NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

VOLUME XV NUMBER 7 September 2000

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Amici *Challenge Misdemeanor Immigration Consequences*

A recent *amicus* brief co-signed by NYSDA urges the United States Court of Appeals for the 2d Circuit to recognize that Congress did not intend in 1996 to turn misdemeanors into "aggravated felonies" for immigration purposes. At issue is the application of the Illegal Immigration Reform and Immigrant Responsibility Act. Manuel D. Vargas, Director of NYSDA's Criminal Defense Immigration Project, wrote the brief in support of a rehearing in *United States v Pacheco*, No. 00-1015. The brief focuses on legislative history, the authoritativeness of the federal sentencing guidelines commentary, and the far-reaching impact of the decision. NYSDA joined the American Immigration Lawyers Association and the National Immigration Project on the brief, which was filed on Sept. 12, 2000. A copy of the brief can be downloaded from either the Immigration Project or Publications pages of NYSDA's web site (www.nysda. org); a hard copy is available from the Backup Center.

DNA Developments

The use of DNA in criminal proceedings remains a hot area. Prosecutors indicting "John Does" by reference to DNA patterns, courts seeking to determine the scientific validity of mitochondrial DNA evidence, and the American Bar Association issuing recommendations for collecting DNA evidence are some of the latest developments of interest criminal defense practitioners.

"John Doe" Indictments Filed

Prosecutors in New York State are hoping to forestall the five-year statute of limitations in rape cases by filing "John Doe" indictments based on DNA profiles. Using a tactic first developed in Wisconsin, three unnamed indictments have been filed in New York City, Suffolk County and most recently in Monroe County. New York is one of a handful of states filing charges based on DNA profiles. Another facet of this end run around the statute of limitations is a stepped-up effort to test rape kits in unsolved cases. New York City Mayor Rudolph Giuliani and Police Commissioner Bernard Kerik have developed a plan to test thousands of old rape kits. Efforts are also being made to lobby the legislature to repeal the statue of limitations in rape cases. (Rochester *Democrat and Chronicle*, 9/23/00; *New York Times*, 9/28/00.)

Mitochondrial DNA Meets *Frye*

Mitochondrial DNA (mtDNA) has met the *Frye* test (*Frye v United States*, 293 F 1013) for the first time in a New York court. DNA can be found in the nucleus of a cell (nuclear DNA) or in the mitochondrion (mtDNA) outside the nucleus. mtDNA has the virtue of being more durable than nuclear DNA, which degrades easily. A Nassau County judge found that mtDNA testing meets the *Frye* standard for admitting scientific evidence, although the experts testified that "mtDNA can not be the unique identifier that nuclear DNA can achieve. . . ." (*People v Klinger*, *New York Law Journal*, 9/12/00.) A copy of the decision is available from the Backup Center.

ABA Makes DNA Recommendations

The ABA has approved a set of recommendations for the collection of DNA and biological evidence in criminal cases. The ABA underscored the need to make such evidence available to defendants and prisoners upon request along with adequate funding for preservation and testing. Copies of the resolution and report adopted by the ABA are available by contacting the ABA Division for Media Relations and Communication Services at (202)662-1090 (Washington DC) or (312)988-5000 (Chicago).

Prisoners Punished for DNA Refusal

State prisoners in New York face solitary confinement if they refuse to provide blood for DNA samples. Last year, legislation expanded the pool of convicted persons who must surrender DNA samples for the state DNA Databank. Approximately 1/3 of inmates in the state system have given samples. The policy has already resulted in samples being forcibly taken from two inmates

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who refused. (*Daily News*, 9/13/00).

More information about developments in DNA testing and litigation is located on the DNA page of NYSDA's web site at www.nysda.org.

Inmate Litigants' Rights and Needs Addressed

Inmates with limited funds face many hurdles to filing civil actions. These barriers, from inscrutable time limitations for filing Article 78 petitions to unwaivable filing fees, often bar access to the courts for prisoners who proceed *pro se*. NYSDA and Prisoners' Legal Services (PLS) have taken a step toward resolving the first problem, while a Supreme Court justice in New York City has reached out to address the other.

Mail Deadline Sought for *Pro Se* Prisoner Litigants

A brief prepared by NYSDA and PLS urges the Court of Appeals to remedy a dire situation for inmates filing their own litigation papers. In New York State, indigent *pro se* incarcerated litigants are often thwarted by the rules of civil practice when they seek to initiate Article 78 proceedings. The rules require that they proceed by an order to show cause to seek judicial approval for service of process by regular mail. Since inmates cannot travel to the courthouse to monitor the signing and filing of their legal papers, the deadline for a prisoner's proposed order to show cause and verified Article 78 petition is problematic.

The Appellate Division, 3rd Department, has held that inmates who mail legal papers as much as four weeks before the time limit expires are still time barred if delays beyond their control result in actual filing after the limitations period. See *Barrett v Coughlin*, 199 AD2d 653 (3rd Dept. 1993). The 2nd Department has adopted a more forgiving rule that deems Article 78 proceedings timely commenced if inmates mail their legal papers in sufficient time to be signed and filed within the limitations period, even if actual filing occurs after the deadline has expired. See *Mandala v Jablonsky*, 242 AD2d 271 (2d Dept. 1997).

Brendan O'Donnell of PLS and Al O'Connor of NYSDA have filed a brief on behalf of Jason Grant, in *Grant v Senkowski*, asking the Court of Appeals to adopt the federal "mailbox-filing rule" for *pro se* Article 78 petitions brought by incarcerated litigants. Under this rule, first recognized by the United States Supreme Court in *Houston v Lack*, 487 US 266 (1988), an inmate's legal papers would be considered timely if they were delivered to prison officials for mailing before the Statute of Limitations expired.

Statute Prohibiting Waiver of Filing Fees Found Unconstitutional

About a year ago, section 1101(f) was added to the CPLR, eliminating the waiver of filing fees for indigent inmates. In contrast, the waiver provision still exists for non-inmates seeking to file actions but unable to pay the fees. In *Gomez v Evangelista*, New York County Supreme Court Judge Emily Goodman found that there was "no rational basis for the State's discriminating between poor persons who are non inmates and poor persons who are inmates. . . ." Raymond Gomez is a prisoner who sought to file a FOIL request, but lacked the funds to pay the filing fee. His predicament prompted the court to evaluate the constitutionality of CPLR 1101(f). The court concluded:

> Prison inmates, no less than other persons, are to be afforded unhampered and equal access to the legal system. Insofar as CPLR §1101(f) mandates immediate or deferred payment without possibility of discretionary waiver only if the movant is an indigent inmate, said requirement violates both the U.S. Constitution and the N.Y.S. Constitution. (See, US Const 14th, §1; NY Const art 1, §11.)

A copy of the decision is available from the Backup Center.

What's New on the Web?

Recently, a familiar web site got a new look and a familiar office got a web site.

www.nysda.org is Now Better than Ever

The home page of the NYSDA web site, www.nysda.org, has been redesigned to respond to the needs of the criminal defense community. One addition is the *Features* section in the center of the page. The latest Association trainers and news are prominently displayed there, such as the filing of the first CD-ROM brief in the Court of Appeals and Al O'Connor's Megan's Law Analysis. The *Features* section will be routinely updated. On the right the side of the screen are two new sections: *Select Hot Topics* and *Resource Highlights*. From NYSDA's considerable collection of Hot Topic pages, the most active ones will be linked to the homepage. *Resource*

Public Defense Backup Center REPORT

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Highlights contains shortcuts to the most commonly used tools, such as the *NYC Assigned Counsel Program's Expert Directory*, the *NYSDA's Chief Defender List* and *Research Links*.

One of the *Resource Highlights* is NYSDA's *Job Opportunities* page. This page has been revamped to include recent job postings that appear after the publication of *The Report* and links to public interest and academic job sites. Also, a section on federal resources for Criminal Justice Act attorneys has been added to *Defense News*. The NYSDA web site is updated regularly, so check back often.

Capital Defender Office on the Web

The New York State Capital Defender Office has launched its own web site: www.nycdo.org. It contains up-to-date statistics about New York's death penalty cases; full text of relevant statutory provisions; assigned counsel standards and links to key sources, including a copy of *Capital Punishment in New York State: A Statistical Report After Five Years of Representation*. Additional information about capital punishment can be found on the NY Capital Defense page of NYSDA's web site at www.nysda.org.

The Cooperating Witness Conundrum: Is Justice Obtainable?

A One-Day Program at Cardozo Law School November 30, 2000

Panels and Presenters Will Look at

- The Role of Cooperators and Informants
- Effective Screening for Truth Telling (Is it Possible?)
- Thinking Outside the Box (Proposals for Change)

Scheduled speakers include Ellen Yaroshefsky (Cardozo School of Law), Stephen Skurka (Counsel for the Ontario Crown Attorneys Association at the Morin Inquiry), Howard M. Shapiro (Wilmer, Cutler & Pickering and former General Counsel to the FBI), Bennett L. Gershman (Pace University School of Law), Hon. Stephen S. Trott (9th Circuit Court of Appeals), Gerald Lefcourt (Law Offices of Gerald B. Lefcourt), and many others. (See page 5.)

Backup Center Staff Changes

Three interns at the Backup Center have recently accepted full staff positions, simultaneously providing continuity and sources of fresh ideas.

Thomas Brewer, who has worked as an intern in NYSDA's Social Science Research Unit since January 1998, is now the Research Associate. Currently a doctoral student and adjunct instructor in the School of Criminal Justice at the University at Albany, he is working with outgoing Research Associate Wendy Pogorzelski (she will be missed) on a study of the media coverage in the *People v Boss et al* (Amadou Diallo) trial. Tom's expertise is not limited to criminal justice. During his internship he often assisted in designing and implementing computer and electronic audio-visual aids for meetings and trainings in addition to pulling together data needed by other Backup Center staff and public defense organizations.

Law Librarian Kate Dixon received her Masters in Library Science from the University at Albany this year, after completing an undergraduate degree in English and Philosophy at the University of Dayton (OH) in 1998. She spent two summers as an intern in the library of the Supreme Court of the United States. Having started as a NYSDA intern last February, she was elevated to her current position in mid-August. Kate is very happy to track down needed information from sometimes obscure sources in a timely manner—the Backup Center has already gained much from Kate's presence on staff.

Having received his Juris Doctorate (*Cum Laude*) at Albany Law School of Union University in May, 2000, Christian J. Kennedy took the New York bar exam in July and is working full time as a Law Graduate at NYSDA while awaiting the results. He says he knew from the moment he took his first law class that he wanted to work in criminal defense. NYSDA's legal staff, as well as lawyers seeking legal research assistance, have benefited from Christian's tenure as a Law Intern since spring, 1999. He came to Albany after receiving his B.S. in Criminal Justice from the Rochester Institute of Technology

National and NY News on Fees

"The pay scale is so low . . . that I believe the majority of court-appointed attorneys look for the best plea bargain, settle it, and move on." So said one Texas lawyer quoted in a new report on how the state of Texas provides legal representation to its poor. The report notes that Texas is one of only five states that lack centralized funding for the poor in criminal cases. It also notes that fees for court-appointed lawyers in Texas often fail to cover basic expenses. (*San Antonio Express News*, 9/22/00.)

The Texas report echoes in many ways the report released in January by New York's Unified Court System (*see Backup Center REPORT* Vol XV, #1). That report, "Assigned Counsel Compensation in New York: A Growing Crisis," remains timely and can be found at the Unified Court System web site: http://www.courts.state.ny.us/18b.html.

The crisis in assigned counsel fees continues to make news in New York, especially as to Family Court. In August, Manhattan Family Court Judge Mary E. Bednar granted a fee of $75 per hour to an attorney appointed to represent a juvenile in delinquency proceedings. (*New York Law Journal* (online) 8/11/00.) (*See also* "County Notes," below).

There has been no news, however, indicating a break in the political impasse blocking an increase. Where to place the fiscal burden of any raise in fees remains the paramount question. (*See Backup Center REPORT* Vol XV, #4 and the "Hot Topics" area of the Association's web site.)

In related news, Governor Pataki has vetoed a bill that would have mandated assignment of a law guardian in adoption proceedings involving a child in foster care. The plan was to provide for continued representation by the child's law guardian after the child had been freed for adoption. Advocates cited the possibility of problems in the foster care setting that would militate against adoption by the foster parents. Among the reasons for the governor's veto message was the estimated $1 million cost of compensating assigned counsel in these cases. (S.7725-a, Veto Message #39, 9/20/00.)

County Notes

The Empire State's 62 counties share many criminal justice and public defense issues, but often address them in different ways. Below is news from a few counties. NYSDA wants to know about developments in your county that would be of interest to public defense professionals statewide—whether as examples of problem-solving or just of problems. When local media covers criminal justice developments, or the local court issues a new ruling helpful (or harmful) to public defense professionals and clients, please e-mail the information to kstrutin@nysda.org or fax it to the Backup Center, attention Ken Strutin (Defense News), at (518)465-3249. (NYSDA reserves the exclusive right to decide which news items will be posted.)

- Broome County has established procedures enabling criminal juries to take notes during trials. (Binghamton *Sun-Press Bulletin*, 9/27/00.)
- Suffolk and to a lesser extent Nassau County face a crisis in finding assigned counsel to represent parties in Family Court due to the low rates provided by section 18b of the County Law. (*Newsday*, 9/27/00.)
- Warren County is considering creating a public defender to meeting growing need for representing indigent clients. (Glens Falls *Post Star*, 9/27/00.)

Murphy Made AC Administrator

James T. Murphy will assume the post of Administrator of the Assigned Counsel Plan for the 2nd and 11th Judicial Districts on Oct. 16, 2000. He was appointed by Presiding Judge Guy James Mangano of the Appellate Division, 2nd Department, to replace the late Donald Weinberger. (*New York Law Journal* (online), 10/4/00.)

Behind Bars in New York State

The opening of a new prison, settlement of an old case, and several other developments concerning prisoners have been reported recently. The following information is offered to assist public defense professionals in answering clients' questions about jail conditions or what awaits them if they are sentenced to state time, as well as to provide information to anyone actively involved in representing prisoners.

New Maxi Prison Opens Its Doors

The final leg in Governor Pataki's prison expansion project has been completed with the opening of a new maximum security prison in Seneca County. Five Points Correctional Facility is described by the Department of Correctional Services (DOCS) as a state-of-the-art state facility, with 1500 beds and enhanced security systems. DOCS expects the facility to be filled to capacity by the end of the year. The address is: Five Points Correctional Facility, Caller Box 400, State Route 96, Romulus NY 14541. Phone (607)869-5111. More DOCS information about the facility and its location can be found on the Department's web site: www.docs.state.ny.us.

Attica Settlement Filed

Nearly 30 years after the Attica uprising over unsanitary and unsafe prison conditions, Judge Michael Telesca of the Federal District Court of the Western District of New York has filed the settlement agreement that will benefit inmate victims and relatives of inmate victims. Shares of the $8 million settlement by New York State will be distributed in October. Survivors who filed claims offered testimony about the brutality and abuse they endured, reliving those desperate moments. It required years of litigation and negotiation to achieve this result (see *Backup Center REPORT* Vol XV, #6). As Judge Telesca reminds us: "Attica is the ghost that has never stopped haunting its survivors — both the inmates and the families of the deceased guards and prison personnel. But at least the settlement of this case provides the basis for the former inmates to close the book on the past and to focus on the future." (*New York Times*, 8/28/00.)

Treatment of Prisoners and Parolees an Ongoing Concern

- An investigation by the U.S. Justice Department has revealed ongoing brutality and mistreatment of inmates at the Nassau County Correctional Center (NCCC). Their report concluded: "NCCC subjects inmates to unconstitutional conditions that have caused them grievous harm: staff engage in a pattern or practice of physical abuse of inmates, and NCCC is deliberately indifferent to inmates' serious medical needs." Links to a series of articles about the problems at the Nassau County Jail and the Justice Department's report are available on the *Prisoners' Rights* page of the NYSDA web site: www.nysda.org.
- New techniques proposed for controlling inmates at Riker's Island include limiting showers and "alternative meals." (*Daily News*, 9/19/00.)
- A recent examination of the Elizabethtown lockup in Essex County by inspectors from the State Commission on Correction is raising questions about conditions there. (*Press Republican*, 9/10/00.)

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Conferences & Seminars

Sponsor: National Immigration Project of the National Lawyers Guild
Theme: Immigration Consequences of Criminal Conduct
Date: November 1, 2000
Place: Boston, MA
Contact: Skills Seminar, National Immigration Project, 14 Beacon Street, Boston MA 02108; tel (617) 227-9727; e-mail: nipstaff@nlg.org

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Sponsor: New York Supreme Court, Appellate Division, 3rd Department
Theme: Law Guardian Update
Date: November 4, 2000
Place: Latham, NY
Contact: Law Guardian Program, Appellate Division, 3rd Department, PO Box 7288, Capitol Station, Albany NY 12224; tel (518) 486-4567; fax (518) 402-2530; e-mail: lgp3d@courts.state.ny.us

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

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

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Sponsor: Benjamin N. Cardozo School of Law of Yeshiva University, Jacob Burns Ethics Center, and Cardozo Law Review
Theme: The Cooperating Witness Conundrum: Is Justice Obtainable? [see box on page 3]
Date: November 30, 2000
Place: New York, NY
Contact: Cardozo Law Review, Benjamin N. Cardozo School of Law, 55 Fifth Avenue, New York NY 10003. For ticket information, call Neeli Berger Margolis (212)790.0324

Sponsor: National Organization for the Reform of Marijuana Laws
Theme: 2000 Key West Legal Seminar
Date: November 30 – December 2, 2000
Place: Key West, FL
Contact: 1001 Connecticut Ave, NW, Suite 710, Washington DC 20036; tel (202) 483-5500; fax (202) 483-0057; e-mail: norml@norml.org, web site: http://www.norml.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
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

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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: 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

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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

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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 Hiscock Legal Aid Society in Syracuse, NY seeks a **Staff Attorney** to represent indigent persons in criminal matters. High-volume caseload. Required: demonstrated commitment to public interest law and to serving the indigent. New York bar admission preferred. Salary $30,000 + DOE. Generous benefits. EOE. Send cover letter and resume, including 3 references, to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202.

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

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

The Dutchess County Public Defender's office has an immediate opening for an entry-level **Assistant Public Defender** to represent criminal defendants (felony and misdemeanor cases). Required: interest in criminal law and commitment to representing indigent defendants, ability to work independently and handle a high-volume caseload. Salary: $44,572 + full benefits package. EOE/AA. Send resume and cover letter to: David Goodman, Dutchess County Public Defender, 22 Market Street, Poughkeepsie, NY 12601.

BEAT THOSE SHORT APPLICATION DEADLINES!

Get Job Notices Early on the Web.

The *REPORT* appears on our web site when the process of making printed copies has just begun. Check the latest issue at www.nysda.org so that slow mail does not deprive you of an opportunity!

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 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 Assigned Counsel Defender Plan of Nassau County (18B) seeks an **Administrator** starting 1/1/01. Required: attorney in good standing, Nassau resident, admitted to practice in NY at least 7 years, experience in criminal law practice and procedure. Preferred: experience in family law. Administrative duties include budget preparation and liaison with Nassau Academy of Law, Legislature, other agencies. Send cover letter and resume by 11/10/00 by fax or mail: Deena R. Ehrlich, Ph.D., Bar Association of Nassau County, 15th & West Streets, Mineola NY 11501, fax (516)747-4147.

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 **Women in Prison Project.** A significant part of the project's role will be policy analysis and advocacy aimed at reforming the system's response to women defendants and prisoners. Policy objectives include: changes in mandatory sentencing statutes, expansion of available alternative programs, ameliorating conditions of confinement, and improving and expanding programs designed to help women prisoners maintain relationships with their children. Responsibilities include: developing and initiating advocacy strategies, including preparing policy papers and meeting with government agencies and the media; organizing a coalition of organizations and individuals; preparing public education materials; supervising staff, and working with the executive director on fundraising activities. Abilities required: do research and policy analysis, write clearly and concisely, communicate and work effectively with different kinds of people, and develop strategies for achieving project goals and do follow up for implementing them. Preferred: Experience in criminal justice, advocacy, women's issues. 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

The Correctional Association also 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. Same abilities as noted above are required. Preferred: Experience in juvenile justice and advocacy. Salary CWE + benefits EOE/AA. Send writing samples and a resume to address above. ⚖

Case Digest

The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are available.

United States Supreme Court

Note: *As with a number of recent criminal cases from the Supreme Court, four of the following cases were decided by very narrow margins: Carter v United States, 5/4; Ramdass v Angelone, 4/1/4; Apprendi v New Jersey, 4/2/3; Stenberg v Carhart, 5/4. The separate opinions in such cases may be very important in determining the decisions' applicability to a particular case.*

Federal Law (Crimes) **FDL; 166(10)**

Lesser Included Offense (Instruction) **LOF; 240(10)**

Carter v United States, No. 99-5716, 6/12/00, 120 SCt 2159

The petitioner was convicted of bank robbery under 18 USCS 2113(a) after pushing a bank customer who screamed, leaping over the counter and opening teller drawers from which he took money before fleeing. He argued that he had not taken the money by force and violence, or by intimidation, as 2113(a) required. He also asserted that he was entitled to a jury instruction on the lesser-included offense under 18 USCS 2113(b), which did not contain such element. The 3rd Circuit affirmed his conviction.

Holding: The common law distinction between larceny and robbery did not apply to these statutorily defined crimes. As a matter of law, the petitioner was not entitled to a lesser offense instruction because 2113(b) requires three elements not required by 2133(a). A defendant who requests a jury instruction on a lesser offense must demonstrate that the elements of the lesser offense are a subset of the elements of the charged offense. *Schmuck v United States*, 489 US 705 (1989). Where only the crime with lesser punishment requires specific intent, asportation, and valuation of the stolen property, the lesser crime was not a lesser-included offense of the greater crime. Judgment affirmed.

Dissent: [Ginsburg, J] At common law, robbery meant larceny plus force, violence or putting in fear. Congress did not depart from that traditional understanding when it rendered "Bank robbery and incidental crimes" federal offenses.

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

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

Ramdass v Angelone, No. 99-7000, 6/12/00, 120 SCt 2113

At sentencing in a capital murder case, the state argued the future dangerousness aggravating circumstance and the petitioner argued for life by saying that he would never be released from jail. The petitioner argued that the jury should have been instructed on his parole ineligibility. He claimed that he was parole ineligible because he fell within the three-strikes law, but one of the convictions relied upon for purposes of the three-strikes law had not yet gone to sentencing when he was sentenced for capital murder. The 4th Circuit reversed a grant of habeas relief.

Holding: A parole-ineligibility instruction is required only when the defendant will be ineligible for parole under state law if the jury fixes a life sentence. *Simmons v South Carolina*, 512 US 154 (1994). The petitioner was not entitled to a *Simmons* instruction because he was not parole ineligible when the jury considered his capital case. A jury had earlier found him guilty of a qualifying crime, but it was not counted for purposes of the three-strikes law because it had not been reduced to judgment. Until the three-strikes law applied, the petitioner was parole eligible. Judgment affirmed.

Dissent: [Stevens, J] There is an acute unfairness in permitting a state to rely on a recent conviction to establish a defendant's future dangerousness while simultaneously permitting the state to deny such a conviction when the defendant attempts to argue that he is parole ineligible based thereon and therefore not a future danger.

Sentencing (Aggravated Penalties) (Enhancement) **SEN; 345(5)(32)**

Due Process (General) (Miscellaneous Procedures) **DUP; 135(7)(10)**

Apprendi v New Jersey, No. 99-478, 6/26/00, 120 SCt 2348

A New Jersey statute classifies possession of a firearm for an unlawful purpose as a "second degree" offense punishable by imprisonment between five and 10 years. A separate "hate crime" statute provides for an extended term of imprisonment if the trial judge finds by a preponderance of the evidence that the defendant acted with a purpose to intimidate one or more people because of race, color, gender, handicap, religion, sexual orientation or ethnicity. The petitioner fired several shots into the home of an African American family who moved to a white neighborhood. He pled guilty to possession of a firearm for an unlawful purpose. The judge found that the crime was racially motivated and applied the sentencing enhancement, raising the sentence

US Supreme Court continued

above the maximum time allowed for the offenses to which the petitioner pled. The state supreme court affirmed.

Holding: Due process requires that a factual determination authorizing an increase in a maximum prison sentence beyond the prescribed maximum for the underlying conviction (other than prior convictions) be made by a jury on the basis of proof beyond a reasonable doubt. Last year, *Jones v United States* (526 US 227 [1999]) held that the 5th Amendment's due process clause and the 6th Amendment's notice and jury trial guarantees require that any fact other than prior convictions that increase the maximum penalty must be charged in an indictment, submitted to a jury and proved beyond a reasonable doubt. *Eg In re Winship*, 397 US 358 (1970). The 14th Amendment requires the same practice by a state. The strengths of the state's interests served by the enhancement statute are irrelevant to procedural issues. Judgment reversed.

Concurrences: [Scalia, J] Justice Breyer's dissent sketches a scheme that leaves criminal justice to the state. Constitutionally guaranteed trial by jury has never been efficient, but has always been free. [Thomas, J] A "crime" includes every fact that is by law a basis for imposing or increasing punishment.

Dissents: [O'Connor, J] Not every fact bearing on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. A legislative definition of the elements of an offense is usually dispositive. *McMillan v Pennsylvania,* 477 US 79, 85 (1986). [Breyer, J] The real world of criminal justice cannot hope to meet the procedural ideal of having juries determine any fact on which increased punishment turns. The majority's decision will impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors.

Admissions (*Miranda* Advice) **ADM; 15(25)**

Confessions (*Miranda* Advice) **CNF; 70(45)**

Dickerson v United States, No. 99-5525, 6/26/00

Miranda v Arizona (384 US 436 [1966]) held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. Congress then enacted 18 USC 3501, which in essence said that the admissibility of such statements should turn only on whether they were voluntarily made. The 4th Circuit found *Miranda* was not constitutionally based and upheld the statute, finding the petitioner's statements met the statutory test.

Holding: Congress may not legislatively supersede Supreme Court decisions interpreting and applying the Constitution. *See eg City of Boerne v Flores,* 521 US 507, 517-521 (1997). The Court granted *certiorari* in *Miranda* "to explore some facets of the problems ... of applying the privilege against self-incrimination to in-custody interrogation, **and to give concrete constitutional guidelines for law enforcement agencies and courts to follow** 384 US at 441-442" (emphasis in original). *Miranda,* being a constitutional decision, may not be overruled by Congress. There is no justification for overruling *Miranda*, which is embedded in routine police practice and is part of the national culture. The test for voluntariness that Congress sought to revive is more difficult for officers and courts to use. Judgment reversed.

Dissent: [Scalia, J] Under this decision, the Supreme Court has the power not just to apply the Constitution but expand it, imposing "prophylactic" restrictions upon Congress and the states. The decision denying effect to this act of Congress is a plain violation of the Constitution.

Speech, Freedom of (General) **SFO; 353(10)**

Hill v Colorado, No. 98-1856, 6/28/00, 120 SCt 2480

The petitioners sought an injunction against the enforcement of a Colorado statute. The law made it unlawful for any person within 100 feet of a health care facility's entrance to knowingly approach within eight feet of another person without that person's consent to pass a leaflet or handbill, or make other specified efforts to convey information, to that person. After various proceedings in several courts, the Colorado Supreme Court upheld the statute.

Holding: The statute is a content-neutral, time, place, and manner regulation. *See Ward v Rock Against Racism,* 491 US 781, 785 (1989). This statute passes the *Ward* test. It is not a regulation of speech, but of the places where some speech may occur. It was not adopted due to disagreement with the message the regulated speech conveys. The state's interests in protecting access and privacy, and providing police with clear guidelines, are unrelated to the content of the regulated speech. The statute is narrowly tailored, leaving open ample alternative channels for communication. It does not prevent a leafletter from standing near the path of oncoming pedestrians and proffering material that can be accepted or declined. *See Heffron v International Soc. For Krishna Consciousness, Inc.* 452 US 640 (1981). It is not overbroad or vague. Judgment affirmed.

Concurrence: [Souter, J] The statute addresses not the content of the speech but the circumstances of its delivery, raising less concern about the state using its power to suppress discussion on a given topic.

Dissent: [Scalia, J] The statute is a content-based restriction in a public forum and is deserving of the high standard of strict scrutiny. The majority's decision is a pro-abortion distortion of 1st Amendment law. [Kennedy, J] The law bars a private citizen from passing a message, in a peaceful manner and on a profound moral issue, to a fellow citizen on a public sidewalk. The majority's analysis will end the proud tradition of free, open discourse in public forums.

US Supreme Court *continued*

Abortion (General) **ABO; 5(20)**

Privacy, Right of (General) **PRV; 302(10)**

Stenberg v Carhart, No. 99-830, 6/28/00, 120 SCt 2597

A physician challenged a Nebraska statute criminalizing performance of "partial birth" abortions. The 8th Circuit found the statute unconstitutional.

Holding: The statute violates the federal Constitution as interpreted in *Planned Parenthood of Southeastern Pa. v Casey* (505 US 833 [1992]) and *Roe v Wade* (410 US 133 [1973]). The statute lacks any exception for the preservation of the mother's health. Where substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women's health, a prohibitory statute must include a health exception when the procedure is medically necessary. The statute is also unconstitutional because, due to the definitions used, it imposes an undue burden on a woman's ability to choose a more common abortion procedure (dilation and evacuation), thereby unduly burdening the right to choose abortion itself. A proffered narrowing interpretation of the statute conflicts with statutory language. Certification of the interpretation question to state court is not necessary because the statute is not fairly susceptible to a narrowing construction. Judgment affirmed.

Concurrences: [Stevens, J] A state has no legitimate interest in requiring a doctor to follow any procedure other than the one that he or she reasonably believes will best protect a woman in her exercise of her constitutional right. [O'Connor, J] If the statute was limited to the dilation and extraction method and included a health preservation exception, the question presented would be far different. [Ginsberg, J] The law targets only a method of abortion and burdens a constitutional right because legislators are hostile to that right.

Dissents: [Rehnquist, CJ] *Casey* was wrongly decided. [Scalia, J] This issue should be left to the states and the people, not the Court. [Kennedy, J] The statute denies no woman the right to choose an abortion and places no undue burden upon the right. States retain a role in regulating abortion. [Thomas, J] Although a state may permit abortion, the Constitution does not dictate that a state must do so.

New York State Court of Appeals

Identification (Eyewitness) (Suggestive Procedures) (Wade Hearing) **IDE; 190(10) (50) (57)**

Lesser and Included Offenses (General) **LOF; 240(7)**

People v Abrew, No. 73, 6/8/00

Before viewing a lineup, the complainant may have seen a "wanted" poster displayed in a prominent location in the station house containing a sketch of the perpetrator created by the complainant and a police artist.

Holding: The court did not abuse its discretion in denying the defense request to call the complainant to testify at the *Wade* hearing. The hearing evidence revealed no substantial constitutional question as to lineup suggestiveness that would necessitate the complainant's testimony. *See People v Chipp*, 75 NY2d 327, 337-338 *cert den* 498 US 833. The defendant presented no evidence to support his theory that viewing the sketch, which was based solely on the complainant's own recollections, could have tainted the lineup. The defendant may not rely on trial testimony to support his challenge to the *Wade* hearing ruling. *See People v Dobt*, 61 NY2d 408, 417. The first-degree assault conviction was not a lesser offense included within the first-degree robbery. The assault charge required the infliction of serious physical injury "in furtherance of" the underlying felony, an element not required by the robbery charge. Criminal Procedure Law 300.30[4]. Order affirmed.

Sentencing (General) (Persistent Violent Felony Offender) (Second Felony Offender) **SEN; 345(37) (59) (72)**

People v Samms, No. 71, 6/13/00

A jury found the defendant guilty of robbery and burglary committed on Feb. 7, 1995. The prosecutor filed a predicate felony statement seeking to have the defendant sentenced as a second violent felony offender, relying upon a Mar. 28, 1995 conviction as the sole predicate. The Appellate Division held the issue unpreserved or waived for failure to challenge below.

Holding: To qualify as a predicate violent felony conviction, the sentence under the predicate conviction must have been imposed prior to commission of the felony to which predicate status is being applied. Penal Law 70.04[1][b][iv]. The defendant never expressly waived his right to be sentenced in accordance with statutory requirements that evidently escaped the judge, prosecutor and the defendant. A challenge to an unlawful sentence falls outside the preservation rule. *People v Morse*, 62 NY2d 205, 214 n2, citing *People v Fuller*, 57 NY2d 152. The lack of authority to impose a predicate sentence based on a conviction concededly out of sequence can be determined from the face of the appellate record, raising no disputes like those concerning, *eg*, whether an out-of-state conviction is the equivalent of a New York offense. Nothing short of a legislative amendment to 70.04 can transform an out-of-sequence conviction into an employable predicate. Order modified, sentence struck, remitted for resentencing.

NY Court of Appeals continued

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

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

People v Kearns, No. 76, 6/15/00

The defendant pled guilty to one count of first-degree sexual abuse in satisfaction of the indictment, waiving his right to appeal. The court determined him to be a sexually violent predator after a hearing pursuant to the Sex Offender Registration Act. The court imposed the negotiated prison sentence. The Appellate Division affirmed.

Holding: The risk level determination is not independently appealable from the criminal judgment of conviction. The decision in *People v Stevens* (91 NY2d 270) upheld the dismissal of appeals from risk level determinations made after the defendants were released from incarceration. Absent relevant Criminal Procedure Law appeal authorization, *Stevens* found no appeal available for a risk level assessment within the criminal proceeding. That the evaluation was made contemporaneously with the criminal judgment does not change the analysis, governing principle, or essential nature of the risk level determination. Appeals of risk level determinations pursuant to CPLR articles 55, 56 and 57 are now authorized (Correction Law 168-d [3]), but only to determinations made after Jan. 1, 2000 which does not apply here. Order affirmed.

Due Process (Notice) **DUP; 135(20)**

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

People v David W., No. 77, 6/15/00

The defendant was convicted of failing to register as a sex offender under the Sex Offender Registration Act (SORA). The duty to register was based on his plea-based sodomy and sexual abuse convictions in May of 1995. He had served his sentence but had not finished a five-year term of probation when SORA went into effect. He received a letter, containing relevant forms, informing him of his obligation to register and notifying him that he had been assigned the highest SORA risk level (3) and was designated a sexually violent predator. He refused to sign and return the form, and sought review of the determination. This prosecution followed. The Appellate Term upheld the resulting conviction and sentence.

Holding: Procedural due process mandated that this defendant receive notice and an opportunity to be heard before his SORA risk level determination was made. His private liberty interest in not being stigmatized as a sexually violent predator is substantial. *See EB v Verniero*, 119 F3d 1077 (3rd Cir). The sexually violent predator label is a status determination that can have a considerable adverse impact on someone's ability to live in a community and obtain or maintain employment. *See Paul v Davis*, 424 US 693, 703 (1976). The procedures in place did not sufficiently prevent the risk of an erroneous deprivation of this defendant's interest. *Mathews v Eldridge*, 424 US 319, 335 (1976). The review procedures were not a substitute for an initial due process hearing because, *inter alia,* the defendant had the burden of proving by "clear and convincing" evidence that his risk level should be modified (Correction Law 168-o[2]). Order reversed, dismissal of the information granted.

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

Judges (General) **JGS; 215(9)**

Barr v Crosson, No. 75, 6/20/00

Current and former Monroe County Court Judges commenced an action alleging that the defendants, including the State of New York, violated their right to equal protection by causing them to be paid less than their counterpart judges in five other counties. The Appellate Division granted plaintiffs summary judgment but denied back pay.

Holding: The challenged salary disparity does not violate equal protection principles. A rational basis exists for the salary schedules, supporting the geographical pay differential. The decision in *D'Amico v Crosson* (93 NY2d 29) rejected the "totality of economic indicators" test applied by the Appellate Division as contrary to the essential governing rational basis test and to the holding in *Henry v Milonas* (91 NY2d 264). Differentials in median home values and per capita income are enough to provide a rational basis for a salary disparity. The workload and economic differences between counties provides a rational basis for the less than 5% pay differential challenged in this case. Order reversed, summary judgment for defendants granted, salary disparity declared constitutional.

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

People v Reddick, No. 94, 6/20/00

Holding: Appeal dismissed because the reversal by the Appellate Division [265 AD2d 855] was not "'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal' (CPL 450.90[2][a])."

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

People v LaSalle, No. 88, 6/29/00

The defendant was convicted of sodomy and criminal use of a firearm. The Appellate Division, finding that the trial court erred in imposing consecutive sentences since both convictions arose out of a single incident, modified the judg-

ment by substituting a provision that all of the sentences run concurrently.

Holding: The prosecution argued that the appellate court should have remitted for resentencing. An intermediate appellate court has a responsibility under CPL 470.20 to take "such corrective action as is necessary and appropriate." In doing so, it has the discretion, upon reversing or modifying a sentence, either to remit for resentencing or to substitute its own legal sentence for the illegal one. Order affirmed.

Search and Seizure (Search Warrants [Issuance]) **SEA; 335(65[k])**

People v Bilsky, No. 92, 6/29/00

An affidavit for a search warrant for the defendant's apartment was presented to a magistrate who signed the warrant. The magistrate then immediately crossed out her signature stating she was "uncomfortable" about signing the warrant and told the officers that they could present it to another magistrate. The next day, the same warrant application, with added language disclosing the presentment to the first judge, was presented to a second magistrate who issued the warrant. A suppression motion was denied. The Appellate Division affirmed the denial.

Holding: The law of the case doctrine does not invalidate a warrant that issued for a judicially authorized search predicated on a finding of probable cause. The doctrine is directed at the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment. *People v Evans*, 94 NY2d 499, 502. It presupposes that a determination on the merits has been made or implicated. An application for a search warrant is not part of an "action," but is often preliminary to a criminal action. There is no adversarial litigation of an *ex parte* application. The first magistrate here never declared that she was denying the warrant because probable cause was not present. Constitutional principles do not prevent law enforcement from seeking successive warrants from different magistrates, where denial may be for a myriad of reasons. *See eg United States v Pace*, 898 F2d 1218, 1230 (7th Cir). The defendant can challenge a search warrant issued by a different, follow-up magistrate. *See* Criminal Procedure Law art 710. Order affirmed.

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

People v Montilla, No. 95, 6/29/00

Holding: Appeal dismissed because the reversal by the Appellate Division [268 AD2d 270] was not "'on the law alone or upon the law and such facts which, but for the determination of law, would not have led to reversal' (CPL 450.90[2][a])."

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

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

Smith-Hunter v Harvey, No. 79, 7/6/00

The plaintiff parked her car in a spot belonging to a partner in a law firm. When the plaintiff returned, her car was blocked in by the defendant's car. The defendant refused to move his car and had his brother physically escort the plaintiff from the building. While being maneuvered out the door, plaintiff fell down a nine-step stairway and was taken to the hospital. On the day of the incident, the defendant signed an information charging the plaintiff with trespass. Days later the plaintiff swore to a complaint charging the defendant with assault. The trespass charge against the plaintiff was dismissed for violation of Criminal Procedure Law 30.30. The plaintiff commenced an action for malicious prosecution. A defense motion for summary judgment was granted. The Appellate Division affirmed.

Holding: A 30.30 dismissal can constitute "termination of the proceeding in favor of the accused" for purposes of a malicious prosecution charge. A criminal proceeding terminates favorably to the accused when "there can be no further prosecution of the alleged offense." *Robbins v Robbins*, 133 NY 597, 599. Dispositions inconsistent with innocence cannot be viewed as favorable to the accused. *See Ward v Silverberg*, 85 NY2d 993, 994. Someone falsely and maliciously accused need not waive speedy trial rights to preserve a civil remedy. Order reversed, summary judgment denied.

Concurrence: [Rosenblatt, J] The test of "not inconsistent with innocence" is more sensible than the "indicative of innocence" test of *MacFawn v Kressler* (88 NY2d 859).

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

Judges (Powers) **JGS; 215(10)**

Trial (Verdicts [Motions to set aside (CPL 330 Motions)]) **TRI; 375(70[a])**

People v Cunningham, No. 87, 7/6/00

The defendant was convicted at a bench trial of violating Vehicle and Traffic Law 1192(3) and 1194(1)(b). The Appellate Term affirmed.

Holding: In reaching the driving while intoxicated verdict, the judge applied a definition of intoxication that improperly lowered the prosecution's burden of proof. *See People v Cruz*, 48 NY2d 419. Upon a motion to set aside the verdict, the judge reconsidered the evidence in light of *Cruz* and again found the defendant guilty. The Court's reconsideration under a different standard constituted a factual determination that "'comes too late and exceeds the scope of [the court's] authority.'" *People v Maharaj*, 89 NY2d 997, 999.

NY Court of Appeals continued

Allowing the second verdict to stand would permit the judge to engage in post-verdict fact-finding impossible in a jury trial, according less finality to a court's verdict when sitting as a trier of fact than to a jury verdict. *People v Carter*, 63 NY2d 530, 539. Order modified, 1192(3) conviction vacated, matter remanded.

Motor Vehicles (Auto Stripping) **MVH; 260(2)**

People v Robinson, No. 89, 7/6/00

The defendant was seen breaking a car window and rummaging through the car and trunk. He was arrested and found to possess stolen bridge tokens and loose change that he admitted was not his. The defendant was indicted for first-degree auto stripping and other charges. He sought in his omnibus motion and at the close of the prosecution's case to dismiss the auto stripping charge for legal insufficiency. The motions were denied. The Appellate Division affirmed after modifying other aspects of the judgment.

Holding: To convict of first-degree auto stripping, the prosecution must show the defendant had previously been convicted of second- or third-degree auto stripping and had committed third-degree auto stripping. Penal Law 165.10[1]. Third-degree auto stripping occurs when someone "removes or intentionally destroys or defaces any part of a vehicle . . ." Penal Law 165.09[1]. The words "destroys or defaces" are abundantly clear and encompass the defendant's conduct. By shattering a car window in the course of a theft, the defendant "intentionally destroy[ed] or deface[d] . . . [a] part of a vehicle . . . without the permission of the owner." The legislature knew when amending the statute about existing decisions interpreting the statute broadly. That the defendant's action could also be punished as criminal mischief does not bar prosecution. Overlapping in criminal statutes is no bar to prosecution. *People v Eboli*, 34 NY2d 281, 287. Order affirmed.

Discovery (*Brady* Material)(Prior Statements of Witness) **DSC; 110(7) (26)**

People v Bond, No. 90, 7/6/00

The defendant was convicted of second-degree murder. Prior to trial he sought, in an omnibus motion, disclosure of prior inconsistent statements or changed testimony of the prosecution's witnesses and other relief. At trial, Carmen Green, an admitted crack addict, was the prosecution's star witness. She testified that the police never questioned her. A year after trial, a hearing was held on the defendant's CPL 440 motion to determine if Green had previously made statements to the police. The court concluded that there was a prior inconsistent statement that went to the heart of Green's testimony, but there was no way that disclosure would have affected the verdict. The Appellate Division affirmed.

Holding: Green's prior denial of having witnessed the shooting is *Brady* material. The defendant made a specific request for such material. Reversal is required where there is a "reasonable possibility" that, had that material been disclosed, the result would have been different. *See People v Vilardi*, 76 NY2d 67, 77. Green was the only witness who provided direct evidence that the defendant shot the decedent. Green's testimony was crucial to the prosecution's theory that it was the defendant alone who shot and killed the decedent despite evidence that someone else at the scene discharged a gun. While the defendant was able to challenge Green's credibility based on her drug use, he was denied the opportunity to challenge the credibility of the prosecution's key witness as a liar. Order reversed, new trial ordered.

First Department

Due Process (Notice) **DUP; 135(20)**

In re Franco v Wing, No. 177, 1st Dept, 4/6/00 [amended 6/29/00]

The petitioner's public assistance benefits were terminated, by the New York State Office of Temporary and Disability Assistance, for failure to keep a required appointment with the New York City Human Resources Administration (HRA).

Holding: The sparse record does not support the termination of the petitioner's benefits. The purported proof that a notice of Eligibility Verification Review was sent to the petitioner gives no indication of when it might have been sent. The HRA failed to satisfy its burden of offering proof that it followed routine procedures relative to addressing, posting and mailing the notice. The rebuttable presumption that the petitioner received the notice did not arise. *See Francis v Wing*, _ AD2d _, 694 NYS2d 29, 30. However, the petitioner's failure, over a six-month period, to apprise the respondents of her inability to receive mail or to provide an alternative mailing address could explain if the notice was not received. A hearing must be held in accordance with this opinion, including the issue of whether the petitioner received actual notice. Remanded to the State agency. (Office of Temporary and Disability Assistance)

Lesser and Included Offenses (General) **LOF; 240(7)**

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) **SEA; 335(15[k])**

People v Young, No. 825,1st Dept, 4/11/00

The defendant, after a jury trial, was convicted of criminal possession of a controlled substance, criminal possession of a weapon, and resisting arrest.

Holding: The record supports the hearing court's determination that the stop of the vehicle in which the defendant was a passenger was not a pretext for investigating an unrelated matter. That the stop was made by officers who were not assigned to traffic duty and did not issue a summons to the driver does not require a finding of pretext. *See People v Washington,* 238 AD2d 43 *lv den* 91 NY2d 1014. A reasonable view of the evidence supported the submission of second-degree criminal possession of a controlled substance as a lesser-included offense of first-degree possession. The evidence permitted the jury to conclude reasonably that the defendant only possessed that portion of the cocaine found on his person. CPL 300.10(4) was not violated when the court interrupted the defendant's summation to inform the parties that it had reversed its original decision to deny the prosecution's request for the lesser included offense. The charge was submitted after the court heard defense counsel's description of the trial evidence in his summation, and counsel was permitted to alter his summation to address the submission of such count. There was no prejudice to the defendant. *See People v Trail*, 172 AD2d 320 *lv den* 78 NY2d 975. Judgment affirmed. (Supreme Ct, New York Co [Williams, J])

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

In re Rubin M., No. 2521, 1st Dept, 4/18/00

A concealed handgun was taken from the appellant as the result of his being stopped on a public street only because he fit the description of a suspect in a so-called "Rape Hot Sheet." The informational handout, provided to all members of the Street Crimes Unit, included different and conflicting descriptions of a person sought in a number of rape and robbery incidents that occurred over a four-year period. It described a black male, 17 to 30 years of age, of slim build, known to wear a scarf or hood on his head. Height estimations ranged between 5'1" to 5'9", weight from 120 to 170 pounds.

Holding: The police stopped the appellant only because he matched a description that could have applied to countless Bronx and Manhattan residents. Having no basis for believing that the appellant was involved in any criminal activity, the officers' initial stop of him, ordering him not to move, surrounding him and demanding that he remove his hands from his jacket, was unlawful. The generic description of the suspect provided no objective reason for a common law inquiry. The evidence seized in the search that followed must be suppressed. *People v DeBour,* 40 NY2d 210, 223. Judgment reversed. (Family Ct, Bronx Co [Weinstein, J])

Licenses and Permits (General) **LAP; 241(10)**

Wong v McGrath-McKechnie, No. 443, 1st Dept, 4/20/00

The petitioner, a taxi driver, purchased an interest in a taxi medallion enabling him to own a taxicab. The respondent revoked the petitioner's medallion license and directed him to sell his ownership interest in the medallion after discovering that he had inaccurately stated on his medallion application that he had no criminal record. The petitioner claims that the omission was unintentional; the application was prepared by a medallion broker and the petitioner simply signed it. In an affidavit, the broker corroborated this stating that he had not inquired about a criminal record. A court modified the directive, vacating the requirement to sell, reducing the license suspension period, and imposing a fine.

Holding: The court's finding that the directive was so disproportionate as to shock the sense of fairness is not disturbed. *Matter of Pell v Board of Education*, 34 NY2d 222. Failing to read a document before signing it is not, standing alone, an exculpation. *Beattie v Brown & Wood*, 243 AD2d 395. However, this petitioner repeatedly made prior disclosures of his criminal history to the respondent in connection with his taxi license and was aware that he was to be fingerprinted as part of his medallion application process. This indicates that the nondisclosure was not willful. Under CPLR 7803(3), the matter is remanded to the respondent for imposition of a lesser penalty. *Rob Tess Restaurant Corp. v New York State Liquor Authority,* 49 NY2d 874. Order modified, matter remanded. (Supreme Ct, New York Co [Lippmann, J])

Due Process (General) **DUP; 135(7)**

Evidence (Motive) (Relevancy) **EVI; 155(87)(125)**

People v Szwec, No. 2882, 1st Dept, 4/20/00

The defendant was convicted of possession of a controlled substance.

Holding: The defendant was denied a fair trial where the court limited his testimony concerning his prior civil suit against the City of New York and two police officers who were among the arresting officers in the instant criminal matter. The court allowed testimony that a suit had been brought but precluded testimony as to the specifics regarding the civil suit offered as proof of the extent to which the officers were motivated by hostility to fabricate the instant charges. Other testimony did establish that the defendant was harassed about his civil suit and physically abused at the time of his arrest, during his transport to the precinct, and upon arriving at the precinct. While trial courts have broad discretion to keep proceedings within manageable limits and curtail exploration of collateral matters, extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that basis. The trial

First Department *continued*

court's discretion in this area is circumscribed by defendants' constitutional rights to present their defenses and confront their accusers. *People v Hudy*, 73 NY2d 40, 56-57. When facts suggest a reason to fabricate, the question is one for the jury. *People v Rios*, 223 AD2d 390, 391. The facts regarding the defendant's civil suit were not too remote or speculative to be probative of the level of hostility the police officers allegedly held. Judgment reversed, new trial ordered. (Supreme Ct, Bronx Co [Straus, J])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(15[k])

People v Olivo, No. 776, 1st Dept, 4/25/00

Two officers sitting in a marked car saw a cab driving in an erratic fashion, passing the patrol car on the left by crossing a double yellow line into the lane of oncoming traffic. As the cab stopped for a traffic light, the officers observed the passenger—the defendant—crouch down with his shoulders moving in the back of the car. The officers pulled the cab over, approached the passenger side of the cab, ordered the defendant out and frisked him, yielding nothing. Without yet speaking to the driver, one of the officers leaned into the back of the cab but saw nothing. He then looked under the seat and found two clear plastic bags containing white powder. The officers arrested the defendant and then spoke to the driver who said everything was all right. No traffic citation was issued. The defendant's suppression motion was denied and he was convicted of possession of controlled substance.

Holding: The initial stop of the cab may have been justified, given the traffic infraction and alleged erratic behavior. The search of the cab after the defendant was removed and frisked without recovering anything was unlawful. *People v Torres*, 74 NY2d 224. The plain view doctrine does not apply given the unlawfulness of the search. *See Arizona v Hicks*, 480 US 321, 326 (1987). Judgment reversed. (Supreme Ct, Bronx Co [Sheindlin])

Counsel (Competence/Effective Assistance/Adequacy) (Standby and Substitute Counsel) COU; 95(15) (39)

Videotapes (General) VID; 382(10)

People v Cosby, No. 941, 1st Dept, 4/25/00

The defendant was convicted of second-degree murder and second-degree criminal possession of a weapon.

Holding: The court properly exercised its discretion in denying the defendant's application for substitution of newly retained counsel, made near the end of the prosecutor's case. There was no showing of good cause, and substitution would have resulted in an unwarranted and prolonged delay while new counsel prepared. *See People v Sides*, 75 NY2d 822, 824. The defendant's ineffective assistance claim concerns matters of strategy and contains factual assertions *dehors* the record as to such matters as counsel's consultations with the defendant. It would require the record to be expanded by way of a CPL 440.10 motion. On the record, the defendant received meaningful representation. *See People v Benevento*, 91 NY2d 708, 713-714. The court properly exercised its discretion in admitting a videotape that showed the defendant and the main identifying witness at the same social gathering. The evidence was relevant to the issue of the witness's acquaintance with the defendant and ability to identify him. The defendant failed to show any prejudice. *See People v Scarola*, 71 NY2d 769, 777. (Supreme Ct, Bronx Co [Bamberger, J at hearing, Donnino, J at trial and sentence)

Second Department

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

Lesser and Included Offenses (General) LOF; 240(7)

People v Grove, No. 98-07313, 2nd Dept, 5/15/00

Holding: The defendant was convicted of second-degree vehicular manslaughter, criminal negligent homicide, driving while intoxicated, and third-degree assault, after a nonjury trial. The criminally negligent homicide and driving while intoxicated convictions should have been dismissed as lesser-included offenses of second-degree vehicular manslaughter. *See* CPL 300.40[3][b]; *People v Maher*, 79 NY2d 978. Judgment modified. (County Ct, Orange Co [Berry, J])

Search and Seizure (Automobiles and Other Vehicles [Impound Inventories]) SEA; 335(15[f])

People v Minto, No. 98-04056, 2nd Dept, 5/22/00

The defendant was convicted of criminal possession of marihuana, driving while ability impaired by drugs, and unlawful possession of marihuana (two counts).

Holding: The prosecution alleged that two separate quantities of marihuana taken from the defendant's car were seized pursuant to an inventory search. However, there is nothing in the suppression hearing record to indicate that the police were acting pursuant to any standardized procedure. No inventory report was generated. The marihuana obtained in that fashion should have been suppressed and the convictions based on that marihuana vacated. *See People v Galak*, 80 NY2d 715. Judgment modified. (County Ct, Rockland Co [Nelson, J]) ⚖

- Federal District Court Judge Lawrence Kahn of Albany has decided that New York State may be required to continue providing treatment to an inmate released on parole under certain conditions. The judge found that a parolee was "owed a limited duty of protection beyond his period of incarceration" and a claim may arise if it can be proven that that the state acted with "deliberate indifference" to his needs. *Lugo v Senkowski*, 99-CV-1213 (NDNY). (*New York Law Journal*, 9/27/00.)

NYSDA Now Has "System Mechanic"

Keeping the computer systems at the Backup Center up to date and running smoothly requires not only the hard work of the NYSDA Information Systems staff but also well-designed software. NYSDA has just received a donation of such software, described below by MIS Director David L. Austin. Readers who are technophiles should not miss the configuration discussions, etc. Other readers, including many of the Backup Center staff who benefit from the new program without personal use, need realize only that NYSDA is very appreciative of the generosity of iolo technologies in providing us with "System Mechanic."

One of the problems with maintaining Windows systems is determining *what* to do to keep your system running smoothly and *when* to do it. With a new software product from iolo technologies, computer system maintenance just got easier.

NYSDA has long searched for the perfect system tune-up and maintenance tool for configuration and long-term upkeep of personal computers systems. Several programs were used in the past, including the old DOS "PC Tools," "Nuts 'n Bolts," and Norton's "System Commander." The new program—"System Mechanic"—is by far the most comprehensive and easiest to use. The program is offered in both an installable version *and* in a version that runs entirely from CD, negating the need for installation. This is a tremendous boon to network administrators, consultants or anyone that needs to keep more than one system "tuned-up" without cumbersome installation and rebooting. The CD version also negates the need for having additional programs loaded on the system adding to performance degradation and "clutter".

What does it do? Here is a nutshell summary:

- Clean-up, repair, and optimize the System Registry
- Speed up Internet connection up to 300% with NetBooster
- Tweak and customize almost 100 undocumented settings in Windows
- Find and remove junk and obsolete files
- Ensure your privacy, remove cookies, cache, and Internet debris
- Find and fix broken Windows shortcuts
- Remove invalid uninstaller information
- Find and remove duplicate files and drivers
- Consolidate critical system maintenance into one easy step with the Maintenance Wizard
- Securely delete sensitive files with Incinerator
- Automatically keep System Mechanic up-to-date with its self-healing WebUpdate feature
- Manage the items that start when Windows does with StartUp manager
- Track and report all system changes with Safe Installer
- Scheduled automatic system maintenance
- Keep comprehensive tool action logs

When first starting the program to begin a tune-up, one of the most thoughtful things that this elaborate, well-documented powerhouse provides is a warning: "Be sure that you have a current backup before you make *any* changes to your system". This should go without saying, but backups seem to be the last thing on any user's mind. It should not be. After accomplishing backup, the program is ready to roll.

Like Windows's MSCONFIG program, System Mechanic displays programs that run upon startup, but that is where the similarity ends. System Mechanic displays so much information about each program that selecting which one to disable to allow quicker startups is a breeze. In addition to the DOS program name, System Mechanic reports the complete name (in English!) of the program, the exact command line command it executes with the complete path and filename of each item *and* a very cool STATUS column with four items: Enabled, Disabled, Possible Invalid Reference, and Disabled Invalid Reference. This makes administration a snap, but to add icing to the cake, System Mechanic allows saving of different configurations (called Profiles) so that each could be used for groups of startup items can be saved collectively and used as needed. YOU CAN EVEN CONNECT TO A REMOTE SYSTEMS AND EDIT STARTUP CONFIGURATIONS! In order to connect, however, you must have administrator privileges and proper rights to access the registry on the target computer.

System Mechanic's Internet Optimization and network speed are remarkable. When NYSDA ran System Mechanic's optimizer on our NT systems, we got a dramatic 40–50% increase in measured throughput. On our Windows systems the results were more varied, but clearly it seemed to "tweak" network setting very much in favor of added performance.

There are too many features to go into the minutia of each, but this program is optimized for seasoned system people and yet easy-to-use for "newbies". The "Help" is outstanding and well organized, giving VERY complete description of the myriad of commands available—and it is color enhanced for easy readability. WebUpdate, tight integration of Help and iolo's web site, as well as extensive use of wizards for many functions, make this program a real keeper for anyone interested in tuning up their system for optimum performance. Highly recommended. ⚖

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