



Public Defense Backup Center REPORT

VOLUME XV NUMBER 8

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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

Racial Profiling News Continues Coast to Coast

"A law enforcement officer shall not engage in racial profiling." With these words, California has become the latest state to enact legislation outlawing racial profiling. It requires California Highway Patrol officers to get diversity training. The statute also mandates the analysis of voluntarily-kept statistical records on traffic stops. Critics, such as the ACLU, claim that the new law falls short by failing to mandate record keeping that would reveal patterns of racial profiling. (*San Francisco Chronicle*, 9/27/00.) A link to the California statute, SB 1102, can be found on NYSDA's web site on the "Race and Law" Hot Topic page.

Meanwhile, a Justice Department probe into New York City's Street Crime Unit has revealed a practice of racial profiling in the NYPD's "aggressive campaign" of street searches. Mayor Giuliani disputed the findings of the report, while acknowledging the need to make changes in the handling of civilian complaints. A federal civil rights lawsuit may be in the offing unless federal prosecutors and the Giuliani administration can agree on reforms. (*New York Times*, 10/5/00; 10/6/00.)

Racial issues in criminal justice are not limited to racial profiling by law enforcement. In one effort to correct a problem, criminal defendants in Buffalo City Court can now request a jury composed of city residents only, instead of jurors drawn countywide. The court expects this policy to provide defendants with representative juries. (*Buffalo News*, 10/5/00.)

In other race-related jury developments, a New York Federal District Court recently overturned a Nassau County homicide conviction due to a *Batson* violation. The court found that prosecutors excluded all five African-Americans from the jury pool, leaving the defendant to be convicted by an all-white jury. (*Newsday*, 9/26/00.)

Criminal Justice Funding Lacks Balance

Salary increases for law enforcement and prosecutors provide a stark contrast to the uphill battle to raise assigned counsel fees and the increasing burdens of providing defense services without adequate funding.

AC Fees, Eligibility Issues

At a statewide judiciary budget hearing (the first ever held, replacing regional hearings), New York's administrative judges gathered to examine critical issues facing the court system, including assigned counsel fees. Increasing the fees—stagnant since the mid-1980s—remains on the judiciary's agenda for this legislative session. According to the *New York Law Journal*, Judge Lippman described depressed assigned counsel fees as an "absolute crisis that must be addressed by the Legislature." The low rates have precipitated a decline in the number of assigned counsel available to represent indigent defendants in court, resulting in delays and adversely affecting the due process rights of the accused. (*New York Law Journal*, 10/5/00.)

Another battle over finances and defense services is looming in Nassau County. The Defense Counsel Screening Bureau (DCSB), which is responsible for determining the eligibility of indigent defendants for assigned counsel, has been targeted as expendable. County legislators are considering whether to eliminate it from the budget. If they cut it, the responsibility for eligibility determinations would shift to the Legal Aid Society and the courts. Matthew Muraskin, Attorney-in-Chief for the Legal Aid Society, was quoted as saying, "I've heard that we'll be responsible for it, but what I didn't hear was that they were going to give us money for it." (*New York Law Journal*, 10/16/00.)

In Syracuse, a County Court Judge has appointed a lawyer to determine a criminal defendant's eligibility for assigned counsel. The appointment followed the County Attorney's objection to assigning an attorney to represent the defendant on his criminal appeal. (*Syracuse Online*, 9/23/00.)

The Other Side Makes More Money

New York City prosecutors will be receiving salary increases across the board due to an eight-million-dollar budget allocation made pos-

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sible by Mayor Giuliani. (*Staten Island Advance*, 9/7/00.) On Long Island, a proposed salary increase for Nassau County Police is raising concerns. District Attorney Dennis Dillon has questioned the benefits of police salary hikes. Among his misgivings are that higher salaries would decrease overtime, affecting the ability of prosecutors to work with police on investigations and trial strategy, and would deprive other areas of the criminal justice system of resources. The terms of the current proposal are for a 22 percent raise over a five-year period. (*Newsday*, 10/4/00.)

Upstate, police in the Capital Region have discovered that federal-asset forfeiture laws can serve to bolster their budgets. They not only obtain property that can be used by their departments, but funds that can boost training and other budget lines. Critics question the propriety of using forfeiture laws in this manner, particularly without civilian oversight. "There's no other area where police forces can increase their budget, so they are going to gravitate toward seizing assets rather than stopping crime," Eric Blumenson, Professor at Suffolk University Law School has said. (*Albany Times Union*, 10/8/00.)

Blumenson co-authored a law review article two years ago about forfeiture abuses. The article includes a section entitled "Conflict of Interest Objections to Self-Financing Police Agencies," which addresses both due process and policy objections. See "Policing For Profit: the Drug War's Hidden Economic Agenda," 65 *University of Chicago Law Review* 35 (1998).

Traficanti to Direct Court Drug Treatment Programs

Deputy Chief Administrative Judge Joseph J. Traficanti Jr. has been appointed the Unified Court System's first director of court drug treatment programs. In addition to overseeing the judiciary's drug screening and treatment programs, he will supervise the creation of specialized courts for persistent misdemeanor offenders. Judge Traficanti will keep his duties as head of operations for state and local courts outside New York City. (*New York Law Journal* 10/18/00.)

ABA Pushes Capital Moratorium

American Bar Association President Martha Barnett has called on governors across the country to declare a moratorium on the death penalty until flaws in its administration are fixed. A "Call to Action" conference in October focused on several key death penalty issues: inadequate counsel; lack of funding for capital defense; role of race and geography in death sentences; and fairness of the process. The conference sought to draw attention to the "flawed" state of capital litigation in this country and seek the support of lawyers and public officials in bringing a halt to an unfair process. (*Fulton County Daily Report*, 10/12/00.)

Death Penalty Issues in NY

The moratorium effort is having an effect in New York State. State Senator Richard Dollinger has prepared a Death Penalty Moratorium Bill to submit to the legislature in January. (*Rochester Today*, 9/2/00.)

The death penalty has become an issue in the Albany County race for District Attorney. The candidates have been expressing their views about the fairness of the process and their approach to applying the capital punishment option. At the same time, an *Albany Times Union* editorial highlighted a recent *New York Times* study indicating that murder rates were lower in states without the death penalty. (*Albany Times Union*, 10/8/00; 10/9/00 *New York Times*, 9/22/00.)

Federal Death Penalty Found Racially Skewed

A recent Justice Department report has revealed a racial impact in the application of the federal death penalty. The publication describes the Department's internal decision-making process for deciding whether to seek death, and contains statistical information about the racial/ethnic and geographic distribution of defendants and victims at certain stages of that process. Of the 19 prisoners currently under a federal sentence of death, four are white, 13 are black, and the two others are Hispanic or other. This document, *Survey of the Federal Death Penalty System: A Statistical Survey 1988-2000* (US Department of Justice 2000), is available on the Department of Justice web site: <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html>. Attorney General Janet Reno has expressed concern over the lack of uniformity in the application of the federal death penalty and has ordered U.S. Attorneys to explain the disparities. (*New York Times*, 9/13/00.)

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Public Defense Backup Center *REPORT*

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CONFERENCES & SEMINARS

Sponsor: New York State Bar Association
Theme: Ethics Issues for Public Service Attorneys
Dates & Places: December 1, 2000 Albany
December 11, 2000 New York City
Contact: CLE Registrar's Office, New York State Bar Association, One Elk Street, Albany NY 12207; tel (800) 582-2452 [Albany area (518) 463-3724]; fax on demand (800) 828-5472; web site: <http://www.nysba.org>

Sponsor: Appellate Division, 1st Department
Theme: Developing a Theory of Defense and Implementing It
Date: December 4, 2000
Places: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

Sponsor: New York State Bar Association
Theme: Ethics & Professionalism
Dates & Places: December 6, 2000 New York City
December 8, 2000 Syracuse
Contact: CLE Registrar's Office, New York State Bar Association, One Elk Street, Albany NY 12207; tel (800) 582-2452 [Albany area (518) 463-3724]; fax on demand (800) 828-5472; web site: <http://www.nysba.org>

Sponsor: Appellate Division, 1st Department
Theme: Effective Cross-Examination
Date: December 7, 2000
Places: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

Sponsor: New York State Bar Association
Theme: Jim McElhaney's Trial Evidence
Date: December 8, 2000
Place: New York City
Contact: CLE Registrar's Office, New York State Bar Association, One Elk Street, Albany NY 12207; tel (800) 582-2452 [Albany area (518) 463-3724]; fax on demand (800) 828-5472; web site: <http://www.nysba.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Last Chance 2000
Date: December 8-9, 2000 (tentative)
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: Appellate Division, 1st Department
Theme: Storytelling
Date: December 11, 2000
Places: New York City
Contact: Office of Special Projects, Appellate Division, First Department, 41 Madison Avenue, 39th Floor, New York NY 10010; tel (212) 340-0595

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, PO Box 79025, Baltimore MD 21279-0025; tel (877) 567-7728

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; web site: <http://www.cacj.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

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; web site: <http://www.web-ex.com/acba>

Sponsor: New York State Defenders Association
Theme: 15th Annual 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; web site: <http://www.web-ex.com/acba> ☪

Job Opportunities

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' duties include: 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 Office of the Multi-County Public Defender (MPD) in Atlanta, GA seeks an experienced **Attorney** to start work in the capital trial division in the fall of 2000. The MPD is a division of the Georgia Indigent Defense Council and is engaged exclusively in representation of individuals facing the death

BEAT THOSE SHORT APPLICATION DEADLINES!

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penalty in Georgia. Salary: CWE + full benefits package (GA state employee status). Required: admitted to the GA state bar, or eligible to sit for the bar in Feb. 2001. EOE. Contact: Michael Mears, Director, Office of the Multi-County Public Defender, 985 Ponce de Leon, Atlanta GA 30306, tel (404) 894-2595, e-mail: mmears@gidc.state.ga.us.

The Correctional Association, the only private organization in New York State with legislative authority to visit prisons and report its findings to policymakers, seeks a **Director** for its **Juvenile Justice Project**. The Project's main activities will be preparing a report on NYC's juvenile detention practices, policy analysis, coalition building, and developing case histories of prevention programs that work. Responsibilities include overseeing and carrying out the

project's principal activities. Duties include: developing and initiating advocacy strategies, including preparing policy papers and working with government agencies and the media; coordinating a coalition; preparing public education materials; arranging visits to juvenile detention facilities; supervising staff; and working with the executive director on fundraising activities. Preferred: Experience in juvenile justice and advocacy. Salary CWE + benefits. EOE/AA. Send writing samples and a resume to: Robert Gangi, Executive Director, Correctional Association of New York, 135 East 15th Street, New York, New York 10003.

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. ☎

Defender News (continued from page 2)

States May Lose Funds for Releasing Future Recidivists

A new law passed by Congress will allow one state to obtain federal money owed to another if the other state has released certain prisoners. The provision focuses on individuals who were convicted by the releasing state of murder, rape, or a dangerous sexual offense, and who after release committed such an offense in the recovering state. The cost-shifting measure, officially known as "Aimee's Law," is included as Section 2001 of the reauthorization bill for the federal Violence Against Women Act.

The amount that may be recovered is equal to the costs of apprehending, prosecuting, and incarcerating a recidivist for the crime committed following release. The triggering conditions are: the average prison term imposed in the releasing state for an applicable offense "is less than the average term of imprisonment imposed for that offense in all States" or the released prisoner had served less than 85% of

the sentence imposed for the prior offense.

Opponents objected that states may ratchet up sentences in a "race to the top" to avoid losing federal funds, disregarding public policy considerations. (68 *Criminal Law Reporter* 58.)

As the *REPORT* went to press, indications were that the measure would be signed into law. The full bill is called the Victims of Trafficking and Violence Protection Act of 2000 (HR 3244). It can be viewed through Research Links on the Association's web site at www.nysda.org. The effective date, if the measure is signed, is Jan. 1, 2002. A hard copy of Aimee's Law is available from the Backup Center.

NYSDA Trains in Monroe County

The Association held its biannual Monroe County trainer on Saturday, Oct. 28, 2000, with public defenders and private practitioners attending. The sessions included: Randy Hertz from NYU—4th Amendment jurisprudence and how to invoke state constitutional authority in search

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Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds NY Youthful Offender Dispositions Not Convictions for Immigration Purposes

In a reversal of direction, the Board of Immigration Appeals (BIA or Board) issued a precedent *en banc* decision holding that New York youthful offender dispositions are not convictions for immigration purposes. The published decision in *Matter of Devison-Charles*, Interim Decision #3435 (BIA 9/12/00) was signed by all 16 of the Board members participating in the review. This resolves the differences in rulings that individual three-member panels had been reaching in unpublished non-precedent decisions. See the *Backup Center REPORT* Vol XV, #6, at pgs. 6-7. Designated as a precedent, the decision is binding on immigration judges and the Immigration and Naturalization Service.

The BIA found that an adjudication of youthful offender status pursuant to New York Criminal Procedure Law Article 720 is "similar in nature and purpose" to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), codified at 18 USC 5031-5042 (1994 & Supp. II 1996). The Board stated:

[T]he central issue before both the state and federal courts is the offender's status, not his guilt or innocence. Perhaps most importantly, under the New York procedures a conviction precedent to a youthful offender adjudication is vacated, rendering it a nullity. . . . All that is left, as in the federal system, is a civil determination of status, which may not be treated as a conviction under governing law. Applying the FJDA as a benchmark, we find that a youthful offender adjudication under Article 720 of the New York Criminal Procedure Law corresponds to a determination of juvenile delinquency under the FJDA.

Matter of Devison-Charles, *supra*, at p. 9 (citation omitted).

The BIA reaffirmed that an adjudication of juvenile delinquency is not a conviction of a crime for purposes of the immigration laws despite recent broad readings of the new statutory definition of conviction for immigration purposes. It went on to hold that, likewise, a New York youthful offender adjudication should not be deemed a conviction for immigration purposes. Defense attorneys and their noncitizen clients should be aware that there is still some question whether the Board would apply its holding to a youthful offender adjudication involving an individual who committed the offense at issue between his or her eighteenth and nineteenth birthdays. The FJDA defines "juvenile delin-

*Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. 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.

quency" as "the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult." 18 USC 5031.

2nd Circuit Holds that AEDPA and IIRIRA Restrictions on Relief from Deportation are Not Applicable to Individuals Who Pled Guilty Before Those Laws Passed

In a long-awaited decision, the United States Court of Appeals for the 2nd Circuit held that 1996 amendments restricting or eliminating relief from deportation under former section 212(c) of the Immigration and Nationality Act (INA) do not apply to noncitizens who pled guilty or *nolo contendere* prior to the enactment dates of these amendments. *St. Cyr v Immigration and Naturalization Service*, __ F3d __, 2000 WL 1234850 (2d Cir 9/1/00). This decision upheld the lower federal district court's ruling and the recent decisions of several federal district judges in other cases on this issue. See the *Backup Center REPORT* Vol XV, #6, at pg. 7.

Previously, the 2nd Circuit had held that lawful permanent resident immigrants whose deportation cases were pending on Apr. 24, 1996 when the Antiterrorism and Effective Death Penalty Act (AEDPA) was enacted should still be permitted to pursue relief from deportation under section 212(c) of the INA as it existed pre-AEDPA. However, the Court did not reach the issue of whether these amendments could be applied to persons whose proceedings were not yet pending on that date, but whose criminal convictions or conduct preceded that date. See *Henderson v INS*, 157 F3d 106, *cert den sub nom Reno v Navas*, 526 US 1004 (1999); see also the *Backup Center REPORT* Vol XIV, #2, at pg. 9, and Vol XIV, #3, at pg. 6.

In *St. Cyr*, the 2nd Circuit first held that the district court properly took *habeas corpus* jurisdiction of the petitioner's challenge to the immigration agency's interpretation of the retroactive applicability of Section 440(d) of the AEDPA of 1996 (restricting eligibility for 212(c) relief based on category of crime) and Section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (eliminating 212(c) relief). On the same date, in a group of companion cases, the 2nd Circuit had ruled that it lacked jurisdiction to hear such challenges on direct petition for review. See *Calcano-Martinez et al v Immigration and Naturalization Service*, __ F3d __, 2000 WL 1336611 (2d Cir. 9/1/00) (dismissing petitions for review without prejudice to same claims being brought under *habeas corpus*).

Reaching the merits in *St. Cyr*, the Court then found that no clear congressional intent exists as to whether AEDPA 440(d) and IIRIRA 304 apply to noncitizens who pled guilty prior to the enactment dates of these Acts. The Court then found that there would be impermissible retroactive effect if the possibility of 212(c) relief were eliminated for the petitioner. Citing the *amici curiae* brief of the New York State Defenders Association, along with the Legal Aid Society of the City of New York and the New York State Association of Criminal Defense Lawyers, the Court stated:

As the Amici in this case demonstrate, a legal resident who is charged with a crime that renders him removable from the United States carefully considers the immigration consequences of his or her conviction and, specifically, the availability of discretionary relief from removal. It is not unreasonable to attribute knowledge of the availability of relief to a legal resident because it is a common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea. Additionally, an attorney's professional duty to his or her client includes advising that client of the immigration consequences of a plea or conviction.

St. Cyr, 2000 WL 1234850, *13. Thus, because application of AEDPA 440(d) and IIRIRA 304 would upset reasonable, settled expectations, and change the legal effect of prior conduct, the Court applied the traditional presumption against the retroactivity of a civil statute to hold that these amendments do not apply to pre-enactment guilty pleas.

The Court's decision includes dicta that AEDPA 440(d) and IIRIRA 304 may permissibly be applied in cases not involving pre-enactment pleas, even when at issue is pre-enactment conduct, or a pre-enactment conviction after trial. Further litigation of this issue will take place in the government's pending appeals to the 2nd Circuit in *Zgombic v Farquharson* (amicus brief filed by NYSDA on Oct. 17, 2000), or in *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno*. (amicus brief filed by NYSDA and the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers, and the Legal Aid Society of the City of New York on Mar. 16, 2000). See *Backup Center REPORT* Vol XV, #6, at pg. 7. We will report on any significant 2nd Circuit or other decisions on these issues in future issues of the *REPORT*.

2nd Circuit Holds that a Misdemeanor Can Be an Aggravated Felony

The 2nd Circuit held that 1996 IIRIRA amendments to the definition of an aggravated felony mean that certain misdemeanors can now be deemed aggravated felonies. The Court reached this conclusion in a federal criminal illegal reentry case in which it ruled that the defendant, who had been convicted of three misdemeanors prior to his deportation, was correctly subjected to the enhanced federal sentencing applicable to an illegal entrant whose prior deportation was subsequent to conviction of an aggravated felony. *United States v Pacheco*, __ F3d __, 2000 WL 1218987 (2d Cir. 8/29/00).

In IIRIRA, Congress had reduced the prison sentence threshold for a crime of violence or a theft offense to be considered an aggravated felony for immigration purposes from "at least five years" to "at least one year." In interpreting this amendment, the 2nd Circuit held that the aggravated felony term, as amended by IIRIRA, now included

misdemeanor crimes of violence or theft offenses if the prison sentence imposed—whether actually imposed or suspended—was one year. The Court cited the earlier decision of the 3rd Circuit in *United States v Graham*, 169 F3d 787 (3d Cir. 1999), reported in the June 1999 *Backup Center REPORT* Vol XIV, #5, at pg. 10.

In a strong dissent, Judge Chester J. Straub argued that the defendant's three suspended sentences of one year's imprisonment for misdemeanor convictions cannot constitute aggravated felonies "unless we adopt an 'Alice-in-Wonderland-like definition of the term 'aggravated felony' that does violence to the plain and settled meanings of both 'aggravated' and 'felony.'"

The defendant, represented by Albany attorney Attorney Martin J. Kehoe, III, filed a petition for rehearing or rehearing *en banc*. On Sept. 12, 2000, the New York State Defenders Association, along with the American Immigration Lawyers Association and the National Immigration Project, filed an *amici curiae* brief in support of the petition for rehearing. The *amici* brief discusses legislative history demonstrating that Congress did not intend for the aggravated felony term to include misdemeanors, legal precedent regarding the authority of the federal sentencing guidelines commentary, and the far-reaching impact of the decision being challenged. A copy of the brief, which is posted in the Immigration Project and Publications sections of NYSDA's web site (www.nysda.org), is available from the Backup Center.

Kirkland and Ellis Fellow begins work with Immigration Project

The NYSDA Criminal Defense Immigration Project is pleased to have Sejal Zota, a 2000 law graduate of New York University School of Law, working with the Project for one year on a Kirkland & Ellis New York City Public Service Fellowship. Ms. Zota, who previously worked with the Project as an Arthur Garfield Hays Civil Liberties Fellow during her third year of law school, began her work with the Project on Sept. 12, 2000.

Ms. Zota's proposed initiatives include: setting up a post-conviction relief project to make sure that only those immigrants whose convictions resulted from fair and legal criminal proceedings are subjected to deportation; developing an intensive immigration training curriculum to create a cadre of in-house immigration experts at each defender, legal aid, or assigned counsel program; and educating New York immigrant communities directly about the deportation risks of criminal cases.

Other Defense-relevant BIA and Second Circuit Immigration and Nationality Decisions

Following are other decisions concerning immigration consequences of criminal proceedings issued in the last few months.

- *Matter of Rodriguez-Ruiz*, Int. Dec. #3436 (BIA 9/22/00)
The Board held that a conviction that has been vacated

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2000 Legislative Review

by Al O'Connor*

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INTRODUCTION

The 2000 Regular Session of the New York State Legislature has been hailed as one of the most “productive” in recent memory. Because the budget was passed in a relatively timely manner this year (a mere 35 days late), the Senate and Assembly had ample time to reach agreement on a wide variety of issues in anticipation of the November elections. A total of 681 bills passed both houses and will be presented to the Governor for approval or veto this year.

In the area of criminal justice, the Legislature passed the “Sexual Assault Reform Act,” which, among other things, drastically increases sentences for certain sex offenders and countermands the *per se* reversible error rule for *Rosario* violations [*People v Ranghelle*, 69 NY2d 56 (1986)].

The Legislature also enacted a “hate crimes” bill, stiffened sentences for crimes committed against cab drivers, legalized the sale and possession of hypodermic instruments, and authorized the Division of Criminal Justice Services (DCJS) to post information about Level 3 sexually violent offenders on the Internet. Summarized below are the bills affecting public defense work that passed the Senate and Assembly this year; vetoed bills are also noted. The complete text of all bills and chapter laws can be found on the New York State Senate and Assembly web sites (www.senate.state.ny.us and www.assembly.state.ny.us). These sites can also be accessed on the Research Links page of NYSDA’s web site (www.nysda.org).

[Ed. note: Statute citations preceded by > are quoted verbatim in part or in full; statute cites preceded by ► are summarized.]

SEXUAL ASSAULT REFORM ACT

Chap. 1 (S.8238-A. 11538) (Sexual Assault Reform Act). Eff.: Feb. 1, 2001

a. New Criminal Offenses Including Date Rape

The Sexual Assault Reform Act establishes new “date rape” offenses (rape 3rd degree/sodomy 3rd degree), which

* Al O'Connor is a Backup Center Staff Attorney. He coordinates the Association’s amicus and legislative work.

are committed by engaging in sexual intercourse or deviate sexual intercourse with another person without his or her consent. The Act also creates new crimes relating to forcible touching and the use of so-called “date rape” drugs; it upgrades offense levels for certain repeat misdemeanor offenders and for sex offenses committed against mentally disabled and incapacitated persons. The Act criminalizes otherwise “consensual” sexual contact between health care providers and their patients, and increases the age limits of victims in numerous instances. Finally, the Act decreases from 12 to 9 the age at which children are presumed capable of testifying under oath.

> Penal Law §130.25 Rape in the third degree

A person is guilty of rape in third degree when:

(3) He or she engages in sexual intercourse with another person without such person’s consent where such lack of consent is by reason of some factor other than incapacity to consent.

> Penal Law §130.40 Sodomy in the third degree

A person is guilty of sodomy in the third degree when:

(3) He or she engages in deviate sexual intercourse with another person without such person’s consent where such lack of consent is by reason of some factor other than incapacity to consent.

> Penal Law §130.05 Lack of consent

2. Lack of consent results from:

[Existing]

(a) Forcible compulsion; or

(b) Incapacity to consent; or

(c) Where the offense charged is sexual abuse, any circumstances, in addition to forcible compulsion or incapacity to consent, in which the victim does not expressly or impliedly acquiesce in the actor’s conduct

[newly added] or

(d) where the offense charged is [rape in the third degree or sodomy in the third degree], in addition to forcible compulsion, circumstances under which, at the time of the act of intercourse or deviate sexual intercourse, the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor’s situation would have understood such person’s words and acts as an expression of lack of consent to such act under all the circumstances.

Not a lesser-included offense: The legislation adds a new subdivision (6) to CPL § 300.50 to specify that neither rape in the third degree, nor sodomy in the third degree as defined above shall be considered lesser-included offenses of the first degree crimes, unless (1) there is a reasonable view of the evidence that the defendant committed the lesser grade crime but not the greater, and (2) both parties consent to its submission.

➤ Penal Law §130.52 Forcible Touching

A person is guilty of forcible touching when such person intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person:

1. for the purpose of degrading or abusing such person; or
2. for the purpose of gratifying the actor's sexual desire.

For the purposes of this section, forcible touching includes the squeezing, grabbing or pinching of such other person's sexual or other intimate parts.

(Class A misdemeanor)

➤ Penal Law §130.53 Persistent sexual abuse

A person is guilty of persistent sexual abuse when he or she *stands convicted* of sexual abuse in the third degree, as defined in section 130.55 of this article, or sexual abuse in the second degree, as defined in section 130.60 of this article, and, within the previous ten year period, has been convicted two or more times, in separate criminal transactions for which sentence was imposed on separate occasions, of sexual abuse in the third degree as defined in section 130.55 of this article, or sexual abuse in the second degree, as defined in section 130.60 of this article [emphasis added].

(Class E felony) [Note: An indictment charging this unfortunately named crime would presumably be subject to the pleading restrictions specified in CPL §200.60.]

➤ Penal Law 130.90 Facilitating a sex offense with a controlled substance

A person is guilty of facilitating a sex offense with a controlled substance when he or she:

1. knowingly and unlawfully possesses a controlled substance and administers such substance to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in this article [P.L. Art. 130]; and
2. commits or attempts to commit such conduct.

(Class D felony)

When a defendant is convicted of facilitating a sex offense with a controlled substance, the court may impose a sentence to run consecutively to the underlying felony sex offense [New Penal Law § 70.25 (2-f)].

➤ Penal Law § 130.65-A Aggravated sexual abuse in the fourth degree

1. A person is guilty of aggravated sexual abuse in the fourth degree when:
 - (a) He or she inserts a foreign object in the vagina, urethra, penis or rectum of another person and the other person is incapable of consent by rea-

son of some factor other than being less than seventeen years old; or

- (b) He or she inserts a finger in the vagina, urethra, penis or rectum of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than seventeen years old.
2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

(Class E felony)

Offense Level Upgrades for Sexual Conduct with Mentally Disabled or Mentally Incapacitated Persons

Sexual intercourse or deviate sexual intercourse with a mentally disabled or mentally incapacitated person has been upgraded from rape or sodomy in the third degree (Class E felonies) to rape or sodomy in the second degree under Penal Law § 130.45 (Class D felonies). That the defendant "did not know of the facts and conditions responsible for such [person's] incapacity to consent" continues to be an affirmative defense.

A new subdivision pertaining to mentally disabled or mentally incapacitated persons has been added to Aggravated sexual abuse in the third degree:

➤ Penal Law § 130.66 Aggravated sexual abuse in the third degree

- (2) A person is guilty of aggravated sexual abuse in the third degree when he or she inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person and such person is incapable of consent by reason of being mentally disabled or mentally incapacitated.

(Class D felony)

"Consensual" Sexual Contact Between Health Care Providers and Patients

The Sexual Assault Reform Act criminalizes otherwise consensual sexual contact between health care or mental health care providers and their patients during a treatment session, as it deems patients legally incapable of consenting to sexual contact with treating professionals. Under Penal Law §130.05, health care and mental health care providers are defined as:

. . . any person who is or is required to be licensed or registered or holds himself or herself out to be licensed or registered, or provides services as if he or she were licensed or registered in the profession of **medicine, chiropractic, dentistry, podiatry, psychology, and social work.**

As a result, health care and mental health care providers are now subject to prosecution under any Penal Law provision that criminalizes sexual contact with a person who is incapable of consent: **Rape in the third degree** (Penal Law

§130.25); **Sodomy in the third degree** (Penal Law §130.40), **Aggravated sexual abuse in the fourth degree** (Penal Law §130.65-A), and **Sexual abuse in the third degree** (Penal Law §130.55).

The legislation specifies that conduct performed for a valid medical reason or mental health care purpose does not constitute a violation of law. It also provides an affirmative defense that the patient consented to such sexual contact “after having been expressly advised by the health care or mental health care provider that such conduct was not performed for a valid medical purpose.”

Finally, persons committed or placed with the **Office of Children and Families** (formerly Division for Youth) have now been deemed legally incapable of consenting to sexual contact with employees of the State agency.

Public Health Law Scheduled Controlled Substance

► Public Health Law §3306

Adds Gamma Hydroxybutyric acid to controlled substance Schedule 1.

b. Repealed Provisions

► Penal Law §130.38 Consensual sodomy

See *People v Onofre*, 51 NY2d 476 (1980); *Bowers v Hardwick*, 478 US 186 (1986).

► Penal Law §§130.25, 130.30 [Marital Exemption only]

Both existing Penal Law Article 130 sexual offense sections that are expressly limited to conduct committed against persons who are “not married to the actor” have been amended to eliminate this restrictive language. However, the definition of “female” in Penal Law §130.00 (4) has been retained. It continues to define a female as a person “who is not married to the actor.” See *People v Liberta*, 64 NY2d 152 (1984). Therefore, the current status of the marital exemption is somewhat unclear.

c. Age Changes Pertaining to Victims, Defendants and Witnesses

► Penal Law §263.05 Use of a child in a sexual performance;

► Penal Law §263.10 Promoting an obscene sexual performance by a child;

► Penal Law §263.15 Promoting a sexual performance by a child:

Age of victim increased to less than 17 years old (from 16).

► Penal Law §130.30 Rape in the second degree;

► Penal Law §130.45 Sodomy in the second degree:

Age of victim increased to less than 15 years old (from 14).

NOTE: Current law requires the prosecution to prove the defendant was over the age of 18. The amended section establishes an affirmative defense that

the defendant was less than four years older than the victim.

► Penal Law §130.35 Rape in the first degree;

► Penal Law §130.50 Sodomy in the first degree;

► Penal Law §130.75 Course of Sexual Conduct against a child in the first degree;

► Penal Law §130.80 Course of sexual conduct against a child in the second degree:

When the defendant is 18 or older, age of victim increased to under 13 (from 11). When the defendant is under 18, victim must be under 11 for charge of rape in the first degree.

► Criminal Procedure Law §60.20 Testimonial Capacity

Decreases the age at which children are presumed capable of testifying under oath from 12 to 9 years old. The legislation also defines testimonial capacity: “A witness understands the nature of the oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and that fact that a witness who testifies falsely may be punished.”

d. Sentencing Provisions

Second Child Sexual Assault Felony Offenders

► Penal Law § 70.07 Sentence of imprisonment for second child sexual assault felony offender

The Sexual Assault Reform Act drastically increases sentences for “second child sexual assault felony offenders.” This category is defined as persons who presently stand convicted of a felony sex offense (Penal Law Articles 130, 263 or section 255.25) involving a victim under the age of 15, and who, within the preceding 15 years (exclusive of time in jail or prison), were previously convicted of a felony sex offense involving a victim under the age of 15. A “sexual assault against a child” is broadly defined as “a felony offense (a) the essential elements of which include the commission or attempted commission of sexual conduct [as defined in Penal Law § 130.00 (10)], [which was] (b) committed or attempted to be committed against a child less than 15 years old.”

Present Conviction	Predicate Conviction	New Sentence Range
• Class B	Class B or C felony	15–25 to life (Indeterminate)
• Class B	Class D or E felony	12–30 (Determinate)
• Class C	Class B or C felony	12–30 (Determinate) or 15–25 to life (Indeterminate)
• Class C	Class D or E felony	10–25 (Determinate)
• Class D	Any degree felony	5–15 (Determinate)
• Class E	Any degree felony	4–12 (Determinate)

Procedure for determining whether defendant is a second child sexual assault felony offender

Current Offense—Whenever the victim’s age is not an element of the crime, the District Attorney may file a special information alleging that the victim was under the age of 15 at the time of the commission of the offense. The defendant must be arraigned on the special information outside the presence of the jury, and may admit, deny or stand mute. If the defendant admits the allegation, the victim’s underage status will be deemed established for all purposes, including possible enhanced sentencing under Penal Law §70.07. Otherwise, the People may seek to establish the victim’s age by proof beyond a reasonable doubt at trial. The jury will be directed to deliberate on the special information only after returning a guilty verdict on the charge or charges included in the indictment.

Predicate Offenses—In most cases, the victim’s age will not be apparent from the elements of the predicate felony conviction, and the People will be required to prove at a hearing that the victim of the predicate offense was under the age of 15 at the time of the crime. When information available to the prosecution indicates that a defendant may be a second child sexual assault offender, it may file a statement at any time *prior to trial* setting forth the date and place of each alleged predicate felony conviction that involved a victim under the age of 15. If the defendant controverts any of the allegations, a hearing must be held following a guilty plea or verdict. The hearing will be governed by the rules of evidence “applicable to a trial on the issue of guilt.” The court must base its finding on proof beyond a reasonable doubt. If the court finds the defendant is a second child sexual assault offender, it must pronounce sentence pursuant to Penal Law §70.07.

A defendant may plead guilty to the underlying indictment, but nevertheless contest the allegations concerning the age of the victim in the current offense and/or predicate offense. In these circumstances, the court must conduct a hearing to determine whether the defendant is a second child sexual assault felony offender.

Probation Terms Doubled

- ▶ Penal Law § 65.00 (3)

Amendments double the period of probation for a felony sexual assault (any Penal Law Article 130, 263 offense or incest), to 10 years. The period of probation for a misdemeanor sexual assault has been doubled to 6 years.

Restrictions on Entering School Grounds

- ▶ Penal Law §65.10 subd. (4-a)

This new subdivision of the Penal Law applies when a defendant is sentenced to probation or a conditional discharge for a sexual assault involving a victim who was under the age of 18. The court shall require, as a mandatory condition of such sentence, that the defendant “refrain from knowingly entering into or upon any school grounds [as defined in Penal Law §220(14-a)] or any other facility or

institution primarily used for the care or treatment of persons under the age of eighteen while [such minors] are present.” The legislation provides an exception for a registered student, family member of a student, or employee of such a facility, who may enter the premises with the written authorization of a probation officer or the court, and with the permission of the chief administrator of the facility.

- ▶ Executive Law §259-c subd. (14);
- ▶ Correction Law §272 subd. (9)

The above restriction must also be imposed as a mandatory condition of parole, conditional release, or post-release supervision for inmates whose underlying sexual assault conviction involved a victim under the age of 18.

e. Bail Restrictions

- ▶ Criminal Procedure Law §530.40 (3);
- ▶ Criminal Procedure Law §530.45 (1);

Amendments provide that there be **no bail** or recognizance *after* conviction of Class B or C Article 130 sex offense committed or attempted to be committed against a person less than 18 years old.

- ▶ Criminal Procedure Law §530.50

Amendments provide **no bail** pending appeal upon conviction of an Article 130 sex offense committed or attempted to be committed against a person less than 18 years old (except Class D or E felonies).

f. Raghelle Countermanded

- ▶ Criminal Procedure Law §240.75 Discovery; certain violations

The failure of the prosecutor or any agent of the prosecutor to disclose statements that are required to be disclosed under subdivision one of section 240.44 or paragraph (a) of subdivision one of section 240.45 of this article shall not constitute grounds for any court to order a new pre-trial hearing or set aside a conviction, or reverse, modify or vacate a judgment of conviction in the absence of a showing by the defendant that there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial or other proceeding; provided, however, that nothing in this section shall affect or limit any right the defendant may have to a re-opened pre-trial hearing when such statements were disclosed before the close of evidence at trial.

HATE CRIMES ACT OF 2000

Chap. 107 (S.4691-A, A.30002) (Hate Crimes Act of 2000). Eff.: Oct. 8, 2000

Elevates a crime one grade level or provides for an increased sentence when the defendant commits a “specified offense” and either intentionally selected the victim or intentionally committed the acts constituting the crime based, in whole or in substantial part, on a belief or perception about the victim’s race, color, national origin, ancestry, gender,

religion, religious practice, age, disability or sexual orientation, regardless of whether such belief or perception is correct.

➤ Penal Law § 485.05 Hate Crimes

1. A person commits a hate crime when he or she commits a specified offense and either:
 - (a) intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct, or
 - (b) intentionally commits the act or acts constituting the offense in whole or in substantial part because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, age, disability or sexual orientation of a person, regardless of whether the belief or perception is correct.
- (2) Proof of race, color, national origin, ancestry, gender, religion age, disability or sexual orientation of the defendant, the victim or of both the defendant and the victim does not, by itself, constitute legally sufficient evidence satisfying the people’s burden under paragraph (a) or (b) of subdivision one of this section.
- (3) A “specified offense” is . . . [see list below]
- (4) For the purposes of this section:
 - (a) The term “age” means sixty years old or more
 - (b) The term “disability” means a physical or mental impairment that substantially limits a major life activity.

Hate Crime Specified Offenses

Assault in the first degree	P.L. §120.10
Assault in the second degree	P.L. §120.05
Assault in the third degree	P.L. §120.00
Aggravated assault upon a person less than 11 years old	P.L. §120.12
Menacing in the first degree	P.L. §120.13
Menacing in the second degree	P.L. §120.14
Menacing in the third degree	P.L. §120.15
Reckless endangerment in the first degree	P.L. §120.25
Reckless endangerment in the second degree	P.L. §120.20
Manslaughter in the second degree	P.L. §125.15 (1)
Manslaughter in the first degree	P.L. §125.20 (1) (2) (4)
Murder in the second degree	P.L. §125.25
Rape in the first degree	P.L. §130.35 (1)
Sodomy in the first degree	P.L. §130.50 (1)

Sexual abuse in the first degree	P.L. §130.65 (1)
Aggravated sexual abuse in the second degree	P.L. §130.67 (1-a)
Aggravated sexual abuse in the first degree	P.L. §130.70 (1-a)
Unlawful imprisonment in the second degree	P.L. §135.05
Unlawful imprisonment in the first degree	P.L. §135.10
Kidnapping in the second degree	P.L. §135.25
Kidnapping in the first degree	P.L. §135.25
Coercion in the second degree	P.L. §135.60
Coercion in the first degree	P.L. §135.65
Criminal trespass in the third degree	P.L. §140.10
Criminal trespass in the second degree	P.L. §140.15
Criminal trespass in the first degree	P.L. §140.17
Burglary in the third degree	P.L. §140.20
Burglary in the second degree	P.L. §140.25
Burglary in the first degree	P.L. §140.30
Criminal mischief in the fourth degree	P.L. §145.00
Criminal mischief in the third degree	P.L. §145.05
Criminal mischief in the second degree	P.L. §145.10
Criminal mischief in the first degree	P.L. §145.12
Arson in the fourth degree	P.L. §150.05
Arson in the third degree	P.L. §150.10
Arson in the second degree	P.L. §150.15
Arson in the first degree	P.L. §150.20
Petit larceny	P.L. §155.25
Grand larceny in the fourth degree	P.L. §155.30
Grand larceny in the third degree	P.L. §155.35
Grand larceny in the second degree	P.L. §155.40
Grand larceny in the first degree	P.L. §155.42
Robbery in the third degree	P.L. §160.05
Robbery in the second degree	P.L. §160.10
Robbery in the first degree	P.L. §160.15
Harassment in the first degree	P.L. §240.25
Aggravated harassment in the second degree	P.L. §240.30 (1) (2) (4)

Or any attempt or conspiracy to commit any of the foregoing offenses

Hate Crime Offense Level Upgrades

➤ Penal Law § 485.10 Sentencing

1. When a person is convicted of a hate crime pursuant to this article, and the specified offense is a violent felony offense, as defined in section 70.02 of this chapter, the hate crime shall be deemed a violent felony offense.

2. When a person is convicted of a hate crime pursuant to this article and the specified offense is a misdemeanor or a Class C, D, or E felony, the hate crime shall be deemed one category higher than the specified offense the defendant committed, or attempted or conspired to commit.

Increased Sentences for Class B and A-I felonies

When the specified hate crime offense is a Class B felony, the following minimum sentences apply:

Specified Offense is:	Minimum Sentence:
Class B non-violent	Indeterminate Maximum = 6 years (e.g. 2-6)
Class B violent (first felony P.L. §70.02)	Determinate = 8 years (up from 5)
Class B non-violent (second felony P.L. §70.06)	Determinate = 10 years (up from 8)
Class B violent (second violent P.L. §70.04)	Determinate = 12 years (up from 10)
Class B (juvenile offender P.L. §70.05)	Indeterminate Maximum = 4 years

When the specified offense is an A-I felony, the minimum sentence is 20 years to life.

Harassment

- Penal Law §240.30 (3);
- Penal Law §240.31

The legislation also amends the elements of aggravated harassment in the first and second degrees to apply to acts committed “because of a belief or perception regarding [a victim’s] race, color, religion, national origin, ancestry, gender, religion, age disability, or sexual orientation, regardless of whether the belief or perception is correct.”

PENAL LAW

Chap. 181 (S.8236) (Assault on a School Employee or Student). Eff.: Nov. 1, 2000

Adds a new subdivision pertaining to assaults against employees and students committed on “school grounds” as the term is broadly defined in Penal Law §220 (14).

- Penal Law §120.05 Assault in the second degree
A person is guilty of assault in the second degree when:
* * *
- (10) Acting at a place the person knows, or reasonably should know, is on school grounds and with intent to cause physical injury, he or she:
 - (a) causes such injury to an employee of a school or public school district; or
 - (b) not being a student of such school or public school district causes physical injury to another, and such other person is a student of such school who is attending or present for educational purposes.

(Class D felony)

- Criminal Procedure Law §380.90 [new];
- Criminal Procedure Law §720.35 [amended]
- Family Court Act §§ 301.2, 380.1.

In addition, the legislation requires criminal courts and family courts to report the conviction or non-criminal adju-

dication of a student who is under 19 years old to a designated official in the student’s school district. The school district must keep records pertaining to the court matter separate from regular school records, and destroy them when the student is no longer enrolled.

Chap. 148 (S.8232) (Crimes against livery drivers – Enhanced penalties). Eff.: Nov. 1, 2000

- Penal Law § 60.07 Authorized disposition; criminal attack on operators of for-hire vehicles.

Authorizes a court to impose an enhanced sentence when a defendant is convicted of a “specified offense” against a livery cab driver. The minimum term of an indeterminate sentence or determinate sentence otherwise authorized pursuant to Penal Law Article 70 must be 3 to 5 years greater when the victim was operating a “for-hire vehicle in the course of providing for-hire vehicle services” at the time of the commission of the offense. A court may decline to impose the additional term on the ground that an enhanced sentence would be unduly harsh given the nature and circumstances of the crime and the history and character of the defendant

Livery Cab Enhancement Specified Offenses

Attempted murder in the second degree	Attempted assault in the first degree
Gang assault in the first or second degrees	Manslaughter in the first or second degrees
Attempted gang assault in the first degree	Attempted manslaughter in the first degree
Assault in the first degree	Robbery in the first or second degrees Attempted robbery in the first degree

Vehicles covered by the new law are described as follows:

The term ‘for-hire vehicle’ shall mean a vehicle designed to carry not more than five passengers for compensation and such vehicle is a taxicab, as defined in [VTL § 148-a], a livery [as defined in VTL §121-e], or a ‘black car’. . . [which shall mean] a for-hire vehicle dispatched from a central facility, which has certified to the satisfaction of the department of state pursuant to article six-f of the executive law that more than ninety percent of the central facility’s for-hire business is on a payment basis other than direct cash payment by a passenger.

‘For-hire vehicle services’ shall mean: (i) with respect to a taxicab, the transport of passengers pursuant to a license or permit issued by a local authority by a person duly authorized to operate such taxicab; (ii) with respect to a livery, the transport of passengers by a livery operator while affiliated with a livery car base; or (iii) with respect to a ‘black car’, the transport of passengers by a ‘black car operator’ pursuant to dispatches from or by a central dispatch facility regardless of where the pick-up

and discharge occurs and, with respect to dispatches from or by a central dispatch facility located outside the state, all dispatches involving a pick-up in the state, regardless of where the discharge occurs.”

Procedure for charging a defendant with committing a “specified offense” against a for-hire vehicle operator

In addition to filing an indictment charging the underlying specified offense, the prosecution must file a special information, alleging that the victim was operating a for-hire vehicle in the course of providing for-hire vehicle services at the time of the crime. The defendant must be arraigned on the special information, and may admit the allegation, deny it or stand mute. If the defendant admits the allegation concerning the status of the victim, that allegation alone shall be deemed established for sentencing purposes in the event of a conviction. Otherwise, the prosecution may seek to establish the allegation by proof beyond a reasonable doubt at trial. The jury will be required to deliberate and return a verdict on the special information only after returning a guilty verdict on the charge or charges included in the indictment.

Chapter 189 (S.8234) (Assault Weapons — Trigger Locks — Ballistic Database). Eff.: Nov. 1, 2000 (Penal Law amendments)

Requires trigger locks to be included with all sales of rifles, shotguns and firearms; establishes a “ballistic fingerprint” identification databank for all new pistols and revolvers sold in the state for purposes of later comparison with bullets and shell casings recovered from crime scenes; requires criminal background checks of gun buyers at gun shows; and enacts new laws concerning assault weapons.

The legislation includes detailed definitions of “**assault weapons**” [Penal Law §265.00 (22)] and “**large capacity ammunition feeding devices**” (Penal Law §265.00 (23)), which have been added to the list of weapons specified in Penal Law §265.02 (Criminal possession of a weapon in the third degree) (Class D violent felonies). (The criminal liability exemption regarding possession of a loaded firearm in one’s home or place of business does not apply to assault weapons.) The legislation also amends Penal Law §265.10 (Manufacture, transport, disposition and defacement of weapons) and Penal Law §265.11 (Criminal sale of a firearm in the third degree) by adding provisions relating to assault weapons and large capacity ammunition feeding devices.

The legislation also creates a new offense:

➤ Penal Law §265.17 Criminal Purchase of a weapon

A person is guilty of criminal purchase of a weapon when:

(1) knowing that he or she is prohibited by law from possessing a firearm, rifle or shotgun because of a prior conviction or because of some other disability which would render him or her ineligible to lawfully possess a firearm, rifle or shotgun in this state, such person attempts to purchase a firearm, rifle or shotgun from another person; or

(2) knowing that it would be unlawful for another person to possess a firearm, rifle or shotgun, he or she purchases a firearm, rifle or shotgun for, on behalf of, or for the use of such other person.

(Class A misdemeanor)

The legislation also restricts the availability of a handgun license to persons 21 or older, unless the applicant is an honorably discharged veteran of one of the armed services [Penal Law §400 (1)].

Chap. 489 (S.8231) (Money Laundering). Eff.: Nov. 1, 2000

Enacts comprehensive amendments to Penal Law Article 470 to facilitate state-level prosecutions of money laundering offenses. The current money laundering statute is divided into three degrees, ranging from a Class A misdemeanor to a Class D felony. The amended statute will now include four degrees of money laundering, from a Class E to a Class B felony. The offense levels are differentiated by the defendant’s intent, the type of criminal activity from which the proceeds are derived, and the total value of property involved in the financial transactions. The top charge of money laundering in the first degree will be reserved for transactions over \$1 million (\$500,000 for drug-related proceeds). The legislation includes amendments that have long been sought by prosecutors; including elimination of the requirement that the defendant exchange criminal proceeds for “equivalent property,” and allowing for the aggregation of value in all transactions that arise out of a single underlying criminal transaction. The definition of a financial “transaction” has been greatly expanded, and will now encompass such minor conduct as storage of criminal proceeds in a safe deposit box. However, the legislation expressly provides that payments to attorneys for legal representation are not financial “transactions” within the meaning of the money laundering statute.

Chap. 156 (S.6688-c) (Abandonment of a child — Endangering the Welfare of a child — Affirmative Defenses). Eff.: July 18, 2000

➤ Penal Law §§260.03, 260.15

Establishes an affirmative defense to the charge of abandonment of a child and endangering the welfare of a child when the defendant left the newborn (no more than 5 days-old), “with the intent that the child be safe from physical injury and cared for in an appropriate manner . . . with an appropriate person or in a suitable location and promptly notified an appropriate person of the child’s location.”

Chap. 57 (S.6294-a) (Increase in Mandatory Surcharges / Crime Victims Assistance Fees). Eff.: Apr. 1, 2000

Increases mandatory surcharges and crime victims assistance fees according to the following schedule: Mandatory Surcharges –Felony (including DWI): \$200 (up from \$150); misdemeanor (including DWI): \$110 (up from \$85); violation: \$ 50 (up from \$40); traffic infractions: \$30 (up from \$25); equipment violations: \$20 (up from \$15).

VTL violations in Town and Village Courts — \$5 extra to above amounts [VTL §§1809 (a) (b)].

Crime Victims Assistance Fee — \$10 in all cases (up from \$5)

Chap. 533 (A.1578-B) (Trespassing / Loitering — summer camps and day camps). Eff.: Oct. 4, 2000

Adds provisions relating to trespassing and loitering on property used as a children's overnight camp or day camp:

- Penal Law §140.10(b) — Criminal trespass in the third degree (Class B misdemeanor)
- Penal Law §240.35 (5) — Loitering (Violation)

Chap. 422 (S.809) (Aggravated harassment of an employee by an inmate — probation employees). Eff.: Nov. 1, 2000

Add employees of a county probation department to the list of persons who may be considered victims under Penal Law §240.32 (Aggravated harassment of an employee by an inmate).

Chap. 441 (S.6703) (Aggravated harassment of an employee by an inmate — police officers). Eff.: Nov. 1, 2000

Adds police officers to the list of persons who may be considered victims under Penal Law §240.32 (Aggravated harassment of an employee by an inmate).

➤ **Chap. ___ (S.7559) (Possession of a Gambling Device — Slot Machines — Affirmative Defense). Eff.: Nov. 1, 2000**

Amends Penal Law §225.32 to provide an affirmative defense to possession of a gambling device (Penal Law §225.30) when the machine is possessed for amusement purposes in the home and is more than 20 years old (decreased from 30 years).

Chap. 434 (S.6173-B) (Stalking — technical amendments). Eff.: Oct. 20, 2000

Makes a technical correction to the elements of stalking in the first degree (Penal Law §120.60) to clarify that the aggravated offense applies to defendants previously convicted of either stalking in the third or *second* degrees.

CRIMINAL PROCEDURE LAW

Chap. 67 (A.10921) (Drug Courts — Transfer of actions from lower criminal courts). Eff.: Nov. 1, 2000

Amends CPL § 170.15 (4) to authorize lower criminal courts outside of New York City to transfer cases, upon motion of the defendant and with the consent of the prosecution, to other local criminal courts in the same county that have been designated as drug courts. (The section was previously limited to Rockland, Suffolk and Tompkins counties.)

➤ **VETOED (S.6492) (Drug Courts — Transfer of actions in Genesee County)**

Would have amended CPL §170.15 (4) to authorize local criminal courts in Genesee County to transfer cases, upon

motion of the defendant and with the consent of the prosecution, to another local criminal court that has been designated as a drug court. This legislation was rendered superfluous by Chapter 67 (A.10921).

Chap. 8 (CPL § 440.30 — DNA testing — Appeal deadline). Eff.: Mar. 6, 2000

In 1999, the legislature amended the Criminal Procedure Law to give defendants a right to appeal from a trial court order denying a post-judgment motion for DNA testing of evidence. *See* L. 1999, ch. 560, amending CPL 450.10; *People v Rae Kellar*, 89 NY2d 948 (1997). The right to appeal was made retroactive to any motion for forensic DNA testing brought and determined since CPL 440.30 (1-a) was enacted in 1994. The legislature has now established Sept. 1, 2000 (or 30 days from notice of entry, whichever is later) as the final date for the filing of a notice of appeal from such an order entered between 1994 and Dec. 1, 1999.

The legislation also makes a technical amendment to the DNA databank law [Executive Law § 995 (7)(b)] to clarify that defendants convicted of grand larceny in the fourth degree under Penal Law § 155.30 (5) (larceny from the person) on or after Dec. 1, 1999 will be subject to mandatory DNA blood testing.

Chap. 514 (S.6922-A) (Audio-Visual Court Appearances): Eff.: Oct. 4, 2000

Amends CPL §182.20 to add Montgomery, Clinton and Rensselaer counties to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

Chap. 497 (S.6225) (Written instructions to grand jurors). Eff.: Nov. 1, 2000

Authorizes a court to provide a grand jury with written or oral instructions "relating to the proper performance of their duties." [Amends CPL §190.20 (5)]

Chap. ___ (S.6250-C) (Expungement — Erroneous Arrests). Eff.: Nov. 1, 2000

Enacts a new CPL § 160.56 to provide for expungement of all records of an arrest when the arresting agency has, *prior to the filing of an accusatory instrument*, determined that "the wrong person has been arrested." The legislation also enacts a new CPL §160.57 to provide a retroactive right to expungement when the petitioning party would have been entitled to relief under §160.56 if the erroneous arrest had occurred after the effective date of the section.

Chap. 506 (S.6647) (Accusatory Instruments — Dismissal for Insufficiency). Eff.: Nov. 1, 2000

CPL §120.20 and §130.30 authorize lower criminal courts to issue a warrant or summons when an accusatory instrument is sufficient on its face as prescribed in CPL §100.40. This legislation requires lower criminal courts to dismiss accusatory instruments when they are found to be facially insufficient and when the court is "satisfied that on the basis

of the available facts and evidence it would be impossible to draw and file an accusatory instrument that is sufficient on its face.”

(Various Bills on Peace Officer Status) Eff.: Upon Governor’s signature — Amends CPL § 2.10 to confer peace office status on:

VETOED (S.1620-A) code enforcement officers for the Town of East Hampton.

VETOED (S.3057-A) uniformed employees of the fire marshal’s office, uniformed court officers of the Town Court, and animal control officers of the Town of Riverhead.

Chap. 381 (S.4483a) uniformed marine patrol officers appointed by the Livingston County sheriff (Eff. 8/30/00).

VETOED (S.4910) code enforcement officers in the Village of East Hampton.

Chap. 385 (S.5767-A) uniformed court officers of the town court of the Town of Newburgh (Eff. 8/30/00).

VETOED (S.6323) members of the security force of Ithaca College.

VETOED (S.6398) full-time fire inspectors in the county of Nassau.

Chap. 393 (S.6682) court security officers employed by the Chautauqua County sheriff’s office (Eff. 8/30/00).

VETOED (S.6962) members of the New York National Guard when designated as peace officers under military regulations and acting as military policemen or air security personnel pursuant to orders issued by appropriate military authority

Chap. ___ (S.7438) police officer status for water-supply police employed by the City of New York

VETOED (S.7466-a) Level III and Level IV traffic enforcement agents employed by the City of New York.

Chap. 404 (A.768-A) parole revocation specialists employed by the Division of Parole (Eff. 8/30/00).

VETOED (A.2820-A) animal shelter supervisors employed by the Town of East Hampton.

Chap. 168 (A.8527-A) state inspector general and investigators employed by her. (Eff. Immediately).

VETOED (S.7705) (Peace Officers)

Would have amended CPL §2.10 (57-a) to provide that seasonal park rangers of the Westchester County Department of Public Safety must be under the immediate supervision of a sworn police officer holding the rank of sergeant or above who is employed by the Department.

Chap. 227 (S.6701) (Peace Officers) (Eff.: Aug. 16, 2000)

Amends CPL §2.10 (68) to provide that dog control officers of the Town of Arcadia may be designated as constables for the purpose of enforcing article twenty-six of the Agriculture and Markets law and for the purpose of issuing appearance tickets permitted under article seven of such law.

SEX OFFENDER REGISTRATION ACT

Chap. 490 (S.972-a) (Sex Offender Registration Act — Internet Access for Level 3 Subdirectory). Eff.: Jan. 21, 2001

Authorizes and requires DCJS to publish the Level 3 sexually violent predator subdirectory (including names and exact street addresses of offenders) on its Internet web page.

Chap. 1 (S.8238) (Disclosure of Internet Accounts and “Screen Names”). Eff.: Feb. 1, 2001

Requires sex offenders subject to the Sex Offender Registration Act to supply information to DCJS about any Internet accounts they maintain and any screen names they use. [Amends Correction Law §168-b]

Chap. ___ (S.6764) (Sex Offender Registration Act — 900 number charges). Eff.: 90 days after Governor’s signature

Establishes a charge of 50 cents for a call to the Sex Offender Registration 900 number hotline. [Amends Correction Law §168-p]

FAMILY COURT PRACTICE

Chap. 475 (A.7162-A) (Family Court Act — Support and Paternity Proceedings — Telephone or Audio-Visual testimony). Eff.: Dec. 19, 2000

Authorizes Family Court judges to permit testimony and depositions by telephone, audio-visual or other electronic means in support and paternity cases when (1) the party or witness lives outside the county (New York City considered one county), or (2) is incarcerated on the date of the hearing and is not expected to be released within a reasonable time of such date, or (3) where the court determines it would be an undue hardship for the party or witness to testify or be deposed at the Family Court where the case is pending. [Amends FCA §433 (c) (d); Adds FCA §531-A.]

Chap. ___ (S.674-B) (Persons in Need of Supervision — 16 and 17 year-olds). Eff.: Nov. 1, 2000

Increases the age limit for PINS proceedings from persons under the age of 16 to those under age 18. The former statutory scheme was limited to males under the age of 16 and females under the age of 18, a sex-based distinction that was struck down by the Court of Appeals in 1972 but never addressed by the Legislature. *Matter of Patricia A.*, 31 NY2d 83 (1972). The new scheme applies to both males and females under the age of 18. [Amends FCA §712 (a); SSL § 371 (6)]

Due to concerns about inadequate funding, it is unlikely that this bill will be forwarded to the Governor for his approval or veto this year.

VETOED (S.7725-a) (Appointment of Law Guardian — Adoptions from Authorized Agencies).

Would have amended Family Court Act §249 (1-a) to provide for the appointment of a law guardian in adoption proceedings from authorized agencies under Article 7 of the Domestic Relations Law; adds a new subdivision (9) to Domestic Relations Law §112 concerning representation of a child in an adoption proceeding by the same law guardian

who was assigned to represent the child in a prior child protective or termination of parental rights proceeding.

PRISONS AND PAROLE

Chap. ___ (S.3941) (Work Release Eligibility — Victims of Domestic Violence). Eff.: Upon Governor's signature

Authorizes the Commissioner of the Department of Correctional Services to grant temporary release (including work release) to otherwise ineligible inmates convicted of homicide and assault offenses "who can demonstrate to the commissioner that he or she was a victim of substantial physical, sexual or psychological abuse by the victim of such homicide or assault and such abuse was a substantial factor in causing the inmate to commit such homicide or assault." [Amends Correction Law §851 (2)]

Chap. ___ (S.7882) (Conditional Release from a Definite Sentence — Terminally Ill Inmates). Eff.: Upon Governor's signature

Authorizes local conditional release commissions to grant release at any time to terminally ill inmates serving definite sentences in excess of 90 days (eliminating 60 day minimum jail stay requirement). [Amends Penal Law §70.40; Correction Law §§273 (1)(4)]

Chap. ___ (A.9008-A) (Private Prisons and Jails Prohibited). Eff.: 90 days after Governor's signature

Provides that the supervision and custody of persons confined by the Department of Correctional Services shall be performed by peace officers or police officers as defined in the CPL; prohibits the delegation of such authority to others (with exceptions for drug treatment programs, temporary release, and state-ready contracts with local correctional facilities); expressly prohibits private ownership or operation of correctional facilities in New York, except where authorized by federal law.

VEHICLE AND TRAFFIC LAW

Chap. 140 (S.7365) (Vehicle and Traffic Law — Possession of an Open Container — Elimination of Intent to Consume element). Eff.: Apr. 10, 2000

Eliminates the "intent to consume" element from the law prohibiting possession of an open container of an alcoholic beverage in an automobile. [VTL §1227 (1)]

Chap. 287 (S.971) (DWI — Suspensions — Out-of-State Convictions / Adjudications) Eff.: Nov. 1, 2000

Requires a one-year license suspension for persons under age 21 who have been convicted or adjudicated for driving while under the influence of alcohol in another state. [Amending VTL §1193 (2)(b)]

MISCELLANEOUS

Chap. 56 (Part G) (S.6293-a / A.9293-a) (Hypodermic Needles — Sale and Possession). Eff.: Jan. 1, 2001 — Scheduled to Sunset: Mar. 31, 2003

Amends Public Health Law §3381 to authorize pharmacies, licensed health care facilities and health care practitioners to sell or furnish up to 10 hypodermic syringes or hypodermic needles to persons over the age of 18, who are now statutorily authorized to possess hypodermic instruments without a prescription. Although the legislation does not expressly amend Penal Law §220.45 (Criminal possessing a hypodermic instrument), the Penal Law section applies to *unlawful* possession of a hypodermic instrument as defined in the Public Health Law. Thus, a charge of criminal possession will no longer lie when the syringes or needles have been legally purchased or obtained from authorized sources.

Chap. ___ (S.1469) (Statewide Child Abuse Register — Expungement of Unfounded Reports). Eff.: Upon Governor's signature

Authorizes the Office of Children and Family Services to expunge an unfounded report from the statewide central register of child abuse when the person who made the report has been convicted of falsely reporting an incident [Penal Law §240.55 (3)] in connection with the matter, or when the "subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse and mistreatment." [Amends Social Services Law §422 (5)]

Chap. ___ (S.8071) (Compulsory school attendance age raised to 17). Eff.: July 1, 2001

Amends the Education Law to raise the age of compulsory school attendance from 16 to 17 years old.

Chap. ___ S.6153-A (Name change applications by certain felons). Eff.: 90 days after Governor's signature

Amends Civil Rights Law §61 to add special notice provisions for name change applications by persons convicted of a violent felony, homicide offense, and certain kidnapping and felony sex offenses when the applicant is incarcerated or under supervision at the time he or she petitions for a name change.

Chap. ___ (A.1432) (Bail enforcement agents — licensing and qualifications). Eff.: Apr. 1, 2001

Amends the General Business Law to subject bail enforcement agents (bounty hunters) to licensing requirements; requires bail enforcement agents to give written notice to local law enforcement agencies prior to attempting to take a person into custody; and authorizes local law enforcement agents to accompany bounty hunters upon entry into "what is believed to be an occupied structure."

Chap. ___ (A.4919-B) (General Obligations Law — Drug Dealer Liability Act). Eff.: 30 days after Governor's signature

Enacts intricate provisions establishing a civil cause of action by persons affected by drug use against convicted "drug traffickers" who have "knowingly participated in a drug market" in New York State (General Obligations Law Article 12).

Chap. 262 (S.8177) (Unlawful Shipment or Transport of Cigarettes). Eff.: Nov. 14, 2000

Amends the Public Health Law to provide for new criminal offenses, including felony offenses for certain repeat violations, concerning the unlawful shipment or transport of cigarettes.

Chap. 48 (A.9596-A) (Agriculture & Markets Law — Forfeiture of Abused Animals). Eff.: June 6, 2000

Amends the Agriculture and Markets Law § 374 (5) to provide that persons convicted of aggravated cruelty to animals under “Buster’s Law” (§ 353-a) may be required to forfeit the animal to a society for the prevention of cruelty to animals or humane society following a forfeiture hearing.

SUNSET CLAUSE EXTENDED

Chap. 16 (Sunset Extended — Medical Parole — Executive Law § 259-r). Sunset Extended to Sept. 1, 2001

Extends the sunset provision of the medical parole law [Executive Law §259-r] to Sept. 1, 2001

Chap. 449 (S.7137) (Sunset Extender — Closed-Circuit testimony of child witnesses). Sunset Extended to Sept. 1, 2001

Extends the sunset clause of CPL Article 65 relating to the closed-circuit testimony of certain child-witnesses to Sept. 1, 2001

Chap. 42 (S.6802) (Sunset Extended — Arts and Cultural Affairs Law — Ticket Scalping) Sunset Extended to June 1, 2001

Extends the sunset clause of New York’s anti-scalping laws (Arts and Cultural Affairs Law Article 25) to June 1, 2001

Chap. 4 (S.6362) (Sunset Extender — Elimination of Mandatory Sequestration). Eff.: Feb. 1, 2000

In 1995, mandatory jury sequestration was eliminated for misdemeanor and lower level felony trials (L.1995, ch. 83). The sunset provision of this law has been extended to Apr. 1, 2001

Chap. 447 (S.7030-a) (Sunset Extender — Driver’s License Suspension after Drug Conviction). Sunset Extended to Oct. 1, 2001

In 1993, the Legislature passed a law requiring a 6-month suspension of the driver’s license, or a 6-month delay in eligibility to receive a license, of any person convicted of a misdemeanor or felony drug offense, including juvenile and youthful offender adjudications (L. 1993, ch. 533). The sunset provision of the law has been extended to Oct. 1, 2001 ☞

Immigration Practice Tips

(continued from page 6)

pursuant to Article 440 of the New York Criminal Procedure Law does not constitute a conviction for immigration purposes.

- *Sutherland v Reno* (2nd Cir. 9/15/00)
The 2nd Circuit held that the petitioner’s Massachusetts conviction for indecent assault and battery constituted a crime of domestic violence for deportability purposes based on findings that the offense was both (1) a “crime of violence” under 18 USC 16 because it involved a substantial risk that physical force may have been used, and (2) a crime committed against a person protected by the domestic or family violence laws of Massachusetts.
- *Lake v Reno* (2nd Cir. 9/15/00)
The 2nd Circuit held that the gender-based discrimination mandated by section 309(a) of the INA—deeming out-of-wedlock children born abroad to US citizen mothers to be US citizens but denying citizenship to those born abroad of US citizen fathers unless the father had formally acknowledged paternity before the child turned 21—violates the right to equal protection secured by the Due Process Clause of the 5th Amendment.

New and Updated NYSDA Immigration Resources Available

The following new or updated resources are available from the Defense Immigration Project page on NYSDA’s website (www.nysda.org):

Immigration Resources for Criminal Defense Lawyers — This informational handout (3 pp.) offers a listing of some published materials, internet resources, and immigration consultation possibilities for criminal defense lawyers representing noncitizen defendants throughout the country.

Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses — Appendix A of the Project manual entitled *Representing Noncitizen Defendants in New York State, Second Edition (2000)*. (The full manual is available from the Backup Center for \$50.)

Aggravated Felony Practice Aids— Appendix C of the Project manual.

“Particularly Serious Crime” Bars on Asylum and Withholding of Removal: Case Law Standards and Sample Determinations— Appendix F of the Project manual.

Removal Defense Checklist for Criminal Charge Cases — This checklist (20 pp.) of removal defense arguments and strategies for noncitizens or lawyers counseling or representing noncitizens in removal proceedings based on criminal charges has recently been updated to include new legal developments through Sept. 8, 2000. ☞

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.

First Department

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

People v Pinkney, No. 579, 1st Dept, 5/2/00

During *voir dire*, the judge gave the jury panel questionnaires that included a series of background questions to which they were asked to orally respond. At the time some of the prospective jurors were responding, the judge left the courtroom. Pursuant to the court's instructions, the minutes of those proceedings were not recorded. After the jury was chosen, defense counsel stated that the defendant waived any objection.

Holding: Notwithstanding the defendant's consent, the judge's absence from the courtroom during a portion of the *voir dire* requires that the conviction be reversed, and the case remanded for a new trial. *People v Toliver*, 89 NY2d 843. The judge's absence deprived the defendant of his right to a trial by jury, "an integral component of which is the supervision of a judge." *People v Ahmed*, 66 NY2d 307, 310. By not participating in portions of the unrecorded *voir dire*, the judge abdicated his responsibility to make fully informed determinations, destroying the integrity of the proceedings. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Goodman, JJ])

Misconduct (Prosecution) MIS; 250(15)

Trial (Summations) TRI; 375(55)

People v Lopez, No. 277, 1st Dept, 5/9/00

The defendant was convicted of selling crack cocaine.

Holding: Before jury selection, the prosecution announced their intention to elicit testimony from an officer that before the alleged offense, the defendant was seen exchanging "a small object" for currency with an unknown third person. The prosecutor contended that the testimony about this earlier transaction was relevant to show why the defendant had attracted the officer's attention and why currency was recovered from various locations on the defendant's person. The exchange was not supposed to be argued as a sale, but in summation the prosecutor reneged upon his assurance not to imply that the earlier exchange was a drug sale. The prosecutor thereby deviated from his obligation as an officer of the court to refrain from summing up in a

manner that denied the defendant a fair trial. *People v Schaff*, 71 AD2d 630, 631. The evidence against the defendant was overwhelming. The judge instructed the jury that the defendant was charged with a single drug transaction and that the previous exchange merely provided the explanation of why the officer was watching the defendant. See *People v Pressley*, 216 AD2d 202 *lv den* 86 NY2d 800. Any prejudice was obviated by the instruction. Judgment affirmed. (Supreme Ct, New York Co [Figueroa, JJ])

Freedom of Information (General)

FOI; 177(20)

Application of Bellamy v New York City Police Department, etc., No. 908, 1st Dept, 5/9/00

The petitioner was convicted of murder. During the prosecution of other alleged participants, those individuals asserted that the petitioner had not been involved. The petitioner then requested copies of several police documents under the Freedom of Information Law (FOIL). Public Officers Law article 6. Getting no substantive response, he commenced an action to vacate the constructive denial of his FOIL request. He was advised that the respondents would provide some of the items requested. A later letter required payment of a \$10 fee. The respondents indicated that redactions had been made because release would fall within the "unwarranted invasion on personal privacy" or "endanger the life or safety of any person" exemptions of Public Officers Law 87.2 (b) and (f). Other items were said to be missing. The court dismissed the petition because the petitioner had not paid the \$10 copying charge.

Holding: The court erroneously overlooked the petitioner's meritorious contention that the respondents' compliance was incomplete. Payment is not a condition precedent to receipt of any documents whatsoever; the respondents have already made certain documents available. An agency denying a request because it cannot find requested documents must certify that it does not have possession of those documents after a diligent search. See Public Officers Law 89(3). Conclusory certifications made upon information and belief without direct knowledge are insufficient. See *Matter of Key v Hynes*, 205 AD2d 779, 781. The respondents failed to certify either that the police department did not have the records in question or that it had conducted a diligent search for the records. *Matter of Cuadrado v Morgenthau*, __AD2d__, 699 NYS2d 367. On remand, the court is to examine *in camera* the documents released in redacted form to ascertain if they do fall within the cited exemptions. Order modified. (Supreme Ct, New York Co [Cohen, JJ])

Confessions (Interrogation)

CNF; 70(42)

Narcotics (Evidence)
(Possession) (Sale)

NAR; 265(20) (57) (59)

First Department *continued*

Trial (Confrontation of Witnesses) TRI; 375(5)

In re Tomicko M. v Presentment Agency, No. 1132, 1st Dept, 5/11/00

Holding: Suppression of the appellant's statement that he "sold out [of drugs]" was properly denied as the statement was not made in response to custodial interrogation. The police officer's inquiry just before the strip search, "do you have anything on you?" was a routine inquiry designed to avoid injury to the officer. There is no indication that the officer sought to elicit a confession. See *People v Burgos*, 255 AD2d 199 *lv den* 93 NY2d 851. The court properly ruled that the presentment agency was not required to disclose the exact location of the police observation post, balancing the appellant's right to confrontation against the state's interest in nondisclosure. The court permitted extensive cross-examination of the observing officer about his ability to observe the transactions at issue, while precluding inquiry as to the actual location of the surveillance site. This was to protect the safety of private citizens who gave the police permission to use their property, and to encourage others to do so. *People v Stanard*, 42 NY2d 74, 83-84. The finding that the appellant committed third-degree criminal possession of a controlled substance is to be dismissed in the interest of justice. It was based upon possession of the same heroin recovered from the buyer, which was the basis for the conviction of third-degree criminal sale. Order modified, and as modified, affirmed. (Family Ct, Bronx Co [Hunt, JJ])

Evidence (Uncharged Crimes) EVI; 155(132)

Witnesses (Child) (Experts) WIT; 390(3) (20)

People v Kanani, No. 1150, 1st Dept, 5/16/00

After a jury trial, the defendant was convicted of 12 counts of first-degree sodomy.

Holding: The court properly exercised its discretion in barring the defendant's expert from offering testimony on the susceptibility of young children to suggestion. The court conducted a thorough *Frye* hearing (*Frye v United States*, 293 F 1013) and received submissions from the prosecution establishing that the expert's theories were highly controversial and had been rejected by other courts and experts. This subject was properly found to be within the knowledge of the jurors. See *People v Washington*, 238 AD2d 263 *lv den* 90 NY2d 944. The court properly admitted various evidence characterized by the defendant as implicating him in uncharged crimes. The evidence was properly admitted for the purpose of explaining or refuting matters raised on cross-examination. See *People v McIver*, 245 AD2d 180 *lv den* 91 NY2d 1010. A prior consistent statement admitted to rehabilitate a complaining witness predated events that the defense contended had led to fabrication, and did not have to predate all

possible motives to falsify. *People v Baker*, 23 NY2d 307, 322-323. Judgment affirmed. (Supreme Ct, New York Co [Brandveen, JJ])

Appeals and Writs (Preservation of Error for Review) (Record) APP; 25(63) (80)

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

Juries and Jury Trials (Discharge) (Findings) (Voir Dire) JRY; 225(30) (35) (60)

People v Redd, No. 1168, 1st Dept, 5/16/00

In the presence of counsel and the defendant, a venireperson, expressing great emotional distress, insisted he could not serve in a murder trial because his father had been killed in the line of duty as a police officer. When asked for details, he requested to speak privately to the court. After a brief unrecorded conference, conducted over defense objection, the court summarized the discussion on the record and excused the venireperson, finding that he had a complete inability to serve.

Holding: The court's *in camera* inquiry and *sua sponte* excusal for cause of the venireperson were appropriate (see *People v Wilson*, 211 AD2d 136, *affd* 88 NY2d 363) and reasonable under the circumstances. The court's actions did not violate the defendant's right to counsel. At the end of the interview, defense counsel declined an opportunity to request further information from the venireperson, who clearly manifested his inability to serve. It is unlikely that counsel would have opposed excusing the venireperson had counsel been present. By failing to raise a right to counsel claim at his *Wade* hearing, and failing to move to reopen that hearing based on his own trial testimony, the defendant failed to provide a record for appellate review of whether the right to counsel had attached at the lineup. *People v Lopez*, 160 AD2d 335 *lv den* 76 NY2d 791. Judgment affirmed. (Supreme Ct, Bronx Co [Barrett, JJ])

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

Misconduct (Prosecution) MIS; 250(15)

People v Olivero, Nos. 3137, 3137A, 3137B, 1st Dept, 5/16/00

After testimony was completed, the parties stipulated that certain chemists would have testified that the glassine envelopes in this case contained heroin. The lawyers and the defendant signed three stipulations. The prosecutor emphasized during summation that the defendant's signature was on the stipulations. The clear import of the comments was that the defendant knew that the envelopes contained heroin because he had knowingly possessed it. Following a defense

First Department *continued*

objection, the trial court explained to the jury the purpose of the stipulations.

Holding: While the prosecutor did not explicitly state that the defendant’s signature evidenced his knowledge or intent (*cf People v Maldonado*, 50 AD2d 556), it is clear that the jury was presented with a unavoidable inference that the signature meant something other than an agreement to allow testimonial substitutes. During deliberations, the jury asked the definition of stipulations and whether the defendant had to sign them. The prosecutor’s remarks stressing that it was “important” and “significant” that the defendant’s signature was on the stipulation were prejudicial. Despite thorough and clear curative instructions, the jurors fastened upon the stipulations, which should have no legal significance. Prosecutorial misconduct deprived the defendant of a fair trial, and was not harmless. *People v Crimmins*, 36 NY2d 230. Judgment reversed, matter remanded for a new trial. (Supreme Ct, Bronx Co [Price, JJ])

Appeals and Writs (General) **APP; 25(35)(63)**
(Preservation of Error for Review)

Grand Jury (General) (Witnesses) **GRJ; 180(3) (15)**
People v Nicholas, No. 1189, 1st Dept, 5/18/00

The defendant was convicted of attempted criminal sale of a controlled substance.

Holding: By pleading guilty, the defendant forfeited his right to review of the denial of his motion to dismiss the indictment on the ground of alleged insufficiency of the evidence presented to the grand jury. His attempt to reserve that right was ineffectual notwithstanding acquiescence by the court and prosecutor in including such a condition in the plea agreement. *People v Thomas*, 53 NY2d 338. The claim that introduction of alleged hearsay impaired the integrity of the grand jury proceeding is unpreserved. Review of this claim would result in a finding that the laboratory reports, each of which bore a certification that it was “made by” the signing technician, satisfied Criminal Procedure Law 190.10 (2). *People v Bennett*, 252 AD2d 369. Even if there were some defect in the certification, it would not rise to the level of impairment of the integrity of the proceeding warranting the drastic remedy of dismissal. *See People v Nelson*, 173 AD2d 205, 206, *lv den* 78 NY2d 956. Judgment affirmed. (Supreme Ct, Bronx Co [Stackhouse, J] on motion to dismiss, Sheindlin, J at plea and sentence)

Post Judgment Relief (General) **PJR; 289(20)**

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

People v Garcia, No. 3118, 1st Dept, 5/18/00

This is an appeal *de novo* ordered by the Court of Appeals because the defendant was unrepresented in the prosecution’s original appeal. The defendant was convicted of robbery and burglary despite inconsistencies in testimony relating to whether the defendant speaks the language used by the perpetrator and the young complainant’s identifications of the defendant as the perpetrator. The trial court vacated the jury’s guilty verdict finding the evidence insufficient as a matter of law.

Holding: The trial court actually looked to the factual weight of the evidence, not its sufficiency. This is not permitted by CPL 330.30[1]. *See gen People v Bleakley*, 69 NY2d 490, 494-495. The record would support legal insufficiency in this case only if the trial testimony of the prosecution witnesses was totally unworthy of belief. *See People v Carthens*, 171 AD2d 387. A comprehensive review of the evidence shows that there is a reasonable view of it that supports the verdict. The jury did not so depart from reason that the verdict should be vacated. Order reversed, verdict reinstated. (Supreme Ct, New York Co [Uviller, JJ])

Evidence (Privileges) **EVI; 155(115)**

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

In re Grand Jury Subpoena Duces Tecum, People v New York City Health and Hospitals Corporation, No. 892N, 1st Dept, 5/18/00

The appellant, Health and Hospitals Corporation (HHC), moved to quash portions of three grand jury subpoenas *duces tecum*. This was denied.

Holding: HHC is not a “hospital” under Public Health Law 2801(1). Its records are not privileged under Public Health Law article 28. *Cf Matter of Application to Quash a Grand Jury Subpoena*, 239 AD2d 412. HHC asserts the quality assurance privilege contained in Education Law 6527(3), but this protects against disclosure only in civil proceedings. *See People v Okereke*, 117 Misc2d 494. The public interest privilege is also inapplicable, as the prosecution has shown the subpoenaed information is necessary to its investigation and not duplicative of other information provided. *See Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 8-9. No protective order is needed, as grand jury proceedings are secret in nature. However, the documents prepared by *amicus curiae* Island Peer Review Organization, an outside, independent standards review firm retained to make recommendations as to patient care and administration, are privileged under Education Law 6527(3). *See Zion v New York Hosp.*, 183 AD2d 386 *app wdrwn* 81 NY2d 881. Order modified as to reports by *amicus* and otherwise affirmed. (Supreme Ct, New York Co [Soloff, JJ])

First Department *continued*

Jurisdiction (General) JSD; 227(3)

Probation and Conditional Discharge (Revocation) PRO; 305(30)

People v Quinones, Nos. 1232-1232A, 1st Dept, 5/23/00

The defendant was sentenced for murder and other counts after a jury convicted him. On the day of sentence, the defendant pled guilty to a violation of probation, and was sentenced to a consecutive term of imprisonment.

Holding: The defendant's sentence of 5 years probation was improperly revoked. There is no evidence in the record that the defendant's probationary period was tolled by a timely declaration of delinquency. *See Penal Law* 65.15(2). His probationary term had expired before the violation of probation proceeding, depriving the court of jurisdiction. Judgment on murder charges affirmed, judgment on probation violation reversed. (Supreme Ct, New York Co [Williams, JJ])

Evidence (Business Records) EVI; 155(15) (75)
(Hearsay)

Impeachment (General) IMP; 192(15)

People v White, Nos. 1238-1239, 1st Dept, 5/25/00

The court denied the defendant's request to receive the Criminal Court complaint into evidence. The complaint was inconsistent with the complainant's trial testimony with respect to which of two perpetrators committed certain acts.

Holding: The complainant did not sign or prepare the complaint. It was not admissible as a prior inconsistent statement. *See People v Gooding*, 202 AD2d 375, 376 *lv den* 84 NY2d 826. The defendant was allowed to ask the officer whether the victim made such a statement. The officer responded negatively. To the extent that the complaint contained a prior inconsistent statement by the officer, the officer admitted that inconsistency. The court properly exercised its discretion in refusing to admit the complaint. *See People v Piazza*, 48 NY2d 151, 163-165. There was no foundation to allow the evidence in as a business record. *See Matter of Leon RR*, 48 NY2d 117, 122. Judgment affirmed. (Supreme Ct, New York Co [Daniels, JJ])

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

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

People v Mathis, No. 1258, 1st Dept, 5/25/00

The defense mistakenly exercised only 14 of 15 authorized challenges following an inaccurate count by the court clerk indicating that all 15 had been used.

Holding: The issue is not preserved. The defense had the responsibility to keep its own count of the peremptory strikes. "The error did not fall within the 'very narrow category of so called "mode of proceedings" errors' (*People v Agramonte*, 87 NY2d 765, 770)." The error did not go "to the essential validity of the proceedings conducted below," irreparably tainting the entire trial. *People v Patterson*, 39 NY2d 288, 295-296 *affd* 432 US 197. The defendant's challenge to the circumstances under which his undisputedly lawful sentence was imposed requires preservation. *See People v Callahan*, 80 NY2d 273, 281. If the claim were reviewed, the record would not establish that at the time of sentencing the court was under any misapprehension about the legal range of alternatives. Judgment affirmed. (Supreme Ct, New York Co [Goodman, JJ])

Evidence (Business Records) EVI; 155(15)

Witnesses (Confrontation of Witnesses) (Experts) WIT; 390(7)(20)

People v Atkins, No. 1302, 1st Dept, 6/01/00

The defendant was convicted of third-degree criminal possession of a controlled substance.

Holding: A laboratory report relating to part of the drugs recovered from the defendant was properly admitted as a business record (CPLR 4518; *People v Taam*, 260 AD2d 261 *lv den* 93 NY2d 1046) after a proper foundation was established through the testimony of a chemist who did not personally test those drugs. The defendant's constitutional right of confrontation was not abridged, as he had the opportunity to cross-examine the chemist witness. *People v Driscoll*, 251 AD2d 759, 760 *lv den* 92 NY2d 896. The chemist witness set out the standard business-record foundation for the absent chemist's report. He also specifically testified that the absent chemist performed a battery of tests "just like" the tests performed by the chemist witness on the main portion of the drugs. The chemist witness was subject to cross-examination as to all relevant matters concerning the reliability of the tests. The record does not suggest that the tests varied from chemist to chemist, and "it is unlikely that a chemist would remember any particular piece of evidence [s]he tested." *Minner v Kerby*, 30 F3d 1311, 1315. By failing to request further relief after objections were sustained, the defendant failed to preserve his claims regarding various comments made by the prosecutor during *voir dire* and in summation. Judgment affirmed. (Supreme Ct, Bronx Co [Stackhouse, JJ])

First Department *continued*

Evidence (Voice) **EVI; 155(134.5)**

Identification (General) (Show-ups) **IDE; 190(17) (40)**

People v Deleon, No. 1332, 1st Dept, 6/06/00

Holding: A hearing was held under *People v Rodriguez* (79 NY2d 445). The court properly ruled that the voice identification of the defendant, made by listening to him around the time of his arrest, by detectives who had listened to tapes of his voice during a lengthy investigation, was confirmatory and so not subject to the notice and hearing requirements of CPL 710.30. The identification of the defendant was based on the officers' comparison of his voice to that heard during those intercepted and transcribed conversations, not the composite tape that was destroyed prior to trial. No adverse inference charge as to the missing tape was warranted. The court properly exercised its discretion as to the timing and manner of playing the actual tapes (which were in Spanish). *People v Flayhart*, 72 NY2d 737, 742-743. The defendant was properly precluded from commenting negatively on the prosecution's failure to play the tapes, since they were only obeying the court's initial order. Judgment affirmed. (Supreme Ct, New York Co [Wittner, JJ])

Auxiliary Services (Interpreters) **AUX; 54(30)**

Juries and Jury Trials (Waiver) **JRY; 225(65)**

People v Familia, No. 1361, 1st Dept, 6/08/00

The defendant was convicted after a nonjury trial of first-degree manslaughter and fourth-degree criminal possession of a weapon.

Holding: The record establishes that the defendant personally signed a written jury trial waiver in open court. He claimed that the waiver was invalid, despite the assistance of an interpreter, because the form was not printed in a language that the defendant could understand. This claim goes to the procedure employed in approving the waiver and requires preservation. *People v Johnson*, 51 NY2d 986. A jury waiver must be a signed writing. NY Const art I, § 2; CPL 320.10(2). However, neither the constitution nor the statute specifies that the written waiver be in a defendant's native language. The requirement of a writing was satisfied when the defendant signed a written instrument that had been translated for his benefit. Judgment affirmed. (Supreme Ct, Bronx Co [Sheindlin, JJ])

Search and Seizure (Arrest/ Scene of Crime Searches) (Standing to Move to Suppress) **SEA; 335(10)(70)**

People v Scott, No. 1206, 1st Dept, 6/13/00

The defendant was apprehended, while smoking marijuana, by two police officers patrolling the lobby of a building. As one of the officers made inquiries, he noticed that the defendant reeked of PCP. Upon searching the defendant, he found keys. The defendant denied that the keys had anything to do with the building or that he lived there. The second officer investigated whether the keys fit any of the building's mailboxes, and retrieved a clear bag containing crack cocaine and PCP. The court granted the defendant's motion to suppress.

Holding: The defendant did not meet his burden of demonstrating the reasonable, personal and legitimate expectation of privacy in the area searched necessary to establish standing to challenge the seizure. *People v Whitfield*, 81 NY2d 904. Mere possession of the mailbox key was insufficient to establish a proprietary interest in the mailbox or its contents (*People v Jose*, 252 AD2d 401 affd 94 NY2d 844), especially in light of the defendant's denial of any personal connection to the building and of any connection between the keys and the building. See *People v Wesley*, 73 NY2d 351; but cf *People v Lilly*, 211 AD2d 428. A desire to keep the mailbox's contents private did not invest the defendant with a reasonable expectation of privacy. Order reversed, indictment reinstated, matter remanded. (Supreme Ct, New York Co [Tejada, JJ])

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

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

Weiner v State of New York, No. 1291, 1st Dept, 6/15/00

The claimant's former husband, proceeding *pro se*, filed a violation of visitation petition in Family Court alleging that the claimant had denied him visitation with their child. However, the husband was not entitled to visitation on the date in question. The Family Court petition clerk who assisted the husband merely included the allegations as made by the husband. On the strength of those allegations, an order to show cause was issued, and the Family Court ultimately issued a warrant for the claimant's arrest. She was arrested at her place of employment. Her subsequent legal action claimed that the Family Court employees who assisted the husband were negligent, which led to her wrongful arrest. The Court of Claims held in favor of the claimant on the issue of liability.

Holding: The conduct of court employees in these circumstances cannot form the basis for state liability. Pursuant to Family Court Act 216-c, a clerk preparing a petition on behalf of a *pro se* petitioner is precluded from second-guessing the petitioner's allegations. There can be no negligence in a clerk's failure to exercise discretion in processing a matter. The normal work of a court clerk participating in the processing of legal proceedings is generally viewed as "quasi-judicial," and cloaked with judicial immunity. See *Welch v State of New York*, 203 AD2d 80, 81. Judicial immunity

First Department *continued*

“applies to all acts of auxiliary court personnel that are ‘basic and integral parts of the judicial function,’ unless those acts are done ‘in the clear absence of all jurisdiction.’” See *Sindram v Suda*, 986 F2d 1459, 1460 [DC Cir 1993]. Family Court clerks assisting in the preparation of papers merely act as scribes, a role distinguishable from the roles cited by the claimant, such as police and probation officers seeking arrest warrants. Judicial immunity precludes any negligence claim. Judgment reversed. (Court of Claims, New York Co [Marin, JJ])

Auxiliary Services (Interpreters) AUX; 54(30)

Confessions (General) CNF; 70(32)

People v Montero, No. 1499, 1st Dept, 6/20/00

Holding: The defendant’s written confession, spoken in Spanish and transcribed in English by a bilingual detective, was properly admitted. That the defendant understood no English did not render his confession inadmissible, since the detective translated the statement, verbatim, into Spanish before the defendant adopted it as his own statement by signing it. See *People v Ventura*, 250 AD2d 403, 404 *lv den* 92 NY2d 931. The accuracy of the detective’s recording and translation were factual issues for the jury. Judgment affirmed. (Supreme Ct, New York Co [Tejada, JJ])

Trial (Public Trial) TRI; 375(50)

People v Garcia, No. 726, 1st Dept, 6/29/00

During jury selection, the prosecutor indicated that she would seek closure of the courtroom when the undercover officer and the ghost officer testified. Defense counsel objected, saying that the defendant’s girlfriend and uncle were present and wanted to attend the entire trial. The court granted the closure motion *in toto*, excluding both the defendant’s girlfriend and uncle.

Holding: The analysis of closure cases involves a four-part standard: Has an overriding interest been advanced that is likely to be prejudiced if closure is not ordered; is the closure no broader than necessary to protect that interest; have reasonable alternatives to closure been considered; and has the court made findings adequate to support closure. *Waller v Georgia*, 467 US 39, 48 (1984). When no showing is made that an identified family member poses a threat to an officer’s safety or to future undercover operations, closure as to that family member is error. See *People v Bass*, 259 AD2d 419. The defendant did not bear the burden to prove that the officer’s fear was baseless, as to the specified individuals or as to the public at large. The burden remained with the

proponent of closure to justify abrogation of the defendant’s 6th Amendment right to a public trial. *People v Tolentino*, 90 NY2d 867. Judgment reversed. (Supreme Ct, New York Co [Atlas, JJ])

Dissent: [Rubin, JJ] The record did not show that either of the persons the defendant alleges to have been barred from the courtroom was actually present when the prosecution sought closure, and no application was made to limit closure. No error is shown nor preserved for review.

Second Department

Constitutional Law (General) CON; 82(20) (55)
(United States generally)

Obscenity (General) (Standards) OBS; 270(17) (25)

People v Barrows, No. 98-06328, 2nd Dept, 6/5/00

The defendant was convicted after a jury trial of attempted first-degree disseminating indecent material to minors. The trial court set aside the verdict holding that Penal Law 235.22 was unconstitutionally vague, overbroad, and, to the extent the statute barred interstate communications, violative of the Commerce Clause.

Holding: The statute is not a violation of the Commerce Clause. The Court of Appeals stated in *People v Foley*, ___ NY2d___ [Apr. 11, 2000], “[w]e are hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. Indeed, the conduct sought to be sanctioned by Penal Law §235.22 is of the sort that deserves no ‘economic’ protection.” The statute is not overbroad; it is narrowly tailored to serve the compelling state interest of protecting children from pedophiles. The “luring” element proscribes conduct, not speech. Order reversed, verdict reinstated. (Supreme Ct, Kings Co [Demarest, JJ])

Evidence (Prejudicial) EVI; 155(106)

People v Rosado, No. 97-02173, 2nd Dept, 6/12/00

The defendant drove a sanitation truck through a red light hitting a car that killed the driver. The defendant was arrested. In response to a detective’s question he stated, “I drank one pint of rum at home about 10:30 p.m. last night”. Tests showed the defendant’s blood alcohol level at .03. Over defense counsel’s objection, the trial court allowed evidence of the defendant’s statement to establish the defendant’s reckless course of conduct leading up to the accident. The defendant was convicted of manslaughter.

Holding: The improper admission of the statement was highly prejudicial and constituted reversible error. See *People v Scarola*, 71 NY2d 769. The statement, and the prosecution’s heavy reliance on it, encouraged the jury to infer that the consumption of alcohol the night before impaired the defen-

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dant's ability to drive. See *gen People v Gokey*, 2 AD2d 231. Judgment reversed. (Supreme Ct, Kings Co [Friedman, JJ])

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

**Matter of Elmore v Plainview-Old Bethpage
Central School District, Board of Education,
No. 99-06390, 2nd Dept, 6/12/00**

The appellant charged the petitioner, a tenured teacher, with having engaged in inappropriate conduct toward a student. A Hearing Officer ruled that the petitioner could not discuss his testimony with counsel during any adjournments in the cross-examination, which was conducted during 5 days over 10 weeks. The petitioner commenced this proceeding pursuant to CPLR article 75 alleging a violation of his right to counsel. The Supreme Court vacated the termination of the petitioner's employment and ordered a new hearing.

Holding: Courts have disapproved similar prohibitions forbidding New York defendants from discussing trial testimony with their attorneys for all but brief periods of time. See *People v Joseph*, 84 NY2d 995. Given the due process considerations involved when a tenured teacher is threatened with termination, this is a sound approach. "[I]t is imperative that the integrity of the process, as opposed to the correctness of the individual decision, be zealously safeguarded." *Matter of Goldfinger v Lisker*, 68 NY2d 225,230. Order, as amended, affirmed. (Supreme Ct, Nassau Co [O'Connell, JJ])

**Parole (Revocation Hearings
[Timeliness])** PRL; 276(45[f])

**Matter of Windley v NYS Division of Parole,
No. 99-10104, 2nd Dept, 6/12/00**

The Supreme Court denied a petition in a proceeding brought pursuant to CPLR article 78 seeking restoration of the petitioner to parole status.

Holding: The court erred in determining that a statutory exemption to the final parole revocation hearing requirement applied to the petitioner, who, while on parole, was convicted of committing a federal crime in New York. See *People ex rel. Harris v Sullivan*, 74 NY2d 305, 311. The petitioner was entitled to a final parole revocation hearing within the statutory 90-day period, which commenced at the time that the warrant was lodged as a detainer at the federal prison. See *People ex rel. Walsh v Vincent*, 40 NY2d 1049, 1050. As no such hearing was held, the petitioner is entitled to relief. (Supreme Ct, Orange Co [Patsalos, JJ])

Judges (Disqualification) JGS; 215(8)

Misconduct (Judicial) MIS; 250(10)

People v Grier, No. 97-03532, 2nd Dept, 6/19/00

During jury selection, the court engaged in a conversation with defense counsel about whether the defendant would accept a plea. During a sidebar conference, the judge agreed to a sentence cap if the defendant would wave a jury trial. The prosecutor later requested the court to recuse itself due to the *ex parte* negotiations. During arguments on this issue the court stated that the allegations of bias would make it hard for the court to find the defendant not guilty. The defense would not join the request for recusal. The defendant was convicted of all counts.

Holding: Generally, due process requires recusal "only where there exists a direct personal, substantial or pecuniary interest in reaching a particular conclusion * * * or where a clash in judicial roles is seen to exist." *People v Alomar*, 93 NY2d 239, 246. Absent statutory disqualification under Judiciary Law 14, the decision was within the court's personal conscience. See *People v Moreno*, 70 NY2d 403, 405-406. The defendant was not prejudiced by the trial judge's conducting a Sandoval hearing. Unlike a lay jury, judges' learning, experience and judicial discipline make them " 'uniquely capable of distinguishing the issues and making an objective determination.' " *People v Brown*, 24 NY2d 168, 172 Judgment affirmed. (County Ct, Westchester Co [Smith, JJ])

Dissent: [McGinity, JJ] The defendant did not, and could not have, received a fair trial under these circumstances.

Homicide (Negligent Homicide) HMC; 185(45)

**Lesser and Included Offenses
(Instructions)** LOF; 240(10)

People v Ducasse, No. 97-11370, 2nd Dept, 6/19/00

The defendant testified at his murder trial that during a physical argument, he hit the decedent in the head with a pipe in order to force the decedent to let him go. The defense request to have the jury charged with the lesser-included offense of negligent homicide was denied. The defendant was acquitted of murder and convicted of second-degree manslaughter.

Holding: A lesser-included offense charge must be given only if, under any reasonable view of the evidence, the jury could find that the defendant committed the lesser but not the greater offense. Criminal Procedure Law 300.50; *People v Green*, 56 NY2d 427. The defendant said that at the time he struck the decedent, the decedent had knocked out two of the defendant's teeth and tried to choke him. The jury would be entitled to find that the defendant reasonably failed to perceive a substantial and unjustifiable risk that the decedent would die as a result of the defendant's actions. See *People v Heide*, 206 AD2d 875 *affd* 84 NY2d 943. The court

Second Department *continued*

should have charged the lesser-included offense. Judgment reversed, indictment dismissed without prejudice to the prosecution's re-presenting any appropriate charges. (Supreme Ct, Kings Co [Friedman, JJ])

Counsel (Anders Brief)**COU; 95(7)****People v Edwards, Nos. 98-11247, 98-11248,
2nd Dept, 6/19/00**

Holding: Assigned counsel, Luise M. Klein, sought to be relieved as attorney for the defendant after submitting a brief in accordance with *Anders v California* (386 US 738 [1967]). An independent review of the record reveals that "an arguable issue exists as to whether, after the court failed to impose the sentence represented to the defendant at the time of his pleas as being the maximum sentence which would be imposed, the defendant should have been given the opportunity to withdraw his plea." See *Santobello v New York*, 404 US 257. Motion granted, new counsel assigned. (County Ct, Nassau Co [Kowtna, JJ])

Counsel (Right to Counsel)**COU; 95(30)****Grand Jury (General)****GRJ; 180(3)****People v Backman, No. 99-01518,
2nd Dept, 7/10/00**

The defendant was arraigned and no counsel was assigned. Three days later he was indicted. Seven days later the defendant was arraigned on the indictment and assigned counsel. He moved for dismissal on the grounds that he was denied effective assistance of counsel and his right to appear before the grand jury. Criminal Procedure Law 190.50. The prosecution opposed the motion as untimely, but the court granted it.

Holding: The defendant's lack of counsel at a time when he was statutorily and constitutionally entitled to the effective assistance of counsel deprived him of his right to appear before the grand jury. See *People v Chapman*, 69 NY2d 497. Although the motion was not made within five days as required by CPL 190.50(5)(c), it was nonetheless properly considered. The defendant's time to make his CPL 190.50 motion was enlarged during arraignment to allow newly-assigned counsel time to make further inquiries. The motion was made within the enlarged period. See *People v Mason*, 176 AD2d 356. Judgment affirmed. (County Ct, Orange Co [DeRosa, JJ])

**Parole (Revocation Hearings
[Evidence] [General])****PRL; 276(45)[c] [d]****People ex rel. Richard J. Korn o/b/o Vernon Jones v
New York State Division of Parole, No. 99-05186,
2nd Dept, 7/10/00**

The Supreme Court sustained a writ of habeas corpus, vacated a parole violation detainer, and, in effect, restored the petitioner to parole supervision under the prevailing terms and conditions.

Holding: A revocation hearing is in the nature of an administrative proceeding to determine whether a parolee has violated the conditions of parole. The preliminary hearing is meant to be informal and summary in nature, with only a minimal inquiry needed to determine whether there is probable cause or reasonable suspicion to believe the parolee has violated a parole condition. See *People ex rel. Calloway v Skinner*, 33 NY2d 23, 31. An admitted or unexplained substantial violation of a parole condition will support a revocation. See *People ex rel. Maggio v Casscles*, 28 NY2d 415, 418. The petitioner agreed to be at his residence between 9 p.m. and 7 a.m., and even if the permission his parole officer granted to attend religious services before 7 a.m. was not rescinded, the petitioner's absence at 2:30 a.m. was not explained. Early services began at 4:10 a.m. and he lived only about 30 minutes away. Order reversed, parole detainer warrant reinstated. (Supreme Ct, Kings Co [Lewis, JJ])

Guilty Pleas (General) (Vacatur)**GYP; 181(25) (55)****Sentencing (General)****SEN; 345(37)****People v Guretzky, No. 97-10620,
2nd Dept, 7/24/00**

The defendant pleaded guilty and the court promised him a sentence of five years probation and a certificate of relief from disabilities. At sentencing, the court sentenced him to five years probation and 500 hours of community service. The court stated that the defendant could apply for a certificate from disabilities after six months.

Holding: The defendant was not sentenced as promised inasmuch as the court imposed an additional condition of community service. Due to the court's failure to impose the promised sentence, without stating a reason, the defendant should receive the promised sentence. See *People v Brown*, 207 AD2d 408. The defendant is not entitled to vacatur of his plea because the court did not issue the certificate of relief, as the court made no promise as to when it would issue the certificate. Judgment modified, community service requirement vacated. (Supreme Ct, Queens Co [Browne, JJ])

Aliens (Deportation)**ALE; 21(10)****People v Wright, No. 98-05241, 2nd Dept, 7/31/00**

Second Department *continued*

Holding: The defendant was convicted of fifth-degree and seventh-degree possession of a controlled substance. The appeal is dismissed as the defendant has been deported and is no longer subject to the court's jurisdiction. *See People v Del Rio*, 13 NY2d 899. (Supreme Ct, Kings Co [Gary, J])

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

**Juveniles (Delinquency –
Procedural Law) (Removal)** **JUV; 230(20) (120)**

Matter of Stephan F., No. 98-11155, 7/31/00

The appellant was originally charged in a felony complaint with, among other things, first-degree robbery. The case was removed to Family Court. Although the charge of first-degree robbery is a designated felony act (*see* Family Court Act 301.2[8][ii]), the removal order did not include a sufficient statement and marking to make the order and related documents a designated felony act petition under Family Court Act 311.1(7). The Family Court denied a motion to dismiss the first-degree robbery count, and found the appellant had committed acts that would constitute first-degree and second-degree robbery. The latter is not a designated felony.

Holding: The failure to include a sufficient statement and marking in the removal order precludes a finding that the appellant committed an act that would have constituted first-degree robbery. *See Matter of David M.*, 229 AD2d 345. The charge can not be reduced to third-degree robbery because that is a lesser-included offense of second-degree robbery. *See Matter of Tonia B.*, 239 AD2d 572 *cert den* 524 US 917. Order reversed insofar as appealed from. (Family Ct, Queens Co [Fitzmaurice, J])

**Evidence (Prejudicial)
(Uncharged Crimes)** **EVI; 155(106) (132)**

**People v Rodriguez, No. 99-03931,
2nd Dept, 7/31/00**

At a pretrial hearing in this homicide case, prior bad acts evidence (relating to robbing drug dealers) was ruled admissible against the defendant. At trial, the witness testifying as to the defendant's admission of prior bad acts gave additional testimony about the defendant's alleged confession to murdering drug dealers. Following a jury trial, the trial court granted a defense post-conviction motion to set aside the verdict.

Holding: Evidence of uncharged crimes is not admissible if offered only to raise an inference that a defendant is of a criminal disposition. *See People v Hudy*, 73 NY2d 40, 54-55. The probative value of the witness's testimony here was substantially outweighed by prejudice to the defendant. *See People v Alvino*, 71 NY2d 233, 242. The evidence was not

overwhelming; the trial court properly set aside the verdict. *See People v Elder*, 207 AD2d 498. Order affirmed. (Supreme Ct, Kings Co [Juviler, J])

Motions (Omnibus) (Suppression) **MOT; 255(27) (40)**

People v Diaz, No. 99-11118, 2nd Dept, 7/31/00

Holding: The hearing court properly expanded the scope of the *Huntley* hearing (*see People v Huntley*, 15 NY2d 72) to include the defendant's *Dunaway* claim. *See Dunaway v New York*, 442 US 200 (1979). The defendant could not, with due diligence, have previously been aware of certain facts that support his *Dunaway* claim. *See Criminal Procedure Law 255.20[3]*. The prosecution's claim that the law of the case doctrine was violated because another Supreme Court justice had implicitly denied the defendant's request for such a hearing lacks merit. *See People v Evans*, 94 NY2d 499, 502. The basis of the information provided by a known citizen informant (the defendant's landlord) was not sufficiently established to satisfy the two-prong *Aguilar-Spinelli* test. The evidence was properly suppressed. Order affirmed. (Supreme Ct, Queens Co [Flaherty, J])

Dissent: [Smith, J] The evidence presented by the prosecution satisfied the second prong of the *Aguilar-Spinelli* test. The information was not an unsubstantiated rumor, unfounded accusation, or conclusory characterization.

Third Department

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

**Trial (Summations) (Verdicts
[Repugnant])** **TRI; 375(55) (70[c])**

**People v Nash, Nos. 10213, 11109,
3rd Dept, 6/29/00**

The defendant and his girlfriend lived with the decedent and the decedent's girlfriend when the decedent was killed. The decedent's girlfriend was the chief prosecution witness. After conviction the defendant moved to vacate the judgment of conviction claiming counsel had met with the decedent's girlfriend before being assigned to the defendant's case, creating a conflict of interest. The motion was denied without hearing.

Holding: The defendant failed to adequately demonstrate that the conflict of interest substantially impacted his defense and that he was denied the effective assistance of counsel. The motion was properly dismissed without a hearing where the moving papers failed to allege any ground that would constitute a legal basis for the motion. *See Criminal Procedure Law 440.30(4)(a)*. The verdict is not repugnant because the defendant was acquitted of criminal possession of a weapon. The count of murder under which he was convicted charged that he acted in concert with a co-defendant, who could have possessed the weapon. The defendant

Third Department *continued*

was not deprived a fair trial where the prosecutor discussed law in his summation because his recitation was correct and the court gave proper instructions. *See People v Goodman*, 190 AD2d 862, 863 *lv den* 81 NY2d 971. Judgment affirmed. (County Ct, Sullivan Co [La Buda, JJ])

Dissent: [Crew, JP] Defense counsel's representation of the prosecution's chief witness raised the potential for a conflict of interest, requiring a hearing.

Jurisdiction (Subject Matter) JSD; 227(10)

Misconduct (Prosecution) MIS; 250(15)

People v John Doe, No. 11699, 3rd Dept, 6/29/00

The defendants obtained preliminary injunctive relief prohibiting the state Attorney General from criminally prosecuting them for an alleged violation of a Medicaid regulation pending resolution of their declaratory judgment action seeking to strike the regulation as unconstitutionally vague. The Attorney General submitted charges to a grand jury and obtained an indictment. The court refused to arraign the defendants on this indictment until the preliminary injunction was lifted. The defendants then sought dismissal of the indictment by the court, which was granted. The Attorney General was held in contempt.

Holding: Although Criminal Procedure Law 210.20(1) seems to require a defendant's arraignment prior to a motion to dismiss, it does not restrict the time period within which a court may dismiss an indictment. *See People v England*, 195 AD2d 751, *affd* 84 NY2d 1. Countenancing the Attorney General's claim that arraignment was required would elevate form over substance and bring harm to the defendants, who could be barred from continued participation in the Medicaid program by the unsealing of an indictment. The County Court had subject matter jurisdiction over the indictment, the filing of which marked the commencement of the criminal action. *People ex rel Gray v Tekben*, 86 AD2d 176 *affd* 57 NY2d 651. The indictment here having been obtained in direct violation of a court order, it was well within the power of County Court to dismiss it. Judgment affirmed. (County Ct, Albany Co [Rosen, JJ])

Discovery (General) (Matters Discoverable) (Right to Discovery) DSC; 110(12) (20) (33)

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Sawyer, Nos. 10257, 10682, 3rd Dept, 7/6/00

The defendant was convicted of second-degree murder, weapons possession, and first-degree assault.

Holding: The defendant was not denied an opportunity to testify at the grand jury. *See* Criminal Procedure Law 190.50(5). Defense counsel received notice one business day before the scheduled grand jury presentment. In objecting to this schedule, the defense gave no indication as to how the time was unreasonable but merely averred that the defendant wanted to testify but was too tired to do so after lengthy interrogation. The defendant had adequate opportunity to consult with counsel, was aware of all the witnesses to the event, and had a copy of a witness's supporting deposition. *See eg People v Degnan*, 246 AD2d 819. The demand for defense review of the defendant's three-hour videotaped statement prior to testifying at the grand jury was part of repeated efforts to discover evidence to which the defense was not then entitled. *See Matter of Brown v Appelman*, 241 AD2d 279, 283-284. Testimony showed that the defendant deliberately thrust a steak knife into the decedent's chest with significant force, an imminently dangerous act that presented a grave risk of death. This was sufficient to support a conviction for depraved indifference murder. *See People v Rios*, 230 AD2d 87, 90-91 *lv den* 90 NY2d 862. Judgment affirmed. (County Ct, Tompkins Co [Barrett, JJ])

Dissent: [Peters, JJ] One day's notice did not provide an opportunity for the defendant to exercise his due process rights pursuant to CPL 190.50(5) and counsel's assertions pertained to those rights, not discovery.

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

Misconduct (Defense) MIS; 250(5)

People v Brown, No. 11194, 3rd Dept, 7/6/00

Before trial, the prosecutor and the defense stipulated to the exclusion of witnesses. The defendant's 13-year-old daughter, an alibi witness, was present in the courtroom for most of the government's case. The court, upon the prosecutor's motion, precluded her testimony.

Holding: Preclusion of the testimony of a defense witness can be an acceptable sanction for violating a court order. *See United States v Nobles*, 422 US 225, 241 (1975). Such sanctions are the most drastic available and are appropriate only in the most egregious circumstances, such as where there has been collusion to gain a tactical advantage. The record here does not support such an extreme sanction. Preclusion of a defense witness's testimony implicates the defendant's 6th Amendment rights so that alternative sanctions, such as an adverse witness charge, generally suffice for a violation of an exclusion agreement. The prosecution did not show the error harmless beyond a reasonable doubt. Judgment reversed. (Supreme Ct, Warren Co [Teresi, JJ])

Concurrence: [Mugglin, JJ] Improper barring of a witness for violation of an exclusion order so impacts the fairness of a trial that a harmless error analysis does not apply.

Third Department *continued*

Defense (General) DEF; 105(31)

Identification (Suggestive Procedures) IDE; 190(50)

People v Conway, No. 11279, 3rd Dept, 7/13/00

The defendant was convicted of criminal sale of a controlled substance.

Holding: The prosecution met its burden of proving reasonableness and lack of suggestiveness in a photo array, and the defendant could not establish that the array, which included five black males with dreadlocks, was unduly suggestive. *People v Parker*, 257 AD2d 693, 694 *lv den* 93 NY2d 1024. Evidence that the crime was committed by a particular other person may be presented only if there is a clear link, beyond mere speculation, between the crime and that other person. *See People v Lush*, 249 AD2d 896. The defendant failed to produce evidence connecting to the crime another person of similar physical appearance, and evidence relating to any such individual was properly precluded. Judgment affirmed. (County Ct, Rensselaer Co [Sheridan, JJ])

Identification (Sufficiency of Evidence) (Wade Hearing) IDE; 190(45) (57)

Motions (Suppression) MOT; 255(40)

People v King, No. 11442, 3rd Dept, 7/13/00

A neighbor gave police a description of the defendant, who had been seen trespassing in a home, along with the route he was traveling. The information was radioed to patrol officers who stopped the defendant one and one-half blocks from the crime scene. The neighbor was brought to see the defendant and positively identified him. At a suppression hearing, none of the officers was asked to describe the defendant as they perceived him at the time he was detained. The suppression motion was denied.

Holding: Where a defendant is seized without a warrant, a suppression court must be given not only the description upon which the police acted, but also facts about the defendant's appearance at the time of such detention. The court must make an independent determination of whether the person detained reasonably fit the description relied upon. *See People v Oliver*, 191 AD2d 815, 816. The officers' testimony here that the defendant fit the description is not enough. *People v Dodt*, 61 NY2d 408, 416. Judgment reversed. (County Ct, Schenectady Co [McGill, JJ])

Death Penalty (Due Process) (General) DEP; 100(55) (80)

Guilty Pleas (General) (Withdrawal) GYP; 181(25) (65)

Confessions (Counsel) (Duress) (Voluntariness) CNF; 70(23) (25) (50)

People v Edwards, No. 11316, 3rd Dept, 7/20/00

The defendant agreed to talk with State Police investigators, who had no arrest warrant. He ultimately confessed and was charged with first-degree murder. The prosecution gave notice of intent to seek the death penalty. The defendant, after denial of his suppression motions, decided to plead guilty to first-degree murder under an agreement approved by county court. The death notice was withdrawn and the prosecutor agreed to a sentence of 25 years to life if the defendant cooperated. The defendant moved before sentencing to withdraw his plea as invalid under *Matter of Hynes v Tomei* (92 NY2d 613 *cert den* 527 US 1015). The court denied the motion and imposed sentence.

Holding: The defendant's waiver of the right to appeal did not prevent his appellate challenge to a plea entered pursuant to statutory provisions later invalidated. Such a plea could not have been knowing and intelligent. Further, some claims cannot be waived because society has an interest in the integrity of the criminal justice system. *See People v Seaberg*, 74 NY2d 1, 9. The 5th and 6th Amendments to the US Constitution were violated by the prosecution's negotiation of a guilty plea to first-degree murder while a death penalty notice was pending. That the plea was not formally entered until the prosecutor withdrew the death notice does not save it from infirmity under *Hynes*. The plea must be vacated.

The suppression ruling was properly denied. The prosecution proved the voluntariness of the defendant's statements. The County Court's decision that the defendant was not in custody was not error as a matter of law. *People v Smith*, 214 AD2d 845, 847 *lv den* 86 NY2d 741. There was insufficient evidence of promises or threats. Why police changed the time noted for completion of the written statement was explained, so the court properly found that the defendant's right to counsel, which attached after the originally-noted time, was not violated. Judgment reversed. (County Ct, Schoharie Co [Bartlett III, JJ])

Fourth Department

News Media (General) NEW; 269(10)

Trial (Public Trial) TRI; 375(50)

Santiago v Bristol, No. OP 00-01131, 4th Dept, 5/25/00

The petitioner was a defendant in a criminal action where the prosecution sought the death penalty. Before trial, several television stations and newspapers (intervenors) moved to intervene to obtain an order permitting audiovisual coverage of the trial. The petitioner and the prosecution opposed the motion, arguing, *inter alia*, that such coverage is prohibited by Civil Rights Law 52. The

Fourth Department *continued*

petitioner commenced this CPLR article 78 proceeding seeking to prohibit the judge (respondent) from enforcing his order declaring Civil Rights Law 52 unconstitutional under NY Constitution, article I §8 and permitting audiovisual coverage of the trial.

Holding: The respondent exceeded his authorized powers in permitting the media to intervene in the petitioner's action. The media's right to intervene is premised upon its right of access to petitioner's trial. *See Matter of Westchester Rockland Newspapers v Leggett*, 48 NY2d 430, 437. The right of access is not the right to broadcast the proceedings. The intervenors have no federal constitutional right to televise or otherwise broadcast the petitioner's trial (*see Nixon v Warner Communications*, 435 US 589 [1978]), nor is there precedent in New York recognizing such a right. *See Matter of Johnson Newspaper Corp. v Melino*, 77 NY2d 1, 8. Because the intervenors have no constitutional or statutory right to broadcast, the respondent had no authority to permit them to intervene. The respondent may not exercise the authority to control his courtroom "in a manner that conflicts with existing legislative command." *People v Mezon*, 80 NY2d 155, 159. Petition granted.

Prisoners (Conditions of Confinement) (Rights Generally) PRS I; 300(5) (25)

Prisons (Classification) (Conditions) PRS II; 300.5(5) (6)

**Matter of Rifkin v Goord, No. CA 99-3473,
4th Dept, 6/16/00**

Prison authorities removed the petitioner from general prison population based on their determination that the notoriety and serious nature of his convictions caused disruption so that his removal was necessary for the safety of the facility and the petitioner. The petitioner sought to be placed in protective custody rather than administrative segregation. He filed a CPLR article 78 proceeding that was converted by Supreme Court into a declaratory judgment action. The court found that the petitioner's constitutional rights were not violated.

Holding: The judgment of officials in the volatile atmosphere of a prison turns largely on subjective evaluations and predictions of future behavior. *Hewitt v Helms*, 459 US 460 (1983). Equal protection does not require absolute equality in these circumstances, but a showing that unequal treatment rationally furthers a legitimate, articulated state purpose such as security. Segregated confinement alone is not cruel and unusual punishment. The petitioner's administrative segregation was imposed and continues with the proper exercise of procedural due process. His placement was the subject of an administrative hearing and his status is subject

to review every 30 days by a three-member committee. The results of such review are forwarded to the petitioner's superintendent for a final determination. *See* 7 NYCRR 301.4(a)(d). Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, JJ])

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

Family Court (General) FAM; 164(20)

Matter of Allegany County Department of Social Services, o/b/o Jennifer L.H. v Thomas T., No. CAF 99-07210, 4th Dept, 6/16/00

In a paternity action, the respondent appeared *pro se* before a hearing examiner and stated that he wanted an attorney. The hearing examiner reserved decision on the request and ordered a genetic markers test. At the next appearance, the examiner extracted an admission of paternity from the respondent, then handed him a form containing his rights. The respondent asked if the Examiner had received the respondent's Social Security information. The Examiner replied "no" and ordered weekly payments of child support, including arrears.

Holding: The respondent's right to counsel pursuant to Family Court Act 262(a)(viii) was violated when his unequivocal request for counsel was ignored. The amount of child support was illegal because the respondent's income, from supplemental security income benefits, was below the poverty level. *See* Family Court Act 413(1)(d); *Matter of Rose v Moody*, 83 NY2d 65 *cert den sub nom Attorney General v Moody*, 511 US 1084. The respondent's consent was obtained in violation of his right to counsel, and the court's reasoning for deviating from the basic child support obligations was not on the record. *See Matter of Michelle W. v Forrest James P.*, 218 AD2d 175, 178. Order reversed, matter remitted for further proceedings. (Family Ct, Allegany Co [Feeman, Jr., JJ])

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

**People v Sprague, No. KA 00-00200,
4th Dept, 6/16/00**

The prosecution made a *Batson* challenge to the defense exercise of a peremptory strike during jury selection. The defendant offered a race-neutral reason for striking the juror in question. The prosecution alleged the reason was pretextual and the court summarily sustained the prosecution's challenge without discussing pretext or setting forth the basis for its ruling. The defendant was convicted.

Holding: When a court finds that the opponent of a peremptory strike has carried its ultimate burden of persuasion, establishing discrimination, the court's ruling and its basis must be reflected and gauged on the record made. *People v Payne*, 88 NY2d 172, 183-184. The record here does not permit meaningful appellate review. Case held, matter

Fourth Department *continued*

remitted for the court to set forth the basis of its ruling. (Supreme Ct, Monroe Co [Mark, JJ])

Sentencing (Ex Post Facto Punishment) SEN; 345(35)

**People v Jennings, No. KA 97-5516,
4th Dept, 6/16/00**

Holding: The defendant must be resentenced on the count of first-degree assault. When the underlying crime was committed, first-degree assault (Penal Law 120.10[1]) was a class C violent felony. *See* Penal Law former 70.02(1)(b). That crime was then reclassified as a class B violent felony. *See* L 1996, ch 646. It is unclear from the record whether the defendant was properly sentenced for the commission of a class C violent felony rather than for a class B violent felony. *See gen People v Smith*, 108 AD2d 686, 687. Judgment modified, remitted for resentencing on one count. (Supreme Ct, Erie Co [Forma, JJ])

Driving While Intoxicated (Evidence) (General) DWI; 130(15) (17)

Sentencing SEN; 345(36)

**People v Alshoabi, No. KA 98-2359,
4th Dept, 6/16/00**

The defendant was charged with, *inter alia*, two counts of first-degree vehicular manslaughter. The prosecution filed a special information under CPL 200.60 to support the necessary enhancing elements, alleging that the defendant knew or had reason to know that his license was revoked for failure to submit to a chemical test. At arraignment the defendant refused to admit, deny, or remain mute on the special information allegations.

Holding: CPL 200.60 is designed to protect defendants from prejudice that may result from permitting juries to learn of prior convictions or related facts. *See People v Cooper*, 78 NY2d 476, 481-483. When the defendant refused to admit the enhancing element, the prosecution was required to submit evidence establishing all elements of the offense. The application for the court order directing the defendant to submit to a blood test did not name witnesses to the accident, but the arresting officer's statement under oath contained reasonable cause to believe the defendant had been driving while intoxicated and was unable to consent to the test because he was unconscious. The jury found the defendant guilty of first-degree aggravated unlicensed operation of a motor vehicle. Their implicit rejection of that offense in the second or third degree foreclosed error for failure to give the lesser-included instruction of unlicensed operation of a motor vehicle. *See People v Boettcher*, 69 NY2d 174, 180. The sentence on several counts was illegal. Imprisonment, but not a fine, is allowed under Vehicle and Traffic Law

600.20(2)(b) when conduct constitutes a class E felony. Judgment modified, remitted for resentencing on those counts. (County Ct, Erie Co [DiTullio, JJ])

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

Post-Judgment Relief (General) PJR; 289(20)

People v Tillman, No. KA 99-234, 4th Dept, 6/16/00

The defendant was convicted of second-degree burglary for having knowingly entered and remained unlawfully in his ex-girlfriend's house with the intent to commit criminal contempt, *ie* violation of an order of protection of which he was aware. Before sentencing, the defendant moved to vacate the judgment contending for the first time that there was no valid order of protection effect at the time of the incident. The court set aside the verdict.

Holding: Vacating a jury verdict before sentencing is allowed if reversal would have been mandated on appeal as a matter of law. *See* CPL 330.30; *People v Ortiz*, 250 AD2d 372, 375 *lv den* 92 NY2d 881. Reversal based on legally insufficient evidence is not mandated on appeal as a matter of law unless the issue has been preserved for appellate review by a timely motion to dismiss directed at the specific deficiency. The trial court was without authority to set the verdict aside as it did. *People v Patino*, 259 AD2d 502 *lv den* 93 NY2d 976. Judgment reversed, remitted for sentencing on those counts. (County Ct, Cayuga Co [Corning, JJ])

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

**People v Stevenson, No. KA 99-1630,
4th Dept, 6/16/00**

An officer observed the defendant standing behind a legally parked car outside a bar. Upon making eye contact, the defendant crouched and acted as if he were moving something heavy. The officer frisked the defendant and found an ammunition clip to a pistol, and a pistol on the ground where the defendant had been standing. The court denied the defendant's suppression motion.

Holding: Where no more than a common-law right to inquire exists, a frisk must be based upon a reasonable suspicion that officers are in physical danger and the defendant poses a threat to their safety. *See People v Hauser*, 80 AD2d 460, 462. This situation did not supply reasonable cause to think a crime was afoot or that the defendant was armed. *See People v Powell*, 246 AD2d 366, 369-370 *app dismd* 92 NY2d 886. The clip should have been suppressed, but not the gun, which was abandoned before contact with the police. The abandonment was not coerced or precipitated by unlawful police activity. *See People v Ramirez-Portoreal*, 88 NY2d 99, 110.

Fourth Department *continued*

Judgment reversed, plea vacated, motion granted in part, matter remitted. (County Ct, Erie Co [D'Amico, JJ])

Evidence (Other Crimes) **EVI; 155(95)**

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

**People v Kise, No. KA 99-5161,
4th Dept, 6/16/00**

The defendant was convicted of sodomy, sexual abuse and endangering the welfare of a child.

Holding: The defendant was denied a fair trial by the admission of evidence that he had an ongoing sexual relationship with the 11-year-old complainant. *See People v Lewis*, 69 NY2d 321. The prosecutor referred to the improper testimony in summation. *People v Harris*, 150 AD2d 723, 726. The charge of endangering the welfare of a child did not include continuing offenses over time. *Cf People v Keindl*, 68 NY2d 410, 421 *rearg den* 69 NY2d 823. The references to the sexual relationship were offered to demonstrate the defendant's propensities and to enhance the complainant's credibility. The evidence of guilt was not overwhelming so the error was not harmless. The improper testimony was likely to divert the jury's attention from the specific offenses charged in the indictment. *See People v Mediak*, 217 AD2d 961, 962 *lv den* 87 NY2d 848. Judgment reversed, new trial granted. (County Ct, Seneca Co [Bender, JJ])

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

**People v Michael S., No. KA 99-5481,
4th Dept, 6/16/00**

The defendant pled guilty to attempted burglary and was adjudicated a youthful offender and sentenced to probation. The defendant then violated probation and the court promised to sentence the defendant to continued probation. The defendant failed to appear at sentencing and the court sentenced the defendant to a term of imprisonment.

Holding: The defendant failed to preserve this claim for review, as he did not object to the enhanced sentence or move to withdraw the plea. *See CPL 470.05(2)*. However, it is reviewed in the interest of justice. *See CPL 470.15(6)(a)*. At

Defender News

(continued from page 4)

and seizure cases; Bill Clauss, Federal Public Defender for the Western District of New York—how to evaluate the federal consequences of state criminal dispositions; and Dr. William Shields from the College of Environmental Science and Forestry in Syracuse—how to identify favorable and unfavorable data in DNA test reports.

sentencing, the prosecutor remained silent about the sentence agreement, and defense counsel erroneously said there had been no promise. The defendant was never advised that the sentence would be enhanced if he failed to appear. *See People v Hendricks*, __ AD2d __ (Mar. 29, 2000). The court erred in failing to afford the defendant an opportunity to withdraw his plea before imposing an enhanced sentence. *See People v Selikoff*, 35 NY2d 277, 241 *cert den* 419 US 1122. Although the defendant failed to preserve the issue for review, the sentence is vacated in the interest of justice. Judgment reversed. (Supreme Ct, Erie Co [Howe, JJ])

Sentencing (General) **SEN; 345(37)(70.5)**
(Resentencing)

People v Reed, No. KA 99-5498, 4th Dept, 6/16/00

The defendant was sentenced in 1954 to imprisonment of one day to life for rape. No hearing was conducted to afford him the opportunity to rebut the prosecution's psychiatric proof or to submit his own. The 1954 psychiatric report failed to discuss and analyze the defendant's sexual problem and state whether his condition was a type that would yield to treatment. The defendant filed a motion under CPL 440.20 to set aside the illegal sentence. The motion was denied.

Holding: The procedure used in sentencing the defendant pursuant to former Penal Law 2189(a) was not constitutional. The sentence must be vacated. *See People v Bailey*, 21 NY2d 588. The defendant's motion is not barred by laches, which is an equitable remedy and usually does not bar an action at law. Further, the government did not assert that it was prejudiced by the delay. *See gen Eagle Comtronics v Pico Prods.*, 256 AD2d 1202, 1203.

The defendant cannot be resentenced under former Penal Law 2189-a, which was limited to cases in which there was a basis for finding a defendant dangerous or capable of benefitting by confinement. The defendant's psychiatric condition is not susceptible to treatment, and whatever program existed under the statutory scheme in 1954 no longer exists. The Parole Board has determined that the defendant does not require segregation from society. Consequently, he should be resentenced under former Penal Law 2010. Order reversed, matter remitted. (County Ct, Monroe Co [Marks, JJ]) ⚔

Joe Nursey of the Office of the Appellate Defender in New York City, led an energized ethical discussion. NYSDA Staff Attorney and Legislative Coordinator Al O'Connor set out the good, the bad, and the ugly in the last legislative session (see page 7). Unfortunately, Michele Maxian fell prey to unreliable airline flight schedules and was unable to present her lecture on defending against allegations of domestic violence. Other portions of the program were expanded accordingly, and the whole program was engaging and well received. ⚔

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