O'Connor, who voiced strong opposition to the Law Revision Commission's new plan.

## **Momentum Builds for Alternatives to Incarceration, Diversion**

Alternative sentencing programs have proven effective at improving individuals' lives and saving municipalities money. Officials in Washington County learned the value of jail alternatives after they shifted their focus from incarceration to pre-trial programs. The increased use of house arrest and intensive probation proved to be an economical and effective option to jail. District Attorney Robert M. Winn commented recently that "county officials are trying to balance public safety with fiscal responsibility." He went on to add that he's "seen more success rehabilitating criminals through alternative sentencing programs that allow them to work or get an education than through stints in the county jail, where there's little to do but watch television." (*Post-Star*, 11/7/00.)

In reaction to the death of a mentally ill prisoner at the Albany County Jail last year, officials obtained a federal grant to screen people with mental illnesses. According to Sheriff James L. Campbell: "This program will hopefully help divert people with mental illness from coming into the system." (*Albany Times Union*, 11/2/00.)

Moreover, Congress has passed the "America's Law Enforcement and Mental Health Project," S. 1865, a bill that will provide millions of dollars for pilot programs establishing mental health court programs across the country. (*Findlaw Legal News* [online], 10/25/00.) A copy of the bill is available on the Internet at [thomas.loc.gov](http://thomas.loc.gov). A federal study on mental health courts describing their operations in detail, *Emerging Judicial Strategies for the Mentally Ill in the Criminal Caseload* (Bureau of Justice Assistance, April 2000), is available on the Internet at [www.ncjrs.org](http://www.ncjrs.org). For more information, visit the Hot Topic page on Mental Illness at NYSDA's web site: [www.nysda.org](http://www.nysda.org).

The Catholic Bishops of the State of New York expressed support for restorative justice and alternative sentencing in *Restoring All to the Fullness of Life: A Pastoral Statement on Criminal Justice for the Jubilee Year* (9/22/00). They underscored the need for treatment and conciliation programs as opposed to the use of incarceration as the overarching solution to crime. Along with their review of various issues, the Bishops ended by pointing out: "We must reject the traditional emphasis on retribution that manifests itself in an over-reliance on incarceration and resort to the death penalty. We must instead balance corrective punishment with efforts at healing, forgiveness, and rehabilitation." (*Albany Times Union*, 10/31/00.) Their statement is available

on the Internet: [www.nyscatholicconference.org/bishops/crimjust.htm](http://www.nyscatholicconference.org/bishops/crimjust.htm).

Shortly after the New York bishops issued their statement, the National Conference of Catholic Bishops published its own statement on criminal justice: *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (11/15/00). Echoing the sentiments of the New York Bishops, the National Conference criticized the overuse of incarceration and mandatory sentencing laws while encouraging community-based solutions, treatment and restoration. They also sought fairer treatment for immigrants and the repeal of mandatory detention. The statement is available on the Internet: [www.nccbuscc.org/sdwp/criminal.htm](http://www.nccbuscc.org/sdwp/criminal.htm).

Voters in California agreed that treatment is a better option than jail for drug offenders by approving Proposition 36, which requires first and second time drug offenders to receive treatment in lieu of prison. (*New York Times*, 11/9/00.)

Similarly, a survey of New York political candidates conducted by The Committee for Modern Courts showed that most candidates did not believe that New York's Rockefeller Drug Laws were effective and favored judicial discretion over mandatory sentencing. (*New York Law Journal*, 10/31/00.)

Meanwhile, debates continue over the "Second Chance Program," a proposed law designed to help low-level or non-violent drug offenders in New York start over without the stigma of a criminal conviction. The law would allow criminal records to be sealed five years after the completion of an individual's sentence. During the five-year period, applicants would have to take positive steps, such as community service, drug treatment or education. (*New York Times*, 10/20/00.) The proposed legislation (A10053B and S07095A) can be found on the Internet through the New York State Assembly Legislative Information System: [assembly.state.ny.us/ALIS/billsearch.html](http://assembly.state.ny.us/ALIS/billsearch.html).

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

A PUBLICATION OF THE DEFENDER INSTITUTE  
Volume XV Number 9 November 2000

Managing Editor Charles F. O'Brien  
Editor Mardi Crawford  
Contributors Stephanie Batcheller, Kate Dixon,  
Sybil A. McPherson, Al O'Connor, and Ken Strutin

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.

## **Defense/Prosecution Resource Disparity and Caseloads Increase**

The still-escalating war on crime has resulted in more funding and resources for prosecution and law enforcement, and more work—but no more resources—for public defenders. For example, in Orange County two additional assistant district attorney positions have been funded by the local legislature. A successful lobbying effort by the District Attorney persuaded legislators to respond to the needs of the prosecutor's office in handling a growing number of criminal cases. (*Times Herald-Record*, 10/20/00.)

In New York City, police announced use of a computer mapping system to crackdown on "quality of life" offenses. According to a press report, "... [Mayor Rudolph] Giuliani acknowledged that the effort might result in a surge in new citations and arrests, which could ultimately increase the burden on the city's courts. But he added that that did not worry him." (*New York Times*, 11/15/00.)

The effects of dramatic changes in the prosecution of prison-based crime and DWI are also being felt by public defense offices expected to provide an unfunded counterweight for these initiatives.

## **Prison Prosecutions Mean More Work for Public Defenders**

District Attorneys in two upstate counties have stepped up prosecution of crimes committed behind bars. In Greene County, this policy has raised serious questions about public defense caseloads and budgets. In a recent court appearance, Public Defender Greg Lubow voiced concerns about adequately representing prison clients without additional funding. The press reported on Lubow's assertion that "the issue was not new but that a new light was shed on what he calls the lack of parity between his office and the District Attorney's Office as a result of (District Attorney Terry) Wilhelm's prosecution of all inmates caught with shanks." (*Daily Freeman*, 11/12/00.)

At the same time, Franklin County is seeking grants to pay for their prosecution of prison crime. An additional assistant prosecutor position has already been budgeted by the local legislature. (*Press Republican*, 10/27/00.)

## **Increased DWI Enforcement May Have Ripple Effect**

A new federal law ties federal highway dollars to state DWI standards and calls for states to lower the blood-alcohol content for DWI to .08. A recent news article reported that "New York state stands to lose \$50 million in federal highway money between the end of 2003 and 2006 if lawmakers fail to adopt the nation's new drunken-driving standards." (*Times Herald-Record*, 10/28/00.) The possibility of lowering the DWI standard has been raised in the New York legislature before, but it remains to be seen whether pending measures will pass this term.

Meanwhile, other changes in the way prosecutors handle DWI cases have begun in western New York. Erie County District Attorney Frank J. Clark unveiled a new, stricter plea bargain policy for drivers accused of DWI. "Starting Dec. 1, no first-time offender who registers a blood alcohol reading

### **Legislative Alert — New Effective Dates**

- Hate Crimes Act of 2000 — applies to offenses committed on or after Nov. 1, 2000.
- Sexual Assault Reform Act — applies to offenses committed on or after Feb. 1, 2001.
- DWI Suspension Pending Prosecution (*Pringle v Wolfe*, 88 NY2d 426 [1996]) — Sunset clause extended to Oct. 1, 2001

*For more information on legislation from the 2000 Regular Session of the State Legislature, see Backup Center REPORT Vol. XV, No. 8 (October, 2000)*

of 0.13 percent or higher will be offered a plea deal to lesser charges." Niagara County has gone a step further: "Starting Jan. 1, (Niagara County District Attorney Matthew J.) Murphy will refuse to plead down if a driver's breath test reading is above 0.12 percent." (*Buffalo News*, 10/27/00, 10/28/00.) These changes in plea bargaining policies are likely to lead to an increased number of cases going to trial, thereby adding to the burden on public defense providers.

## **The Future of Violence**

"Future dangerousness," the likelihood that a defendant will commit another violent act sometime down the road, is a serious issue for clients and their lawyers. Everything from bail decisions and sex offender commitments to the sentencing phase of a death penalty case may hinge on "expert" predictors of a defendant's violent tendencies. The standards for admitting such evidence have been criticized by scientists and scholars alike. Dr. Paul Appelbaum, Chairman of the Psychiatry Department at the University of Massachusetts Medical School and Vice President of the American Psychiatric Association, recently said: "I don't believe a psychiatrist can respond to a reasonable degree of medical certainty on a hypothetical question about the future dangerousness of a defendant he has never examined." (*Los Angeles Times*, 11/8/00.)

At the "National Conference on Science and the Law" held in October, experts from diverse fields discussed the efficacy of predictors of dangerousness. According to the Conference Report, there has been a shift towards an actuarial analysis leading away from clinical portraits. The novelty and misapplication of these new techniques has created cause for concern. "The problem with using such unstructured clinical assessments, which are often expressed in terms of a professional's 'clinical judgment,' is that the validity of assessments by particular professionals cannot be tested, and the research has shown that they are not accurate." Randy K. Otto, Forensic Psychologist and Professor in the Department of Mental Health law and Policy at the University of South Florida. The future of "future dangerousness" might also mean using genetic predictors threatening to cancel centuries of debate over "free will." (*BNA Criminal Law Report*, vol. 68, no. 5, at 95 (11/1/00.)

*(continued on page 11)*

## Defense-Relevant Immigration News

by Manuel D. Vargas and Sejal R. Zota\*

### 2nd Department again dismisses an appeal because an immigrant defendant was deported

In a two-sentence decision, the Appellate Division, 2nd Department, last summer dismissed an appeal of an immigrant defendant, stating that because the appellant had been deported, he was no longer subject to the court's jurisdiction. *People v Wright*, 712 NYS2d 398 (7/31/00) (*Backup Center Report*, Vol XV, #8, p. 25). This decision is the eighth of such published short decisions in the 2nd Department, dismissing the appeal of a deported defendant without providing legal support for such action. *People v Forde*, 182 AD2d 830, 586 NYS2d 495 (1992); *People v Hernandez*, 157 AD2d 854, 551 NYS2d 806 (1990); *People v Ragsdale*, 144 AD2d 708, 535 NYS2d 63 (1988); *People v Ospina*, 143 AD2d 952, 533 NYS2d 696 (1988); *People v Adamson*, 122 AD2d 147, 504 NYS2d 620 (1986); *People v Bryant*, 103 AD2d 832, 478 NYS2d 809 (1984); *People v Jimenez*, 97 A.D.2d 799, 468 NYS2d 421 (1983). Some of these cases cite to *People v Del Rio*, 14 NY2d 165, 199 NE2d 359 (1964), the one Court of Appeals case that has substantively addressed whether deportation ends a pending appeal.

In *Del Rio*, the Court dismissed the defendant's appeal for "mootness" on a showing that the defendant had left the United States for Cuba, that his sentence had been commuted, and that he had been released from prison on parole and later deported by the INS to Cuba. However, the Court set aside the dismissal upon the defendant's application for vacatur of the dismissal, in which the Court was told that defendant "never executed any waiver, consent, application or other request for commutation" or agreed to his removal from prison and from the United States. The Court later learned that these were an erroneous statement of facts, and that *Del Rio*, in consideration of the commutation of his sentence and of his release from prison, had solemnly agreed that he would go at once to Cuba and never again enter the United States.

Based on *Del Rio*'s actions, the Court reasoned that he must be held to have abandoned the appeal and deliberately waived and forgone his right to have the appeal heard and decided. The Court used two rationales. It analogized *Del Rio*'s case to that of absconding defendant-appellants who may not have their appeals heard. It also compared him to defendant-appellants that have accepted parole or other mitigation of punishment. These appellants are considered to have abandoned their appeals.

\* **Manuel D. Vargas** is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. **Sejal R. Zota** is working with the Project on a Kirkland & Ellis New York City Public Service Fellowship. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

Apart from *Del Rio* and the 2nd Department orders (which provide no legal argument), there appears to be no reported case law in New York on this issue. Therefore, despite the 2nd Department's approach, the issue of whether deportation ends an appeal is still unsettled. New York defense attorneys should argue that a client's appeal must be heard if the client has not agreed to deportation in exchange for early release. Because the Court focused on the fact that it was *Del Rio* who was responsible for his own exile ["having so exiled himself from the jurisdiction..."], it is not difficult to distinguish this case. Ostensibly, if an individual is deported on the sole basis of INS authority, not on the basis of voluntary early release, then the court should still retain jurisdiction because the appellant has not abandoned his appeal. This was illustrated by the Court of Appeals' decision to set aside the dismissal and put the appeal back on the calendar when it believed that *Del Rio* had not agreed to deportation in exchange for the commutation of his sentence, even though he was no longer in the US.

### Supreme Court to review challenges to INS indefinite detention

The Supreme Court has agreed to review two federal appeals court decisions that reached opposite results on the issue of whether the INS may indefinitely detain noncitizens whom the United States is unable to deport. *Reno v Ma*, No. 00-38 (10/10/00) [case below *Kim Ho Ma v Reno*, 208 F3d 815 (9th Cir. 2000)] and *Zadvydas v Underdown*, No. 99-7791 (10/10/00) [case below *Zadvydas v Underdown*, 185 F3d 279 (5th Cir. 1999)].

### INS using NY felony DWI-related offenses as aggravated felonies for deportation purposes

In several recent cases, the INS has used New York felony DWIs with a prison sentence of one year or longer as aggravated felonies for immigration purposes. In doing so, the INS is relying on the Board of Immigration Appeals (BIA) decision, *Matter of Puente-Salazar*, Interim Decision #3412 (9/29/99). There, the BIA ruled that the felony offense of driving while intoxicated under Texas law is a conviction of a crime of violence and therefore an aggravated felony for immigration law purposes. The Board found that operating a motor vehicle in a public place while under the influence involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense, thus meeting the second prong of the 18 USC 16 definition of "crime of violence." See the *Backup Center REPORT* Vol. XIV, #9, at p. 4.

The government's position is that a felony DWI under New York's Vehicle & Traffic Law 1192 [2], [3], or [4] with a one year prison sentence likewise constitutes a crime of violence and is therefore an aggravated felony. Many of the New York DWI cases are being appealed to the 2nd Circuit. The appellants are challenging the INS' position that a felony DWI or related offense always constitutes a deportable aggravated felony offense. While this issue is currently being

litigated, defense attorneys should try to avoid felony DWI convictions with one year prison sentences for immigrant clients.

For those who are litigating this issue in immigration removal proceedings or the federal courts, NYSDA's Criminal Defense Immigration Project has prepared a memo compiling various arguments why a New York felony DWI offense does not constitute a "crime of violence" (COV), and should thereby not render someone deportable. The arguments include that 1) DWI is not a specific intent offense, and thus does not fall under 18 USC 16(b); 2) congressional intent regarding 18 USC 16(b) demonstrates that Congress never intended for COV's under 18 USC 16 to include DWI's; 3) Veh. & Traf. 1192 is a divisible statute that covers conduct that does not necessarily meet the definition of "crime of violence"; and 4) subsequent DWI in NY is not a substantive felony offense, and thus does not fall under 18 USC 16(b). This memo is available on the NYSDA web site ([www.nysda.org](http://www.nysda.org)), or from the Backup Center.

### Supreme Court to review constitutionality of citizenship law that restricts acquisition of US citizenship based on birth to a citizen father

The Supreme Court will also review a decision upholding the constitutionality of the gender-based distinction in US citizenship law that allows a citizen mother but not a citizen father to confer citizenship on a child born "out of wedlock" outside of the United States. *Nguyen v INS*, No. 99-2071 (9/26/00). In *Miller v Albright*, 523 US 420 (1998), an earlier case presenting the same issue, the Court did not reach a majority opinion on the merits. In the case now to be reviewed, the 5th Circuit held that the gender distinction was not unconstitutional. *Nguyen v INS*, 208 F3d 528 (5th Cir. 2000). Two other circuit courts have struck down this distinction on equal protection grounds, including the 2nd Circuit. *US v Ahumada-Aguilar* (9th Cir. 1999); *Lake v Reno*, (2d Cir. 9/15/00) (reported in the *Backup Center REPORT* Vol. XV, #8, at p. 17).

### New federal law will expand grants of automatic citizenship to certain foreign-born children of US citizens

A new federal law confers US citizenship on certain foreign-born children who are or will be adopted by a citizen parent, or one of whose noncitizen parents is or becomes a US citizen before the child reaches the age of 18. Public Law No. 106-395 (10/30/00). The new law will take effect on or about Feb. 27, 2001. ☪

## Job Opportunities

Disability Advocates seeks a **System Reform Litigator** to undertake complex system reform litigation and advocacy regarding abuse and neglect of prisoners with mental illness in New York State. Disability Advocates is a not-for-profit law firm providing free protection and advocacy services to persons with disabilities. Salary DOE, outstanding benefits. EOE. Send resume and writing sample ASAP to Disability Advocates, Inc., 5 Clinton Square, 3rd Floor, Albany NY 12207.

Pace University School of Law expects **two entry-level, tenure-track positions** for the 2001-2002 academic year. Academic areas needed include criminal procedure, an integrated criminal law/legal research and writing program, and others. Strong academic record and potential for excellent scholarship and teaching required; two to five years in legal practice or clerkships preferred. Send resume, including references, to Prof. Barbara Black, Chair Appointments Committee, Pace University School of Law, 78 N. Broadway, White Plains NY 10603, e-mail: [Bblack@law.pace.edu](mailto:Bblack@law.pace.edu).

The Brennan Center for Justice seeks a **staff attorney** for its Criminal Justice Program, to start no later than March 2001. The Program, launched in September 2000, works to ensure the right to effective assistance of counsel, improving the quality of indigent defense, fair enforcement of criminal law,

and measured and meaningful sanctions. The Program's inaugural project will be to create a community justice institute to support defenders working in partnership with community groups, to promote fairness and safety. Candidate should be lawyer with three to five years' experience, demonstrated commitment to social justice, imaginative and collaborative approach to problem solving and advocacy, and excellent verbal, writing and analytical skills. Criminal justice experience (policy-makers, policy advocates, litigators, community organizers) preferred. Salary CWE, excellent benefits. Submit, by Dec. 22, 2000, a resume, two writing samples, three references, and a cover letter explaining interest in the Criminal Justice Program to: Administrative Director, Criminal Justice Program, Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 12th Floor, New York NY 10013. Web site <http://www.brennancenter.org>.

The Brennan Center Criminal Justice Program also seeks a **National Association for Public Interest Law (NAPIL) Fellow**. The fellowship begins Sept. 2001 for a two-year period. Recent law graduates and third-year law students eligible to apply. Candidates should have strong writing and analytical skills, imagination, and versatility. Experience in criminal justice or community organizing preferred. Salary scale

starts at \$42,000 for first-year lawyers. EOE. Submit by Dec. 18, 2000, a resume, two writing samples, three references, and a cover letter explaining interest in the Criminal Justice Program to: Administrative Director, Criminal Justice NAPIL Fellowship, Brennan Center for Justice at NYU School of Law (address above).

Prisoner's Legal Services of NY seeks applicants for four **Managing Attorney** positions (Albany, Ithaca, Plattsburgh, and Poughkeepsie). Responsible for managing legal and administrative matters for 3 attorneys, 3 paralegals, and 2 support staff. Must be admitted to practice in NYS or be eligible for admission *pro hac vice* and be willing to take the next available bar exam. Must have minimum of 5 years legal practice experience (preferably in civil legal services, civil rights, poverty law, or federal litigation). Previous management and supervisory experience preferred. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references (with phone numbers) to Maria McGuinness, Human Resources Manager, Prisoners Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850; tel (607) 273-2283; fax (607) 272-9122.

**FOR MORE JOBS, CHECK OUR WEB SITE: [www.nysda.org](http://www.nysda.org)** ☪

# CONFERENCES & SEMINARS

**Sponsor:** Law Education Institute  
**Theme:** National CLE Conference  
**Date:** January 3-8, 2001  
**Place:** Vail, CO  
**Contact:** Law Education Institute, Inc., 250 West Coventry Court, Milwaukee WI 53217-3963; tel (800) 926-5895; fax (414) 228-5815

**Sponsor:** National Association of Drug Court Professionals  
**Theme:** 2nd Annual Juvenile & Family Drug Court Training Conference: Strengthening Families through Partnerships  
**Date:** January 10-13, 2001  
**Place:** Miami, FL  
**Contact:** NADCP, P. O. Box 79025, Baltimore MD 21279-0025; tel (877) 567-7728

**Sponsor:** Albany County Bar Association  
**Theme:** Immigration and Naturalization  
**Date:** January 20, 2001  
**Place:** Albany, NY  
**Contact:** Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail [acba@global2000.net](mailto:acba@global2000.net); web site <http://www.web-ex.com/acba>

**Sponsor:** Appellate Division, First Department CLE  
**Theme:** Street Encounters & Search Warrants  
**Date:** January 22, 2001  
**Place:** New York City  
**Contact:** Office of Special Projects, Supreme Court of the State of New York, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0502

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Recent Case Developments & Theory  
**Date:** January 28-February 2, 2001  
**Place:** Aspen, CO  
**Contact:** NACDL, 1025 Connecticut Ave NW, Ste 901, Washington, DC 20036; tel (202) 872-8600 ext. 236; e-mail [meetings@nacdl.com](mailto:meetings@nacdl.com); web site <http://www.criminaljustice.org>

**Sponsor:** Appellate Division, First Department CLE  
**Theme:** The Internet for Lawyers  
**Date:** January 29, 2001  
**Place:** New York City  
**Contact:** Office of Special Projects, Supreme Court of the State of New York, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0502

**Sponsor:** Albany County Bar Association  
**Theme:** All Ethics in One Afternoon  
**Date:** February 15, 2001  
**Place:** Albany, NY  
**Contact:** Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail [acba@global2000.net](mailto:acba@global2000.net); web site <http://www.web-ex.com/acba>

**Sponsor:** California Attorneys for Criminal Justice & California Public Defenders Association  
**Theme:** CACJ/CPDA Capital Case Defense Seminar: One Case – One Client  
**Date:** February 16-19, 2001  
**Place:** Monterey, CA  
**Contact:** CACJ, 4929 Wilshire Blvd, Suite 688, Los Angeles CA 90010; tel (323) 933-9414; fax (323) 933-9417; e-mail [cacj@ix.netcom.com](mailto:cacj@ix.netcom.com); web site <http://www.cacj.org>

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Midwinter Meeting & CLE: Forensic and Psychological Aspects of Trial  
**Date:** February 21-24, 2001  
**Place:** Las Vegas, NV  
**Contact:** NACDL, 1025 Connecticut Ave. NW, Ste. 901, Washington, DC 20036; tel (202) 872-8600, fax (202) 872-8690, e-mail [assist@nacdl.com](mailto:assist@nacdl.com); web site: [www.criminaljustice.org](http://www.criminaljustice.org)

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Life in the Balance: Capital Case Training for Mitigation Specialists, Defense Investigators and Defense Attorneys  
**Date:** March 3-6, 2001  
**Place:** Albuquerque, NM  
**Contact:** Ron Gottlieb: tel (202) 452-0620 x233; e-mail [r.gottlieb@nlada.org](mailto:r.gottlieb@nlada.org)

**Sponsor:** Albany County Bar Association  
**Theme:** Do's and Don'ts of Local Courts  
**Date:** March 8, 2001  
**Place:** Albany, NY  
**Contact:** Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail [acba@global2000.net](mailto:acba@global2000.net); web site <http://www.web-ex.com/acba>

**Sponsor:** New York State Defenders Association  
**Theme:** 15th Annual New York Metropolitan Trainer  
**Date:** March 24, 2001  
**Place:** New York City  
**Contact:** NYSDA, 194 Washington Avenue, Suite 500, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; web site <http://www.nysda.org>

**Sponsor:** Albany County Bar Association  
**Theme:** Criminal Law: Recent Developments & Practical Tips  
**Date:** April 20, 2001  
**Place:** Albany, NY  
**Contact:** Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail [acba@global2000.net](mailto:acba@global2000.net); web site <http://www.web-ex.com/acba> ↕

*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.*

## New York State Court of Appeals

Judges (General) JGS; 215(9)

Misconduct (Judicial) MIS; 250(10)

### Matter of the consideration of the suspension of Hon. Laura D. Stiggins, No.143, 9/15/00

**Holding:** “. . . Honorable Laura D. Stiggins is suspended, with pay, effective immediately, from the office of Justice of the Dansville Town Court, Steuben County, pending disposition of her request for review of a determination by the State Commission on Judicial Conduct.”

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

### People v Finger, No. 117, 10/12/00

The defendant moved to dismiss his conviction on the ground “that the prosecution fail[ed] to prove each and every element of both counts of the indictment, beyond a reasonable doubt, as a matter of law.” The Appellate Division affirmed.

**Holding:** The defendant’s general motion to dismiss was insufficient to preserve the argument for review. *See People v Gray*, 86 NY2d 10, 19-21. The defendant’s remaining contention is without merit. Order affirmed.

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

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

### Carter v NYS, Executive Dept., Division of Parole, No. 103, 10/17/00

The Division of Parole instituted proceedings against the petitioner, alleging that he violated his parole. In August of 1997, an Administrative Law Judge issued a recommendation that the petitioner’s parole be revoked. Ten days later, Parole adopted that recommendation. The defendant sought review in the Parole appeals unit, which affirmed both the revocation and the penalty. The notice of that decision contained a handwritten notation that, given the length of the hold, the case was to be scheduled for full Board review.

Following a Delinquent Time Case Review (9 NYCRR 8005.21), the Board notified the defendant that his penalty was reduced from 96 months to 60. Four months later, the defendant commenced CPLR article 78 proceedings, arguing that his parole was improperly revoked. The Supreme Court dismissed because the action was untimely. The Appellate Division affirmed.

**Holding:** A CPLR article 78 proceeding against a public “body or officer must be commenced within four months after the determination to be reviewed becomes final and binding.” CPLR 217(1). An agency determination is final—triggering the statute of limitations—when a petitioner is aggrieved by the determination. *See Biondo v New York State Board of Parole*, 60 NY2d 832, 834. A petitioner is aggrieved once the agency has issued an unambiguous final decision putting the petitioner on notice that all administrative appeals have been exhausted. Here, the appeals unit decision was a final and binding determination, making the article 78 filing too late. The notation concerning full Board review did not create an ambiguity. Order affirmed.

Larceny (False Pretenses) (Fraud) LAR; 236(30) (35)

### People v Sala, Nos. 106, 107, 108, 10/17/00

At the close of the prosecution’s case, the defendants unsuccessfully moved for dismissal based on the insufficiency of the evidence and were convicted on all counts. Before sentencing, the court dismissed the case against one defendant and granted reargument on the dismissal motions of the others. The court dismissed 10 of 16 larceny charges. The Appellate Division modified the judgment, reinstating the jury verdicts on the dismissed counts and affirming the defendants’ convictions.

**Holding:** The prosecution presented proof that the defendants disguised their corporation as a financial planning institution, when in reality the defendants used the corporation to channel investors’ assets into risky investment vehicles while misrepresenting and concealing the risks involved. The evidence was legally sufficient to demonstrate the defendants’ fraudulent intent in relation to all counts. The sufficiency argument as to the larceny counts dismissed by the trial court was not preserved. The jury was instructed that the proper definition of a “false statement” included both affirmative misrepresentations and any representation that effectively concealed or omitted a material fact. The defendants did not object to this interpretation, but later argued that an omission of material fact does not constitute the “false statement” necessary for larceny by false pretenses. Review is limited to whether there was legally sufficient evidence of false statements based on the charge as given. *See People v Deckle*, 56 NY2d 835, 836. The question of whether false pretenses can ever rest on material omissions or concealments alone is not reached. Order affirmed.

**NY Court of Appeals** *continued*

**Juveniles (Persons in need of Supervision)** **JUV; 230(110)**

**In re Beau "II", No. 97, 10/19/00**

School officials filed a person in need of supervision (PINS) petition in Family Court against the respondent, a student with a disability covered by the Individuals With Disabilities Education Act (IDEA), citing his habitual tardiness and aggressive behavior. The court adjudicated the respondent a PINS. He unsuccessfully moved to dismiss the petition. The Appellate Division reversed, holding that the filing of the petition was a proposed change to the respondent's educational program triggering the substantive and procedural safeguards of IDEA and Education Law art. 89.

**Holding:** The need to follow IDEA procedures turns on whether there truly is a contemplated change in a respondent's educational placement "likely to affect the child's learning experience in some significant way." *Dong v Board of Educ. of the Rochester Community Schools*, 197 F3d 793, 801 (6th Cir.). The PINS adjudication in this case effected no substantial and material change upon the respondent's educational placement. The only difference in circumstance was that he was made subject to monitoring by the probation department. The suggestion that all PINS proceedings are barred by IDEA is rejected. Order reversed.

**Grand Jury (Procedure)** **GRJ; 180 (5)**

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

**People v Hansen, No. 115, 10/19/00**

At the grand jury, the prosecutor played portions of a television news videotape—some of a reporter's comments and an interview with the defendant after his arrest. The prosecutor then cross-examined the defendant about his conflicting statements. At the end of the proceedings, the prosecutor instructed the grand jurors that "only the portion of the tape where [defendant] is making a statement should be considered as evidence." The motion court found that the prosecutor inadvertently played both portions of the tape, and denied the defendant's motion to dismiss the indictment based on the claim that the videotaped remarks were unsworn hearsay. The defendant pled guilty to one count of attempted first-degree burglary. The Appellate Division affirmed.

**Holding:** A guilty plea generally marks the end of a criminal case, not a gateway to further litigation. *People v Taylor*, 65 NY2d 1, 5. As a rule, a defendant who in open court admits guilt may not later seek review of claims related to the deprivation of rights that took place before the plea was entered. *See People v DiRaffaele*, 55 NY2d 234, 240; *see also, Tollet v Henderson*, 411 US 258, 267 [1973]. A conviction rests directly on the sufficiency of a defendant's plea, not the legal

or constitutional sufficiency of any proceedings which might have led to conviction after trial. A guilty plea extinguishes most, but not all, claims that preceded it. The claim that the integrity of the grand jury was impaired by the videotape did not activate a jurisdictional issue. It essentially related to the amount of proof needed to satisfy the elements considered by the grand jury, and the sufficiency of the grand jury evidence cannot be challenged after a guilty plea. Order affirmed.

**Instructions To Jury (Circumstantial Evidence)** **ISJ; 205(32)**

**Flight (Evidence)** **FLI; 170(5)**

**People v Cintron, No. 96, 10/24/00**

Police apprehended the defendant after a high-speed car chase that began when they discovered that the car had no insurance. Police later learned that the car was stolen. At trial, the court did not instruct the jury on the inferences arising from recent and exclusive possession of stolen property or from the defendant's operation of a vehicle not belonging to him. He was convicted of charges including fourth- and third-degree criminal possession of stolen property and third-degree unauthorized use of a vehicle. He argued that, given the prosecution's failure to request the above charges, the circumstantial evidence pertaining to his flight was insufficient as a matter of law to prove that he knew that the vehicle was stolen and that he did not have the owner's consent to operate it. The Appellate Division affirmed.

**Holding:** Knowledge that property is stolen can be established through circumstantial evidence such as recent exclusive possession, a defendant's conduct, or contradictory statements from which guilt may be inferred. *People v Zorcik*, 67 NY2d 670, 671. This defendant was caught in exclusive possession of a vehicle stolen three days earlier. The jury could have reasonably inferred from the defendant's flight his knowledge that the car was stolen. *See People v Yazum*, 13 NY2d 302, 304 *rearg den* 15 NY2d 679. This was not a case where flight or consciousness of guilt was the only evidence. *See eg People v Leyra*, 1 NY2d 199, 209-211. The lack of instructions on inferences did not preclude the jury from using common sense to infer from the evidence the knowledge elements of the crimes in question. *People v Edwards* (104 AD2d 448), to the extent it is inconsistent with this decision, should not be followed. Order affirmed.

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

**Reckless Endangerment (Evidence)** **RED; 326 (15)**

**People v Lynch, No. 116, 10/24/00**

The defendant was convicted of second-degree assault, first-degree reckless endangerment, and fourth-degree

## NY Court of Appeals *continued*

criminal possession of a weapon. The Appellate Division reduced the count of second-degree assault to third-degree assault because the evidence that the defendant used a deadly weapon was legally insufficient. The appellate court affirmed the conviction as modified and remanded for sentencing on the reduced offense.

**Holding:** Depraved indifference to support first-degree reckless endangerment requires proof 'that the actor's reckless conduct is imminently dangerous and presents a grave risk of death.' *People v Roe*, 74 NY2d 20, 24. "This calculus requires an 'objective assessment of the degree of risk presented by defendant's reckless conduct.'" *People v Register*, 60 NY2d 270, 277. The defendant drove a sharp metal object into the back of the complainant's neck, causing injury to the spinal cord. After the complainant fell to the ground, the defendant and others kept kicking and beating him, and one threw a computer on his head. A valid line of reasoning exists by which a rational person could conclude that, viewed objectively, the degree of risk of the defendant's actions was great enough to create a very substantial risk of death. See *People v Russell*, 91 NY2d 280, 287-288.

The erroneous failure to remove two jurors for cause was not preserved for review, as the defendant failed to exercise all peremptory challenges. While counsel exhausted the initial number of peremptories, the record shows that the court offered counsel another one, but counsel voiced only acquiescence to the jury. Order affirmed.

**Dissent:** [Smith, JJ] The court did not make clear that an additional peremptory challenge was being offered, nor did the court have authority to do so at the last second.

## First Department

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

**Misconduct (Prosecution)** **MIS; 250(15)**

### **People v King, No. 1211, 1st Dept, 8/3/00**

A jury convicted the defendant of first-degree robbery and related charges.

**Holding:** It was not error for the court to allow cross-examination of the defendant's alibi witness concerning her fear of the defendant. Her statements that she was "terrified" of him provided a good faith basis for the inference that the witness's fear supplied a motive to create a false alibi. *People v Rodriguez*, 143 AD2d 854 *lv den* 73 NY2d 859. By "failing to object, failing to make specific objections, or by failing to request further relief after objections were sustained," the defendant failed to preserve challenges to the prosecution's summation. The record does not indicate that review is necessary in the interest of justice. Judgment affirmed. (Supreme Ct, New York Co [Alpert, JJ])

**Dissent:** [Rosenberger, JP] The prosecutor's inflammatory and misleading statements on summation cumulatively denied the defendant a fair trial, warranting reversal. *People v Ortiz*, 116 AD2d 531. The prosecutor knew, when asking in summation if anyone was surprised that a crime victim would refuse to be found to testify, that the prosecution had chosen not to call that witness because he could not identify the perpetrators. The prosecutor improperly urged that the defendant had not been sufficiently punished for prior crimes, which the defendant said he became involved in as a confidential informant and so had been given favorable plea bargains. The summation exploited the jury's fears by insinuating that lenient plea bargains are allowing career criminals to abuse the legal system. Prosecutors have a duty to safeguard the rights of all parties, including defendants, and to ensure a fair trial. *People v Lombard*, 4 AD2d 666, 671.

**Forfeiture (General)**

**FFT; 174(10)**

**Plea Bargaining (General)**

**PLE; 248(10)**

### **Property Clerk, New York City Police Dept. v Deans Overseas Shippers, Inc, No. 1250, 1st Dept, 8/3/00**

A van driven by a defendant and owned by his employer was seized and vouchered by the plaintiff. The defendant pled guilty to disorderly conduct. As part of the plea agreement, the prosecution agreed that the van would be released. When the employer made a demand for the van, the plaintiff Property Clerk commenced this action claiming the van had been forfeited. The court granted the defendant's motion for summary judgment.

**Holding:** A district attorney's waiver of forfeiture right did not bind the Property Clerk, an independent agency who was not a party to the criminal action. *Property Clerk v Ferris*, 77 NY2d 428. *Ferris* found that the forfeiture law's "interest of justice provision," CPLR 1311(4), did not apply to proceedings under the City's administrative code. Prosecutorial waiver is a necessary but not conclusive condition for vehicle return. Criminal courts lack the authority to adjudicate the Property Clerk's civil claim. An independent determination, made in a civil proceeding, is required to determine whether seized property is subject to forfeiture. *Property Clerk v Conca*, 148 AD2d 301, 302. If the defendant was misled by the prosecutor, he may move to vacate his plea. Judgment reversed. (Supreme Ct, New York Co [Gangel-Jacob, JJ])

**Freedom of Information (General)**

**FOI; 177(20)**

### **Application of Legal Aid Society v NYC Police Dept., No. 205, 1st Dept, 8/17/00**

The Legal Aid Society (LAS) sought class certification for criminal defendants with pending prosecutions whose Freedom of Information Law (FOIL) requests to the New York City Police Department (NYPD) had been denied. LAS

**First Department** *continued*

further sought declaratory and injunctive relief from the respondent's procedure regarding FOIL requests.

**Holding:** The court erred in granting class certification. Government operations are involved, and later petitioners will be protected by *stare decisis* principles. *New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d 49, 51. There has been no showing that the NYPD has flouted previous court orders; the narrow exception to the rule against class certification in government operations cases only applies when the government demonstrates reluctance to extend the relief to other parties not before the court. *Mitchell v Barrios-Paoli*, 253 AD2d 281. The NYPD's generic determination that disclosure will interfere with pending criminal proceedings is a sufficiently particularized justification for denying FOIL requests to criminal defendants. *Pittari v Pirro*, 258 AD2d 202 *lv den* 94 NY2d 755. Finally, Public Officer Law 89 (3) requires that an agency make the records available, deny the request, or acknowledge the request receipt and state the approximate date of compliance within five days of a request. A City rule requiring the determination to be made within 10 days is inconsistent with the statute, which has no such requirement. The court erred in imposing a 15-day limit by combining the two rules. Order and judgment reversed, petition dismissed. (Supreme Ct, New York Co [Schlesinger, JJ])

**Fourth Department**

**Search and Seizure (Warrantless Searches)** SEA; 335(80)

**People v Brown, No. KA 99-2042, 4th Dept, 7/7/00**

After the defendant answered his door, police observed what appeared to be cocaine on the kitchen counter. They entered without a warrant, arrested the defendant and seized the drug. The defendant moved to suppress the evidence.

**Holding:** The defendant's contentions that, absent exigent circumstances, the observations of police did not justify their warrantless entry into his home are without merit. The police had been told by a third party that the third party bought drugs at the defendant's residence earlier. Later, the police returned to the defendant's home, still without a warrant. While there was no explicit testimony or finding on exigency, it is well known that persons who engage in drug trafficking often attempt to dispose of drugs or escape. *People v Clements*, 37 NY2d 675, 684-685 *cert den sub nom Metzger v New York*, 425 US 911. Exigent circumstances did exist and the warrantless search was legal. Judgment affirmed. (Supreme Ct, Monroe Co [Cornelius, JJ])

**Dissent:** [Scudder, JJ] The prosecution failed to prove exigent circumstances. There was no showing that obtaining a warrant would not have been feasible. *People v Ramos*, 206 AD2d 260, 262. The police went to the residence on two

occasions, and there was no indication the defendant knew of their presence and was therefore likely to destroy evidence or escape. *People v Vennor*, 176 AD2d 1217, 1218.

**Plea Bargaining (General)**

PLE; 284(10)

**Sentencing (Enhancement)  
(Presentence Investigation  
and Report)**

SEN; 345(32) (65)

**People v Parker, No. KA 97-05498, 4th Dept, 7/7/00**

The defendants in these cases entered into plea agreements that required them to be truthful and cooperative with both the court and the probation department in the preparation of presentence investigation reports. The court had then justified harsher penalties than promised because the defendants had violated their agreements. One defendant refused to discuss his offense, as he had taken an *Alford* plea (*North Carolina v Alford*, 400 US 25 [1970]). Another had complained to the probation officer about his lawyer. A third had delayed a required drug and alcohol evaluation because he could not afford it, and initially lied about his offense but eventually admitted it to the probation officer. The fourth had told the probation officer that he was too drunk to know what he was doing during the offense and had used information from his lawyer at his plea colloquy.

**Holding:** The enhanced sentences do not meet the requirements of due process because they are based on subjective interpretations of each defendant's conduct, not probative facts. There is a thin line between assertions of facts and expressions of opinion that could easily be misinterpreted. Defendants are attracted to plea bargains by the "reasonable assurance of certainty" that they provide. *People v McConnell*, 49 NY2d 340, 346. "[T]o the extent that the assurance of certainty is diluted the bargaining process becomes less acceptable to defendants, to the detriment of the criminal justice system as a whole." Judgments modified, bargained-for sentences imposed. (Supreme Ct, Monroe Co [Bristol, JJ])

**Search and Seizure  
(Automobile and Other  
Vehicles [Impound Inventories]  
[Investigative Searches])**

SEA; 335(15[f] [k])

**People v Valerio, No. KA 97-5546, 4th Dept, 7/7/00**

The appellant was convicted of first-degree criminal possession of a controlled substance. After a routine traffic stop of a vehicle in which the appellant was a passenger, police officers impounded the vehicle. Upon further search of the vehicle, officers uncovered 15.57 pounds of cocaine hidden between the rear seat and the trunk. At trial, the appellant challenged the inventory search of the vehicle and sought to suppress the seized evidence.

## Fourth Department *continued*

**Holding:** The vehicle in which the appellant was a passenger was illegally parked, so the officers had a credible and objective reason for approaching and questioning those in it. The subsequent license plate check revealed that the car was unregistered, giving rise to a “founded suspicion” of criminality. See *People v Battaglia*, 86 NY2d 755, 756. The fact that the car was illegally parked and unregistered authorized the officers to impound it. See *South Dakota v Opperman*, 428 US 364, 368-369 (1976). The appellant and his companion voluntarily accompanied officers to the precinct, and the record establishes that the cocaine was discovered during a search conducted pursuant to the appellant’s voluntary oral and written consent (see *People v Gonzalez*, 39 NY2d 122, 128-129), which the officers were entitled to elicit. Judgment affirmed. (County Ct, Seneca Co [Bender, JJ])

**Dissent:** [Green, J P] The police questioning at the scene did not relate to the expired car registration but to clothing in the trunk, and lacked a founded suspicion. See *People v Hollman*, 79 NY2d 181, 191. All police action after the initial contact was unlawful.

Admission (*Miranda* Advice)

ADM; 15(25)

Motions (Suppression)

MOT; 255(40)

## People v Scott, No. KA 97-05505, 4th Dept, 7/7/00

The defendant was convicted of first-degree assault. Before trial he sought, in an omnibus motion, *inter alia*, suppression of statements that he made to a hostage negotiator. He argued that he should have been given *Miranda* warnings before making those statements because the hostage negotiator was interrogating him while he was in custody. The court concluded that the defendant was neither in custody nor subject to interrogation during the hostage negotiations and therefore refused to suppress the statements.

**Holding:** The defendant, who was armed with a deadly weapon and holding hostages inside a residence, was not in police custody even though the residence was surrounded by police officers. There were no officers physically in the defendant’s presence and he retained a degree of freedom inconsistent with a formal arrest. See *People v Mayfield*, 14 Cal 4th 668 *cert den* 522 US 839. Furthermore, the defendant was not subject to interrogation as defined by the US Supreme Court. That court has defined interrogation as “words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.” See *Rhode Island v Innis*, 446 US 291, 302 (1980). Here, the intent of the negotiator was to persuade the defendant to release the hostages and to surrender peacefully rather than to elicit incriminating statements. Judgment affirmed. (Supreme Ct, Monroe Co [Ark, JJ]) ☞

## Defender News (continued from page 3)

Finally, in Texas, the right of the Attorney General to intervene in the United States Supreme Court to confess error where race was a factor in penalty-phase risk assessment is being litigated. (*Texas Lawyer*, 11/15/00.)

### Takeout OK in Payton Place

Food delivery to an apartment of suspected drug dealers literally opened the door for police to order its occupants outside and make arrests without a warrant. According to the Court of Appeals for the 2nd Circuit, “occupants of a known stash house, having voluntarily exposed themselves to public view by answering the door to receive their food delivery, had no reasonable expectation of privacy against being seen by persons standing in a public hallway; and . . . once they were seen, in the absence of unreasonable police conduct, the occupants’ temporary seizure in the course of a limited investigation does not constitute a violation of the Fourth Amendment.” The court characterized the protection of privacy under *Payton v New York* (445 US 573 [1980]) as being limited to “physical intrusion” or crossing the threshold. Relying upon the “open door” rationale of *Santana v United States* (427 US 38 [1976]) the court concluded that after the door was opened, the officers needed no warrant to temporarily seize the occupants and conduct a limited investigation so long as the investigation was “reasonable in all the circumstances.” Judge Sotomayor dissented. (*New York Law Journal*, 10/19/00.) *US v Gori*, No. 99-1568(L), 99-1569 (10/18/80).

## Appointments Announced

NYSDA member and Syracuse Association of Criminal Defense Lawyers President Kate Rosethnal has been elected to the bench. She will serve a ten-year term as Syracuse City Court judge. (Syracuse Online, 11/8/00.)

In other news, Justice Graffeo of the Appellate Division, 3rd Department, has been appointed by Governor Pataki to the Court of Appeals, subject to Senate confirmation. (*New York Law Journal*, 11/3/00.) William J. Fraser has been named New York City Corrections Commissioner. (*New York Times*, 11/10/00.)

## Board Notes

Lisa Schreibersdorf, Executive Director of the Brooklyn Defender Services, has been named NYSDA’s designee to the New York State Association of Criminal Defense Lawyers Board of Directors. She replaces Leonard E. Noisette, who resigned effective Dec. 31, 2000. He remains a member of the NYSDA Board of Directors.

Robin Steinberg, Executive Director of The Bronx Defenders and a member of the NYSDA Board, was chosen earlier this year to receive the prestigious Kutak-Dodds Prize. Awarded by the National Legal Aid and Defender Association (NLADA) and the Robert J. Kutak Foundation, the prize honors a public defender, civil legal services attorney, or public interest lawyer “who, through the practice of law, has contributed in a significant way to the enhancement of the human dignity and quality of life of those persons unable to afford legal representation.” ☞

# **NYSDA MEMBERSHIP APPLICATION**

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

Enclosed are my membership dues:

\$50 Attorney       \$15 Law Student / Other Student / Inmate       \$25 All Others

I have enclosed a tax-deductible contribution:  \$500     \$250     \$100     \$50     Other \$ \_\_\_\_\_

Name \_\_\_\_\_ Firm/Office \_\_\_\_\_

Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Home Address \_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

County \_\_\_\_\_ Phone (Office) \_\_\_\_\_ (Fax) \_\_\_\_\_ (Home) \_\_\_\_\_

E-mail Address (Office) \_\_\_\_\_ E-mail Address (Home) \_\_\_\_\_

Please indicate if you are:     Assigned Counsel       Public Defender       Private Attorney  
    Legal Aid Attorney       Law Student       Concerned Citizen

(Attorneys and law students please fill out) Law School \_\_\_\_\_ Degree \_\_\_\_\_

Year of graduation: \_\_\_\_\_ Year admitted to practice \_\_\_\_\_ State(s) \_\_\_\_\_

Checks are payable to the **New York State Defenders Association, Inc.** Please mail coupon, dues, and contributions to: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany, NY 12210-2314.

## **NEW YORK STATE DEFENDERS ASSOCIATION**

194 Washington Avenue, Suite 500  
Albany, NY 12210-2314

Non-Profit Organization  
U.S. Postage  
**PAID**  
Albany, NY  
Permit #590