Legislative News

The budget stalemate in Albany this year has delayed action on most criminal justice legislation. Two significant bills did pass the Senate and Assembly before the end of the Regular Session and have been signed into law by Governor Pataki.

Mandatory Sequestration Eliminated

In 1995, the Legislature amended CPL 310.10 to eliminate the requirement that deliberating juries be sequestered, except upon the trial of a Class A or B felony, or a Class C violent felony, an amendment that was routinely extended after its original expiration date in 1997. Chapter 47 of the Laws of 2001 abolishes mandatory sequestration across-the-board and makes the change permanent. From now on, judges will have discretion to permit deliberating juries to separate in all criminal trials in New York, including capital cases. The law went into effect on May 30th.

“Son of Sam Law” Expanded

The Legislature has also greatly expanded New York’s “Son of Sam Law.” Originally enacted to prevent notorious criminals from profiting through media exploitiation of their crimes, the law now applies in a wide array of circumstances. Chapter 62 (S.5110a) of the Laws of 2001 allows crime victims to sue convicted criminal defendants for damages—despite expiration of the governing Statute of Limitations—whenever an inmate or defendant under supervision receives funds or property in excess of $10,000 from any source except earned income or child support payments (e.g., gifts, bequests, civil damage awards). The law sets up an elaborate system of notification to the Crime Victim’s Board (CVB) whenever a defendant covered by the Act receives such funds; it also authorizes steep fines for persons or organizations who fail to notify the Board when required to do so. The CVB will notify all known crime victims that the defendant is no longer judgment-proof, paving the way for them to bring civil damage actions within three years of the CVB’s notice. The CVB is authorized to seek prov-
thing left on our agenda is 18-B,” Chief Administrative Judge Jonathan Lippman has said. “That is what we are really pointing to in this year’s session, and I am still optimistic it will get done. I know Katie Lapp and the task force are working very hard. . . . On a daily basis, we are in touch with members of the task force and pushing it forward.” (New York Law Journal, 6/27/01.)

Kahn Holds Firm on Higher Fees

Supreme Court Justice Marcy L. Kahn found on June 21, 2001 “that the current crisis in representation constitutes an extraordinary circumstance warranting compensation in excess of the current hourly rates and statutory limit in the present case.” Similar rulings by Kahn had been found lacking in necessary individualized facts by Administrative Judge Micki A. Scherer of the Criminal Term of the Supreme Court in Manhattan a month before. In a footnote, Kahn acknowledged Scherer’s ruling, but stated that the Administrative Judge’s order did not carry “the force of binding adjudicative precedent” with regard to another fee application. Kahn also noted that, while the issue was not before her in the fee application she was considering, there is a genuine question as to the legitimacy of 22 NYCRR 127.2(b), the Chief Administrator’s Rule under which Scherer’s order in other cases had been made. A copy of Kahn’s decision in People v Francine Johnson, Ind. No. 205/2000, Sup Ct, Crim Term, Part 44 (6/21/01) is available from the Backup Center.


Demands for public defense reform are being heard not just from public defense lawyers and the courts, but from many directions. Michael Whiteman, a founding member of the law firm Whiteman Osterman & Hanna and former counsel to Governor Rockefeller, joined by two other architects of the current public defense system, has called on the State to reform public defense. Former State Senator Warren M. Anderson, former Assemblyman Richard J. Bartlett, and others have joined the Committee for an Independent Public Defense Commission, with Whiteman as Chairman.

This committee in formation announced at a press conference on July 9, 2001 that it has delivered to Governor Pataki, Assembly Speaker Silver, and Senate Majority Leader Bruno a proposal calling for an independent statewide commission to guarantee high quality public representation. Included in the proposal is an increase of assigned counsel rates with an index for cost of living increases, elimination of caps on fees, and state financial assistance for all types of public defense programs. Oversight of state expenditures for public defense and the provision of public representation would be guided by standards created under the Commission, which would be appointed by the State’s political leaders from candidates put forward by a nominating committee designed to ensure the Commission’s independence.

Whiteman’s announcement of the committee was prefigured in his June letter to the Albany Times Union in which he powerfully expressed the essence of the current debate over public defense funding in one line: “New York’s public defense system is not working.” He pointed out that New York assigned counsel rates are the second-lowest in the country, and clients are being denied access to counsel and a fair and speedy resolution of their cases. Noting that more than money is required to solve the problem, he urged that the creation of a statewide commission to promulgate, oversee and enforce standards for client representation, attorney training and individual caseloads was the best hope for achieving justice for all.

His letter concluded, “In a truly just society, public defense attorneys in criminal cases would provide zealous, high-quality representation, without fear or favor.” (Albany Times Union, 6/1/01.)

29 Counties Call for State Action

Stagnant assigned counsel fees have precipitated a crisis in indigent defense across the state. Nearly half of the state’s counties are on record asking for an overhaul of the way public defense is funded and for the creation of an independent statewide commission. The InterCounty Legislative Committee of the Adirondacks, made up of 11 counties, and the InterCounty Association of Western New York, with 18 counties, have passed resolutions supporting state funding of public defense, and a statewide commission. The two groups are comprised of the following counties—Western New York: Allegany, Cattaraugus, Cayuga, Chautauqua, Erie, Genesee, Livingston, Monroe,

**Public Defense Crisis Gains Prime Time**

Even national television is taking notice of New York’s assigned counsel crisis. In an upcoming segment, ABC’s “PrimeTime” plans to present a story about a typical intake day in a New York family court as seen through the eyes of the judge, the attorneys and the clients. The producers of the show were said to be looking for attorneys and clients willing to speak on camera and for “strong cases that illustrate the harm to clients as a result of the shortage [of attorneys].” *(New York Law Journal, 6/27/01.)*

**Federal Habeas Labyrinth**

Meeting the exhaustion requirements for a federal habeas corpus petition can be a frustrating and difficult experience. Victor Zarvela discovered through persistence that all is not lost when a petition is dismissed for untimeliness. Zarvela filed a federal habeas motion, which included exhausted and unexhausted claims (i.e., a mixed petition) within the one-year time limit of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 USC 2244(d). At about the same time, he received FOIL material that supported a *Brady v Maryland* (373 US 83 [1963]) claim in state court. The federal court granted his request to withdraw the petition without prejudice to renew later. Zarvela immediately filed his state post-conviction motion and a year later it was denied. In a second federal habeas petition, Zarvela raised only exhausted claims, including the new state claim, eliminating the unexhausted ones. The petition was dismissed as untimely.

On appeal, the 2nd Circuit considered the Supreme Court’s decision in *Rose v Lundy*, 455 US 509 (1982) requiring district courts to reject mixed petitions, thus preventing them from adjudicating unexhausted claims. In light of the post-*Rose v Lundy* enactment of the AEDPA one-year time limit, dismissing mixed petitions in their entirety worked a hardship on petitioners. (Note, however, that the US Supreme Court held in *Duncan v Walker*, No. 00-121, 6/18/01, that the phrase “other collateral review” does not refer to federal habeas corpus petitions, and that the time in which an initial federal habeas petition is pending does not toll the AEDPA’s one year limitations period. A case summary will appear in the next issue of the REPORT.)

One option was to limit dismissals to the unexhausted claims, thus allowing the remainder of the petition to stand. Alternatively, a stay could be fashioned to prevent excessive delays and abuse of process by allotting a reasonable time (normally 30 days) for the petitioner to file in state court and, after exhaustion, return to federal court within a similarly reasonable time. The round-trip tolling provision between federal and state court was consistent with the “reasonable diligence” requirement for equitable tolling. “If a district court elects not to stay the exhausted claims and instead dismisses the entire petition, it should normally include in the dismissal order an appropriate explanation to a pro se petitioner of the available options and the consequences of not following required procedures.” In Zarvela’s case, the 2nd Circuit found that the petitioner’s prompt actions warranted a stay, and only the unexhausted claims should have been dismissed. The petitioner would not be punished for failing to anticipate the necessity of an appropriately conditioned stay. The district court’s dismissal was reversed. *Zarvela v Artuz*, No. 99-2757v2 (2nd Cir. 6/26/01).

In another case, the 2nd Circuit further clarified the muddy waters of federal habeas by deciding that a motion to vacate judgment under FRCP Rule 60(b) was not a successive petition under the AEDPA, 28 USC 2244(b). The court reasoned that the two motions were distinct. A motion to vacate centered on technical issues associated with a federal judgment, while the habeas petition aimed to upset a state court conviction. *Rodriguez v Mitchell*, No. 99-2170(L) (2nd Cir. 6/6/01).

**Accepting Bail From Strangers**

In New York City, there are lines of people anxiously waiting to pay for theater tickets, game passes, or just subway tokens. Recently, a line of people formed to pay someone’s else’s bail. Calvin Baker was arrested and tried for selling $10 worth of heroin. His case resulted in a mistrial. For more than a year he sat in jail unable to post a $2,500 bond. A juror, disconcerted by Baker’s lengthy pretrial detention, posted bail. When Baker returned to court, the judge revoked the bail and raised the figure to $10,000. The court feared that the defendant would have no incentive to return to court without a connection to his benefactor. An investment banker, who read about the case, reacted strongly and along with an advocate from the Kunstler Fund for Racial Justice posted the new bail. The banker was quoted as saying, “I thought a terrible tragedy had been perpetrated on this individual and on me as a taxpayer.” Fearing that bail from strangers increased the risk of flight, the judge rejected it. According to Stephen Gillers, an expert in legal ethics and Professor of Law at New York University Law School, “There is nothing in the New York criminal procedure that forbids strangers from helping someone who may be the victim of injustice.”

Finally, a Manhattan Supreme Court Justice granted a writ of habeas corpus finding that public policy did not prevent a stranger from posting bail. *(The New York Times, 5/4/01; New York Law Journal, 6/7/01).*
Oklahoma Chemist’s Testimony is “Junk Science”

An Oklahoma City police chemist who worked on thousands of investigations is under scrutiny by the FBI for giving misleading testimony. A state investigation was ordered into all cases that relied upon Joyce Gilchrist’s work. The investigation, one of the largest ever conducted, began after the release of a man convicted of rape and imprisoned for 15 years. His freedom hinged on new DNA testing that discounted the work of Gilchrist. Questions have previously been raised about the quality of work by forensic scientists in laboratories in Illinois, West Virginia and Florida. (The New York Times, 5/8/01, 5/11/01.) A similar scandal regarding FBI laboratories eventually yielded few, if any, overturned convictions, after review by prosecutors of closed cases. (See Backup Center REPORT, Vol. XII, Nos. 2 and 4, Vol. XV, No. 6.)

Cameras in the Courts

New York’s ban on cameras in the courtroom continues to be contorted by lower court judges. In the trial of Rensselaer County Executive Henry Zwack for perjury, Judge Patrick McGrath interpreted the cameras ban, Civil Rights Law 52, to permit still photography and prohibit television coverage only during the testimony of subpoenaed witnesses.

The constitutionality and scope of the cameras ban has been the subject of trial court decisions in several New York counties, each with unique interpretations and conclusions. (See the Cameras in the Court page of NYSDA’s web site, www.nysda.org.) Together they form a picture that never comes into focus. The Rensselaer County Court decision added one more layer to an eclectic body of law that is having a detrimental impact on the rights of defendants. (New York Law Journal, 6/27/01.)

In Congress, Senator Charles Schumer is trying to bring cameras into the federal courts. The US Judicial Conference is opposing the legislation based on its study of the intimidating effects that cameras have on jurors and witnesses. (Albany Times Union, 6/7/01.)

Phone Calls Did Not Merit Felony Criminal Contempt

A criminal contempt charge based on violating an order of protection rises or falls with the specific statute involved. Lamont White was tried on several felony counts, including criminal contempt, related to acts of domestic violence against his wife. The contempt charges were based on telephone calls that White made to his wife from Rikers Island. Upon a motion to set aside the verdict under CPL 330.30, the court found that phone calls did not fall under the proscriptions of the criminal contempt statute, Penal Law 215.51[c]. The “stay away from the person or persons on whose behalf the order was issued” language did not encompass telephone calls, according to a Manhattan Supreme Court judge. The plain meaning of the “stay away” language was a geographic and physical barrier setup around the protected person, not a communications blackout. The legislature had an opportunity to broaden the statute to include all types of contact or itemize specific forms of prohibited communication as it did in other sections, but failed to do so. People v White, No. 3863-00 (Sup Ct, NY Co 6/15/01.)

Funding for Family Court Increased

Orders of protection and contempt charges impact many criminal clients who have associated matters in family court. In an effort to expand the resources available for the representation of criminal defendants with cases in family court, New York City agreed to provide an additional $300,000 to fund the Brooklyn Defender Services. The money will pay for new lawyers and social work staff who will assist clients in abuse, neglect, and domestic violence cases. (New York Law Journal, 6/18/01.)

In a related development, the City will fund a new program to represent indigent adults accused of child neglect or abuse. Legal Services for New York City will receive $500,000 to represent indigent clients in 15 poor neighborhoods. Currently, the majority of parents in abuse and neglect cases are represented by assigned counsel. The funding measure was prompted, in part, by the recommendations for improving legal services suggested by the Appellate Division First Department Committee on the Representation of the Poor in its report, Crisis in the Legal Representation of the Poor (2001). The report urged increased funding for assigned counsel, more defense support services, and the establishment of an independent oversight commission to monitor the public defense system among other objectives. Observers see this as a first step towards providing representation to everyone entitled to counsel in family court. (New York Law Journal, 6/11/01.)

Prosecution Expert Gets $200 an Hour

In Sullivan County, the DA has scored a financial victory. In a recent capital murder case, the prosecutor requested an order to pay their expert witness $200 per hour—twice the rate set by the Appellate Division. The court granted the request, finding that there was no limit on fees paid to experts in capital cases. (Compare County Law 722-c, capping non-capital defense expert fees at a total of $300.) The court also held that the state was obligated to pay the fee directly, not through the county. (New York Law Journal, 7/1/01.)
**Defender Institute Holds Successful BTSP**

NYSDA held its annual Defender Institute Basic Trial Skills Program the second week in June at the Rensselaer Polytechnic Institute (RPI). As in the past, a top-notch faculty assembled to facilitate the program. Attorneys, trial specialists, professors, and actors from around the nation converged on the RPI campus to share their experience and knowledge with New York attorneys new to trial practice.

The institute trains attorneys who provide indigent defense services. Twenty-one public defense programs were represented, including assigned counsel plans, legal aid societies, not-for-profit contract providers, and public defenders. Participants learned trial techniques from the initial client interview to jury selection to closing arguments. It was an intensive week of lectures, demonstrations, and participant exercises. By Saturday’s graduation, participants were confident in their abilities to conduct jury trials and departed from RPI eager to apply what they had learned. (See photos of BTSP, pp. 16-17.)

**NYSDA to Install Case Management System in Albany**

There has been a lot of activity regarding the Public Defense Case Management System (PDCMS) in the last few months. NYSDA was recently informed it had been awarded the bid for a Request For Proposal let by Albany County for a public defender case management system. The PDCMS will be installed in the Albany County Public Defender Office within the next few months. We also recently submitted a bid for a public defender case management system in Dutchess County. Within the last few months the PDCMS was upgraded in both the Rockland County Public Defender Office and the Schenectady County Public Defender Office, and additional reporting capability was developed. In June, we completed two days of advanced PDCMS training for both attorneys and support staff in the Monroe County Public Defender Office.

**Gant Joins BUC Staff**

Isaiah “Skip” Gant has joined the Backup Center as a Staff Attorney. Already known to many New York public defense lawyers from his presence on the Defender Institute BTSP faculty and other trainings, Skip brings to NYSDA an extraordinary depth and breadth of experience. He has been an attorney with the Federal Defender Office in Nashville and the Capital Case Resource Center of Tennessee, specializing in death penalty litigation, and was a private practitioner on the south side of Chicago for over 15 years. He taught trial advocacy as an adjunct professor at DePaul University Law School and has done training throughout the country, including at the National Criminal Defense College. In 1991, Skip was a defense consultant for the Judge Advocate General in a military capital case in Bamberg, Germany. He spent four years in Cambodia as director of the International Human Rights Law Group’s Cambodia Defender Project training defense lawyers, and as a United Nations consultant/mentor to judges and prosecutors at the Phnom Penh Municipal Court. Along with Kathryn M. Kase, counsel to Crane, Green & Parente, Skip recently represented Tracy Grady in a high-publicity case stemming from the shooting of two Albany police officers.

**Fine Attorney-in-Charge of CAB**

Andrew C. Fine, a former NYSDA Board member and 24-year veteran at The Legal Aid Society in New York City, has been named Attorney-in-Charge of the Society’s Criminal Appeals Bureau. He replaces Sue Wycoff, who plans to return to Oklahoma and resume working on death penalty cases. Fine has overseen the Society’s practice in the New York Court of Appeals for the past 16 years. (law.com, 6/8/01.)

A 1974 graduate of Cornell Law School, Fine has been with the Society since 1977 except for a brief period in 1982 when he served as law clerk to Honorable Jacob D. Fuchsberg. He has been a faculty member for many NYSDA and other continuing legal education trainings.

**DOCS Sets Grooming Standards**

In Directive 4914, issued Feb. 5, 2001, the Department of Correctional Services has established Grooming Standards regarding haircuts and shaves at reception and generally. Included in the directive is a description of what religious exemptions are available. Only inmates with a court order restraining enforcement of initial shaving requirements are exempt from initial shaves, and such inmates are to be placed in the extended classification unit at the Downstate Reception Center or in administrative segregation in other facilities. Inmates who profess to be “a Rastafarian, Taoist, Sikh, American Indian, Orthodox Jew, or member of any other religious sect of a similar nature...” and inmates with court orders restraining haircuts are not to be forced to comply with initial haircut requirements and are not to be disciplined or placed in administrative segregation as a result. Inmates who do not profess to be members of the listed or similar sects, and who have no court order, can refuse the initial haircut on religious grounds but are to then be placed in the extended classification unit or administrative segregation. Attorneys who want a copy of the directive in order to advise or assist clients should contact the Backup Center.

Ed. note: The directive was provided to the REPORT by Dutchess County Chief Assistant Public Defender and NYSDA Board member David Steinberg, whose frequent contributions of materials to the Backup Center, REPORT, and annual Information Exchange are greatly appreciated. He was (continued on page 9)
Resources Sighted, Cited, or Sited

This section of the REPORT contains resources of potential interest to defense teams. Whether sighted in other publications by staff or others, cited by members or others in pleadings, or cited on the Internet, these resources are noted for readers’ information; Backup Center staff have not investigated every one, and no representation as to their quality or continuing availability is made by listing them here.

NYSDA CASE DIGEST SYSTEM. The Case Digest System (CDS) is a powerful, easy-to-use computer program that quickly searches and retrieves digests from the last 15 years of criminal case summaries. The summaries (over 7,000) are taken from NYSDA’s monthly newsletter, the Public Defense Backup Center Report. The CDS also contains the New York City Assigned Counsel Expert Witness Directory, a statewide listing of defender office addresses and phone numbers, and NYSDA’s Subject Matter Index. Format: CD-ROM; Win 95/98. Cost: First Year—$180 (includes initial system software and annual subscription cost); $75/year thereafter. To order a copy of the Case Digest System, contact Kate Dixon at NYSDA, (518) 465-3524; e-mail kdixon@nysda.org

From Prison to Home: The Dimensions and Consequences of Prisoner Reentry. Urban Institute (2001). To order a print copy, contact The Urban Institute, 2100 M Street NW, Washington DC, 20037: tel 202-261-5709; fax 202-728-0232; e-mail paffairs@ui.urban.org; web site: http://www.urban.org/pdfs/from_prison_to_home.pdf

US Circuit Court of Appeals Search Engine. The Legal Information Institute at Cornell University School of Law (http://www.law.cornell.edu/) has created a search engine for its collection of federal circuit court decisions. Courts may be searched individually or in toto. The scope of the collection varies from cases beginning in 1992 for the Fifth Circuit to the most current decisions from all the circuits. Web site: http://www.law.cornell.edu:9999/USCA-ALL/results.html

Navigating the Maze of Criminal Records Retrieval – Updated. LLRX (June 1, 2001). A copy of this article, which includes hyperlinks to the sources cited, is available on the web. Web site: http://www.llrx.com/features/criminal2.htm


Treatment Services in Adult Drug Courts. OJP (2001). To order a print copy (NCJ 188086), contact The BJA Clearinghouse of the National Criminal Justice Reference Service, PO Box 6000, Rockville MD 20849–6000: tel 1–800–851-3420; fax 301–519–5212; fax on demand 1–800–688–4252; e-mail askncjs@ncjrs.org; web site: http://www.ncjrs.org/txtfiles1/ojp/188086.txt

CriminalVictimization2000.BJS(2001).Toorderaprint copy (NCJ 187007), contact The BJA Clearinghouse (address above); web site: http://www.ojp.usdoj.gov/bjs/abstract/cv00.htm

TraceDetectionofNarcoticsUsingaPreconcentrator/IonMobilitySpectrometerSystem. NIJ (2001). To order a print copy (NIJ Report 602-00), contact The BJA Clearinghouse (address above); web site: http://www.ncjrs.org/txtfiles1/niij/187773.txt

What Future for “Public Safety” and “Restorative Justice” in Community Corrections? NIJ (2001). To order a print copy (NCJ 187773), contact The BJA Clearinghouse (address above); web site: http://www.ncjrs.org/txtfiles1/niij/187773.txt

Breaking the Juvenile Drug-Crime Cycle. NIJ (2001). To order a print copy (NCJ 186156), contact The BJA Clearinghouse (address above); web site: http://www.ncjrs.org/txtfiles1/niij/186156.txt

Youth in the Criminal Justice System. ABA (2001). To order a print copy (ISBN 1-57073-912-9), contact the American Bar Association Service Center: ABA Publication Orders, PO Box 10892, Chicago IL 60610-0892; tel (800)285-2221 or (312)988-5522; fax 312/988-5568; web site: http://www.jlc.org/home/updates/updates_links/reports/youthincjs.html

Beyond Reason: The Death Penalty and Offenders with Mental Retardation. HRW (2001). To order a print copy, contact the Publications Department, Human Rights Watch, 350 Fifth Avenue, 34th Floor, New York, NY 10118-3299; tel 212-216-1813; fax 212-736-1300; web site: http://www.hrw.org/reports/2001/ustat/


Making Your Case: A Message Development and Media Training Workshop. DPIC (2001). For more information or to schedule a workshop, contact the Death Penalty Information Center, 1320 18th Street NW, 5th Floor, Washington DC 20036; tel (202)293-6970; fax (202)822-4787; e-mail dpic@deathpenaltyinfo.org; web site www.deathpenaltyinfo.org
The Bronx Defenders, an innovative public defender office, seeks experienced, caring and aggressive **Staff Attorneys/ Public Defenders** to work collaboratively with other lawyers, social workers and investigators. Candidates should have at least two years criminal defense experience. New York Bar membership or eligibility for reciprocal admission preferred. People of color and bilingual (Spanish/English) strongly encouraged to apply. Send cover letter and résumé to Robin Steinberg, Executive Director, Bronx Defenders, 890 Grant Avenue, Bronx, NY 10451.

The law Offices of Bennett H. Brummer, Public Defender for the Eleventh Judicial Circuit in Miami-Dade County, Florida, seeks an experienced **Trial Lawyer** to join its five-member **Capital Litigation Unit**. Applicant should be a member of the Florida Bar or willing to take the next scheduled Florida Bar exam and have significant trial experience. Salary is competitive; benefits include pension, major medical health insurance, paid sick leave, and four weeks of annual leave. Send résumé to Stephen K. Harper, Law Offices of Bennett H. Brummer, 1320 N.W. 14th Street, Miami, FL 33125; tel (305)798-5870; e-mail pubdef@lightspeed.net.

The Kern County (CA) Public Defender’s Office is recruiting for **Trial Attorneys I-IV** (salary range $46,000-$92,000 DOE). The Kern County (CA) Public Defender’s Office, seeks experienced, aggressive, and bilingual **Staff Attorneys** for its five-member **Capital Litigation Unit**. Applicants must have at least two years criminal defense experience. New York Bar membership or eligibility for reciprocal admission preferred. People of color and bilingual (Spanish/ English) strongly encouraged to apply. Send cover letter and résumé to Robin Steinberg, Executive Director, Bronx Defenders, 890 Grant Avenue, Bronx, NY 10451.

Membership in California Bar required. Office has 54 attorneys, plus investigators and support staff, and excellent facilities. For further information contact Mark Arnold at pubdef@lightspeed.net; for applications contact Michael Goulart at the Kern County Personnel Office, tel (616)868-3927.

The Oneida County Public Defender/ Criminal Division is seeking an **Assistant Public Defender**. To apply, submit a complete resume including all educational institutions (including elementary education) and a complete employment history; a writing sample; proof of admission to the New York State Bar; copy of valid driver’s license; names, addresses, and telephone numbers of 3 references. Residency in Oneida County must be established by effective hiring date of August 1, 2001. Send application materials to Frank Nebush, Jr., Oneida County Public Defender, Criminal Division, 250 Boehlert Center, 321 Main Street, Utica, NY 13502; tel (315)798-5870; e-mail pubdef@co.oneida.ny.us.

The Sullivan Legal Aid Bureau seeks an entry-level **Staff Attorney** in the Legal Aid agency for Criminal and Family Court practice. Salary $33,000 plus benefits. Contact Stephen Schick, Sullivan Legal Aid Bureau, 11 Bank St., Monticello, NY 12701; tel (845)794-4094.

The Legal Aid Society seeks a **Director of Special Litigation Unit (SLU) – Juvenile Rights Division**. The Director will have primary responsibility for supervising all impact advocacy, litigation, and legislation advocacy in the areas of juvenile justice, child welfare, and education; overseeing and evaluating the work of the SLU; and will be lead counsel on all SLU cases; will be involved in JRD policy and practice. Required: supervisory experience, six years legal practice; significant experience in impact litigation in state, federal and appellate courts; knowledge of family and criminal law; strong interpersonal and negotiation skills; experience at legislative advocacy. Preferred: pro bono, government, public service, or academic experience. Salary CWE; excellent benefits. Send resume and cover letter, writing sample, and list of references to Jodi Hirschman, Deputy Attorney in Charge, The Legal Aid Society, Juvenile Rights Division, 90 Church Street, 15th Floor, New York, NY 10007; fax (212)577-7978; e-mail jehirschman@legal-aid.org.

The National Coalition to Abolish the Death Penalty seeks a **Communications Director** to develop and carry out the overall communications strategy for the organization, maintain press lists and contacts, manage the communications department, and serve as editor-in-chief of all publications. Required: Bachelor’s degree, three years’ experience in communications, superior communications skills, opposition to the death penalty, and commitment to public interest work. Preferred: degree in journalism or communications, bilingual, immigrant community background. Salary range $35,000-40,000; generous benefits; moving expenses. EOE. To apply, submit cover letter, résumé, names of three references, samples of writing or media advocacy work to: Communications Director Search Committee, National Coalition to Abolish the Death Penalty, 1436 U Street, NW, Suite 104, Washington, DC 20009.

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**Pro Bono Counsel Needed for Death Row Prisoners**

Over 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Elisabeth Semel, Director, ABA Death Penalty Representation Project, 50 F Street NW, Suite 8250, Washington DC 20001; e-mail: esemel@aol.com. For information, also see the Project’s web site: www.probono.net (Death Penalty Practice Area).

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**Job Opportunities**

Always check the NYSDA web site for the latest Job opportunities:

[www.nysda.org](http://www.nysda.org)
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<td>New York State Defenders Association</td>
<td>34th Annual Meeting and Conference</td>
<td>July 26-28, 2001</td>
<td>Lake George, NY</td>
<td>Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany, NY 12210; tel (518)465-3524; fax (518)465-3249; e-mail <a href="mailto:nsteuhl@nysda.org">nsteuhl@nysda.org</a>; web site <a href="http://www.nysda.org">www.nysda.org</a></td>
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<tr>
<td>National Bar Association</td>
<td>76th Annual Convention</td>
<td>July 28-August 4, 2001</td>
<td>Dallas, TX</td>
<td>National Bar Association, 1225 11th St. NW, Washington, DC 20001; tel (202)842-3900; fax (202)289-6170</td>
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<td>Carroll Investigative Services</td>
<td>Improved Procedures for the Collection &amp; Preservation of Eyewitness Evidence</td>
<td>August 3, 2001</td>
<td>Newburgh, NY</td>
<td>Paul Carroll, PO Box 431628, Big Pine Key, FL, 33043-1628; tel (305)872-5701; e-mail <a href="mailto:sgtcpcet@aol.com">sgtcpcet@aol.com</a></td>
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<td>Santa Clara University Law School</td>
<td>Bryan Schechmeister Death Penalty College</td>
<td>August 4-9, 2001</td>
<td>Santa Clara, CA</td>
<td>Ellen Kreitzberg, Santa Clara University Law School, tel (408)554-4724; e-mail <a href="mailto:ekreitzberg@scu.edu">ekreitzberg@scu.edu</a>; web site <a href="http://www.scu.edu/law/dpc">www.scu.edu/law/dpc</a></td>
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<td>National Institute for Trial Advocacy</td>
<td>Representing the Accused in a Capital Trial</td>
<td>August 9-12, 2001</td>
<td>Philadelphia, PA</td>
<td>Shari Herman, NITA Admissions, Notre Dame Law School, PO Box 6500, Notre Dame, IN 46556-6500; tel (800)225-6482; fax (219)271-8375, web site <a href="http://www.nita.org">www.nita.org</a></td>
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<td>Practicing Law Institute</td>
<td>Ethics in Context: Ethics for Children’s Lawyers</td>
<td>August 20, 2001</td>
<td>Santa Clara, CA</td>
<td>Practicing Law Institute, 810 Seventh Ave., New York, NY 10019; tel (800)260-4PLI; fax (800)321-0093; web site <a href="http://www.pli.org">www.pli.org</a></td>
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<td>National Drug Court Institute</td>
<td>Comprehensive Drug Court Public Defenders’ Training</td>
<td>September 12-15, 2001</td>
<td>Williamsburg, VA</td>
<td>Colby Miller, NDCI, 901 North Pitt Street, Suite 370, Alexandria, VA 22314; fax (703)706-0577</td>
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<td>New York Association of Criminal Defense Lawyers</td>
<td>Weapons for the Firefight</td>
<td>September 14, 2001</td>
<td>New York City</td>
<td>Patricia Marcus, NYSCDL: 475 Park Avenue South, Suite 3300, New York, NY 10016; tel (212)532-4434; fax (212)532-4668; e-mail <a href="mailto:info@nysacdl.org">info@nysacdl.org</a></td>
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<td>New York Association of Criminal Defense Lawyers</td>
<td>Appellate Seminar</td>
<td>September 15, 2001</td>
<td>Batavia, NY</td>
<td>Patricia Marcus, NYSCDL: 475 Park Avenue South, Suite 3300, New York, NY 10016; tel (212)532-4434; fax (212)532-4668; e-mail <a href="mailto:info@nysacdl.org">info@nysacdl.org</a></td>
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Conferences & Seminars

Sponsor: SEARCH, the National Consortium for Justice Information and Statistics
Theme: 2001 Symposium on Integrated Justice Information Systems (IJIS)
Date: October 1-3, 2001
Place: Jacksonville, FL
Contact: SEARCH, 7311 Greenhaven Drive, Suite 145, Sacramento, CA 95831; tel (916)392-2550; web site www.search.org

Sponsor: National Conference on Science and the Law
Theme: Emerging Trends: Scientific Evidence in the Courtroom
Date: October 4-6, 2001
Place: Miami, FL
Contact: National Conference on Science and the Law, Institute for Law and Justice, 1018 Duke Street, Alexandria, VA 22314; tel (703)684-5300; fax (703)739-5533; e-mail nijpcs@ilj.org

Sponsor: New York State Bar Association
Theme: New York Appellate Practice
Dates & Places: October 12, 2001 Albany 
November 8, 2001 New York City 
November 16, 2001 Buffalo 
December 5, 2001 Hauppauge, L.I.
Contact: NYSBA, 1 Elk Street, Albany, NY 12207; tel (518)463-3724 or (800)582-2452; fax (518) 487-5618; web site www.nysba.org

Sponsor: New York Association of Criminal Defense Lawyers
Theme: Cross To Kill
Dates & Places: October 19, 2001 Binghamton 
October 27, 2001 Buffalo
Contact: Patricia Marcus, NYSCDL: 475 Park Avenue South, Suite 3300, New York, NY 10016; tel (212)532-4434; fax (212)532-4668; e-mail info@nysacdl.org

Sponsor: New York State Bar Association
Theme: DWI – The Basics
Dates & Places: October 26, 2001 Buffalo 
November 8, 2001 Long Island 
November 9, 2001 New York City 
November 27, 2001 Albany
Contact: NYSBA, 1 Elk Street, Albany, NY 12207; tel (518)463-3724 or (800)582-2452; fax (518)487-5618; web site www.nysba.org

Sponsor: New York State Bar Association
Theme: Criminal Law Update
Dates & Places: November 2, 2001 Buffalo 
November 9, 2001 Long Island 
November 16, 2001 New York City and Albany
Contact: NYSBA, 1 Elk Street, Albany, NY 12207; tel (518)463-3724 or (800)582-2452; fax (518)487-5618; web site www.nysba.org

Defender News (continued from page 5)
appointed in June to be Vice Chair of the Dutchess County Criminal Justice Council, the first member of the Public Defender’s Office to hold a leadership position on the Council, which was created in 1993 to collaborate with and advise the county legislature and executive on policy and critical issues involving the criminal justice system.

Quote Shows Canadians Understand
“[John] Rosen [the Toronto barrister who defended serial rapist and convicted killer Paul Bernardo] believes that the public understands that defense attorneys are as essential to the system of justice as police or prosecutors.
‘I remember one day during the trial, I was walking down the street at lunch . . . and a man walked up to me and said “Are you that Mr. Rosen? Are you the one representing that Paul Bernardo?”’ the barrister said. ‘I was ready to put up my dukes, but then he said, “I just want to shake your hand. I don’t agree with what he did, but I just wanted to say that you’re doing a good job.”’
‘And you know,’ Rosen added. ‘He was literally the first of hundreds to do that.’” LexisONE Special Report by Seamus McGraw, 6/22/01.

Apprendi Applied to Aid Federal Defendant
As was noted in the last REPORT, the New York Court of Appeals has rejected the assertion that the discretionary persistent felony offender sentence enhancement provisions of Penal Law 70.10 and CPL 400.20(5) violate the right to trial by jury under Apprendi v New Jersey, 530 US 466 (2000) (see p. 28). Apprendi did, however, recently help a defendant convicted of federal drug charges in New York. The jury had not made a finding as to the quantity of cocaine the defendant allegedly conspired to distribute. The presentence investigation report concluded that the defendant, Juan Moises, had distributed at least a ton of cocaine, and made Sentencing Guideline determinations accordingly. Under Apprendi, however, the quantity of drugs involved must be determined by a jury before the quantity can be used to increase a penalty beyond a statutory maximum. As there was no jury determination of quantity in this case, the defendant was to be sentenced within the most lenient statutory maximum, 20 years under 21 USC 841(b)(1)(c). Counsel for Moises was Thomas F. Liotti of Garden City, NY. (US v Moises, S1 99 Cr. 711 [WHP], So. Dist. NY, 5/24/01.)

June 2001
Admissibility of Expert Identification Testimony in New York After People v Anthony Lee

by David Crow*

Introduction

On May 8, 2001, New York joined the growing number of jurisdictions that have declared admissible expert testimony on the reliability of eyewitness identification. In People v Anthony Lee, the New York Court of Appeals held that testimony by an expert on the factors that affect reliability of eyewitness testimony cannot be precluded on the ground that it invades the province of the jury or is within the ken of the average juror. The Court of Appeals had never previously ruled on this issue. Before Lee, a few trial judges had allowed expert testimony, but most had not. The Appellate Divisions had uniformly upheld preclusion of defense expert identification testimony.

Lee has drawn national attention, although prosecutors have attempted to play down its significance. It is true that the Court of Appeals ultimately upheld Mr. Lee’s conviction, essentially because he was arrested in the complainant’s stolen car, albeit several months after it was stolen, providing what the Court must have considered strong corroboration for the identification at issue. But, narrow as the Lee opinion appears to be on first reading, it presents a real opportunity to the defense to make their case in trial courts on the merits. In People v Mooney, 76 NY2d 827 (1990), when the Court was previously presented with the question of expert identification testimony, it also upheld the conviction, but the majority wrote no substantive decision. In contrast, Lee is a substantive opinion that can be cited to trial courts and requires the Appellate Divisions to change their position. In essence, the Court held that the subject was a proper one for expert testimony, and left it to the trial courts to assess the scientific basis for particular testimony and balance the importance of expert testimony as it would other proffers of expert testimony. As with any offer of expert testimony, the issue is potentially one of due process. See, e.g., Washington v Schriver, 240 F3d 101 (2d Cir. 2001).

In the wake of Lee, defense attorneys should consider offering expert identification testimony in any case where identification is central to the case. The strongest argument for admissibility will be presented in a “pure” one-witness identification case, that is, one with no corroborative evidence to support the identification and with many features that an expert could explain decreased the likelihood that the identification was accurate.

The problem of mistaken identification has been the subject of intense legal, scientific, and public attention in the last few years. Expert testimony is only one part of the debate. Jury instructions, right to counsel, police investigatory methods, and the scope of the Wade hearing are also affected by the increasing awareness that the problem of mistaken identification is far greater than previously supposed. Although more jurisdictions now admit expert testimony than in the past, several state supreme courts faced with the same arguments presented in Lee have recently decided to adhere to the common law practice of precluding such testimony on the ground that it does not assist the trier of fact in reaching a more accurate verdict. See, e.g., State v McClendon, 248 Conn 572 (1999); State v Coley, 32 SW3d 831 (Tenn. 2000).

The legal and scientific literature on eyewitness identification is immense. If you have a case in which the trial court orders a Frye hearing or appears amenable to granting a motion to admit expert testimony, I suggest you begin with:

- The defendant-appellant’s brief in Lee: emphasis on the judicial response to the science,
- LAS amicus brief in Lee: emphasis on the underlying science, the role that DNA exonerations have played in confirming the psychological research findings, and influence of the research on recent Department of Justice recommendations for best police practices for identification cases.
- Gary Wells, Professor of Psychology at Iowa State University (see infra): a leading researcher in the field, has written a number of extremely lucid articles and maintains a web site at www.iastate.edu/faculty/gwells.
- Elisabeth Loftus, Professor at the University of Washington: a pioneer in this area who continues her eyewitness identification work while also working in the area of false memory and accusations of sexual abuse. She is the author of Eyewitness Testimony: Civil and Criminal (1997).

Frye Challenges

Eyewitness identification experts are generally cognitive and experimental psychologists who work in academia. Among researchers who have published work in the
area of identification accuracy, there is a high degree of consensus on many findings important to defense lawyers. A few independent researchers have questioned some of the findings, but under any reasonable definition of scientific acceptance, there are many conclusions that should be allowed to go to the jury. Attempts to admit expert identification testimony have usually come from the defense, because most of the research suggests that identification is less reliable than commonly believed. Until Lee, prosecutors in New York have generally not had to face the decision of whether to mount a Frye challenge to expert identification testimony because so few trial courts have been willing even to consider admitting it. After Lee, prosecutors may demand Frye hearings. Undoubtedly, some prosecutors will find “experts” willing to contradict the defense. However, I am not aware of any pro-prosecution expert with the stature of the researchers relied on by the defense bar.

My prediction is that, since research has been so voluminous over the last twenty years, and its main findings so widely accepted within the field, Frye hearings should not pose a substantial barrier to expert testimony. The greater obstacles and tactical problems lie elsewhere.

“Pure” Identification Cases v Identification Cases with “Corroboration”

In Lee, the Court of Appeals seemed to suggest that expert testimony was most appropriate where the only evidence of guilt was eyewitness testimony. The defense in Lee argued that expert testimony should be admissible whenever identification was central to the case. Logically, the line drawn by the Court does not make sense, especially where the “corroborating” evidence is as thin as it was in Lee (presence in the stolen car eight months after the crime). Identification will usually be the most powerful evidence in the case, and the defense should be allowed to attack it. However, given the language of Lee, it seems likely that prosecutors will argue, and trial judges may agree, that they are on safe ground in precluding expert testimony where there is other evidence of guilt in addition to eyewitness testimony.

What Can an Eyewitness Identification Expert Testify About?

There are four broad categories of factors that can affect eyewitness identification: the characteristics of the eyewitness (e.g., intelligence, memory, training); the characteristics of the perpetrator (e.g., distinctive features); the factors in the criminal encounter that affect the eyewitness’s ability to observe the perpetrator (“event factors”); and the factors in the criminal investigation, especially in the conduct of lineups and showups, that affect the reliability of an eyewitness identification (“post-event factors”). Each category has been extensively studied by psychologists. The defense typically emphasizes event and post-event factors. Prosecutors sometimes rely on research findings about eyewitness and perpetrator characteristics, and sometimes argue that they are much more important than event and post-event factors.

Researchers who testify at trial as experts do not offer an opinion that eyewitness identification is accurate to a given percentage, or directly offer an opinion on the reliability of the identification testimony by the eyewitness in the case. Instead, they explain the factors that make identification more or less reliable, leaving the ultimate determination to the jury. Obviously, there is a tension between these two propositions. As a matter of science, it is certainly fair to argue that the physical and mental characteristics of the eyewitness, and the appearance of the perpetrator, vary too widely to permit the expert to give a simplistic opinion on the reliability of a given identification. However, researchers have generally concluded that identification evidence is much less reliable than commonly believed. Maximizing the information presented to the jury to support this theme, without crossing the line into a forbidden opinion on the ultimate issue, is the task of the defense lawyer.

The Relative Judgment Effect

I believe that the most dramatic demonstration of the inherent weakness in eyewitness identification is the so-called “relative judgment” effect. Prof. Gary Wells, a leading researcher as noted above, has repeatedly demonstrated that eyewitnesses identify a suspect in a “blank” lineup almost as often as they do in a lineup that contains the perpetrator. Even worse, eyewitnesses are equally confident when making an incorrect identification as when making a correct one.

Wells used a staged crime and two groups of 100 eyewitnesses. In the first group, the eyewitnesses viewed a lineup with the culprit present and most chose the right man. Of the 100, 20 declined to make an ID. However, the other group viewed a lineup with the culprit removed (“removal without replacement”), and, startlingly, only 30 people declined to make an ID. Most of the rest chose the innocent filler who most resembled the culprit. See “Eyewitness Identification Procedures: Recommendations for Lineup and Photospreads,” Law and Human Behavior, Vol. 22, #6 (Dec. 1998), pp. 613-617.

The strength of the “relative judgment effect” is highly counter-intuitive. It is easy to understand that an unfair lineup produces unreliable results. However, there has been little discussion outside the research literature of the tendency of eyewitnesses to make incorrect identifications from fair lineups. From the defense lawyer’s perspective, the importance of the relative judgment effect is profound. If the police are fortunate enough to arrest the perpetrator, the eyewitness is likely to accurately identify him from a lineup. However, if an innocent person falls under suspicion because he matches the general descrip-
tion of the perpetrator, there is a serious danger that the eyewitness will—confidently but mistakenly—identify him as the perpetrator.

Obviously, expert testimony on the research and implications of the relative judgment effect could have a dramatic effect on the jury’s evaluation of identification testimony. Typically, however, the focus of expert testimony has instead been on the particular factors that make identification more or less reliable. Some judges may view testimony about the relative judgment effect as an improper attack on the general reliability of eyewitness identification evidence. Continued education of the judges, the media and the public may enable us to get past this perception.

Event and Post-Event Factors

Some experts focus on the conditions of the incident itself that affect identification accuracy. Others emphasize the effect of the police investigation. Finally, there are “courtroom” factors, including the degree of confidence displayed by the witness when testifying. The “General Acceptance 2001” article lists at least 20 factors of these types that enjoy a high degree of consensus. Here are a few of the most important. Note: The “General Acceptance” article is very good for beginning your thinking about potential topics for expert testimony. However, the article does not try to give a complete description of each topic, and some of the topics may initially strike you as trivial or obvious. For the full value of some of the topics, you will need to read the amicus brief or Wells’ articles or the Penrod book.

Courtroom Effects

The degree of confidence exhibited by the eyewitness, although very influential with courts and juries, is not a good predictor of accuracy. Eyewitness confidence is a poor predictor of eyewitness accuracy. Juries and judges are heavily influenced by the degree of confidence exhibited by the witness. Indeed, there is consistent evidence to indicate that the confidence that an eyewitness expresses in his or her identification during testimony is the most powerful single determinant of whether observers of that testimony will believe the identification is accurate. Expert testimony about the poor fit between confidence and accuracy applies broadly to contested identification cases.

Event Effects

There is solid evidence that cross-racial identification, in particular by Whites of Blacks, is subject to a greater error rate than would otherwise be the case.

High levels of stress, particularly where a gun is displayed to the eyewitness, are negatively correlated with accuracy. Up to a point, stress heightens the ability to observe but very high levels of stress degrade it.

Police Investigation Effects

Police procedures can have a much greater effect on identification evidence than commonly understood. Research has found that a number of factors can have suggestive effects besides the obvious ones involving the resemblance of the suspect to the fillers. Seemingly innocuous police procedures, like a failure to state explicitly to the eyewitness that the culprit may not be present (“failure to warn”), can drive up rates of misidentification substantially.

Another non-obvious problem can occur when the eyewitness is told after the lineup that he or she has identified the suspect (“feedback effect”). This strongly reinforces eyewitness confidence without adding anything to accuracy.

Researchers also recommend that the detective running the lineup not be the investigating detective on the case, and not know who the suspect is (“double-blind” lineup). This prevents both intentional and unintentional influencing of the witness.

Finally, studies show that lineup results can be improved if suspects and fillers are shown to the eye-
Practical Problems in Proffering Expert Identification Evidence

Since the early 1980s, when California and Arizona pioneered the acceptance of expert testimony on identification, defense lawyers in every jurisdiction have devoted tremendous effort to getting experts on the stand. Admission of expert testimony, however, is no guarantee of success with the jury. Psychologists who have studied the ability of eyewitnesses to make accurate identifications have also studied the effect of attempts by experts to educate the jury and improve the accuracy of their judgments. They have found that resistance to social science testimony among juries is substantial, particularly where it challenges deeply-ingrained “common sense” ideas. For the defense lawyer, therefore, the ability of the identification expert to communicate effectively with the juror is, compared with an expert in a “hard science” like medicine, especially important.

Another problem with attempts to offer expert testimony is that there are not very many people in the United States who can easily qualify as experts on identification and who are willing to testify. The number nation-wide may be no more than 100, and almost all are busy academic researchers, not professional witnesses. Therefore, it will be necessary to anticipate the need for an expert well before a case proceeds to trial.

New Challenges to Lineup Procedures With or Without a Live Expert

In 1999, the United States Department of Justice issued a document titled Eyewitness Evidence: A Guide for Law Enforcement (Guide). The Guide represents the first set of national guidelines in the United States for the collection and preservation of eyewitness evidence for criminal cases. Guided in large part by the psychological researchers’ experiments, a group of prosecutors, defense lawyers, and police was able to make several consensus recommendations. Among the most important: eyewitnesses should be warned before viewing a lineup that the perpetrator may not be in the lineup; and police should avoid post-lineup statements to eyewitnesses that congratulate them for selecting the “correct” suspect.

The Guide describes, without unanimously recommending, double-blind lineups and sequential lineups.

The Guide represents the next great battle in the challenge to make identification evidence more reliable.

The defense should try to present an expert whenever the police use investigation techniques that are less accurate than those recommended as best practices by the DOJ. However, even without a live expert, defense lawyers could seek to use the Guide itself as a basis to cross-examine detectives and police officers about their investigative techniques, just as the defense can cross-examine a police chemist about his or her familiarity with scientific tests that might have produced more accurate results.

Conclusion

In the last ten years, defense lawyers, academics, and the media have put intense pressure on the criminal justice system by repeatedly showing that many eyewitness identifications are honest but mistaken. DNA exonerations, improvements in the basic science, and more aggressive challenges by the defense to identification evidence have produced an opportunity to educate juries on the perils of eyewitness identification, and make courts pay more than lip service to the well-known warning by Justice Brennan in Wade that mistaken identification is the greatest danger in the justice system. Expert testimony will not solve the problem by itself, but it has an important role to play. No conscientious lawyer can disregard these developments when planning strategy and tactics in the defense of an identification case.

Endnotes

1 Lee was represented by the Office of the Appellate Defender. The Legal Aid Society submitted an amicus brief in conjunction with the New York State Defenders Association.
3 The New York County District Attorney’s brief to the Court of Appeals in Lee did not address the basic questions of whether the subject of expert identification testimony was based on acceptable science, or whether such testimony was generally admissible. It merely urged the Court to uphold the conviction on the ground that, assuming such evidence was generally admissible, it was not an abuse of discretion for the trial court not to have done so in Mr. Lee’s case. In effect, the District Attorney made a calculated gamble that by ignoring the substantive legal issues in the case, it could get the same result that it got in Mooney—a decision that for 11 years was broadly misread to give carte blanche to trial courts to refuse to admit expert testimony on identification.
5 Friage v US, 293 F 1013 (1923).
6 The relative judgment effect was the highlight of a recent New Yorker magazine profile of Prof. Wells. “Under Suspicion: the fugitive science of criminal justice,” The New Yorker, Jan. 8, 2001.
US Supreme Court Affirms 2d Circuit Decision Striking Down Retroactive Application of 1996 Repeal of Waiver of Deportation for Certain Immigrants

On June 25, the US Supreme Court struck down the government’s retroactive application of 1996 amendments restricting or eliminating relief from deportation to lawful permanent resident immigrants who pled guilty to deportable offenses prior to the enactment dates of these amendments. Immigration and Naturalization Service v St. Cyr, No. 00-767, 2001 US LEXIS 4670 (6/25/01). The Court’s decision affirmed the Sept. 1, 2000 decision of the United States Court of Appeals for the 2nd Circuit that upheld a district court’s grant of habeas corpus relief to a petitioner challenging this retroactive application of the 1996 amendments to eliminate his pre-1996 right to apply for relief from deportation under former section 212(c) of the Immigration and Nationality Act. St. Cyr v Immigration and Naturalization Service, 229 F3d 406 (2d Cir. 2000). See the Backup Center REPORT, Vol. XV, #8, at pp. 5-6.

As an initial matter, the Court held that the federal courts have jurisdiction under 28 USC 2241 (habeas corpus statute) to decide the legal issue raised by the petitioner despite claims by the government that the 1996 amendments stripped the courts of jurisdiction to decide such questions of statutory interpretation.

On the merits, the Court then found that the 1996 amendments had impermissible retroactive effect under the traditional presumption against retroactive application of new statutes. The Court stated that the 1996 amendments’ “elimination of any possibility of § 212(c) relief [from deportation] for people who entered into plea agreements with the expectation that they would be eligible for such relief clearly ‘attaches a new disability, in respect to transactions or considerations already past’” (quoting Landgraf v USI Film Products, 511 US 244, 269 (1994)). The Court noted that, “[e]ven if the defendant were not initially aware of § 212(c), competent defense counsel, following the advice of numerous practice guides, would have advised him concerning the provision’s importance.” (citing amici curiae brief of the National Association of Criminal Defense Lawyers, NYSDA, and 13 other criminal defense organizations).

US Supreme Court Holds that Government May Not Indefinitely Detain Deportable Immigrants Who Cannot be Returned to their Countries of Origin

On June 28, the Supreme Court struck down the government’s practice under the current immigration statute of indefinitely detaining immigrants who have been ordered deported or removed but whom the government is unable to remove. Zadvydas v Davis, No. 99-7791, 2001 US LEXIS 4912 (6/28/01). Noting the serious constitutional problem that would arise if the immigration statute were read to permit indefinite or permanent deprivation of human liberty, the Court interpreted the statute to limit a deportable immigrant’s detention to a period reasonably necessary to bring about the individual’s removal from the United States. For the sake of uniform administration in the federal courts, the Court stated that six months would be a presumptively reasonable period of detention to effect a deportable immigrant’s removal from the country. If removal is not accomplished within this period, the Court indicated that the individual should be released if “it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.” This decision affects primarily immigrants who are subject to deportation orders to countries such as Cuba with which the United States does not have a repatriation agreement or which for other reasons will not accept return of its nationals, and those immigrants who are stateless.

Supreme Court Upholds Constitutionality of Law Allowing Citizen Mothers but Not Citizen Fathers to Confer Citizenship on Child Born Outside the US

In a close 5-4 decision issued on June 11, the high court upheld the constitutionality of the gender-based distinction in US citizenship law that allows a United States citizen mother to confer citizenship on her child born “out of wedlock” outside of the United States, but does not so allow a father unless the father had formally acknowledged paternity before the child turned age 21. Nguyen v INS, No. 99-2071, 2001 US LEXIS 4340 (June 11, 2001). The Court’s decision, which affirmed the decision of the Court of Appeals (see Nguyen v INS, 208 F3d 528 [5th Cir. 2000]), has the effect of overruling the decisions of two other circuit courts that struck down this distinction on equal protection grounds, including a decision last year of the 2nd Circuit. See Lake v Reno (2d Cir. Sept. 15, 2000) (reported in Backup Center REPORT, Vol. XV, #8, at p. 17); US v Ahumada-Aguilar (9th Cir. 1999).

BIA Holds Multiple Convictions for Simple DUI Do Not Aggregate into a Crime Involving Moral Turpitude

On May 9, the Board of Immigration Appeals (BIA) found that an aggravated driving under the influence
conviction under § 28-697(A)(2) of the Arizona Revised Statutes, defined as a third conviction for driving under the influence, did not constitute a crime involving moral turpitude for immigration purposes. Matter of Torres-Varela, 23 I&N Dec. 78 (BIA 2001). Specifically, the Board stated: “We find that multiple convictions for the same DUI offense, which individually is not a crime involving moral turpitude, do not, by themselves, aggregate into a conviction for a crime involving moral turpitude.”

The Board distinguished its prior published decision in Matter of Lopez-Meza, Int. Dec. 3423 (BIA 1999) (see Backup Center REPORT, Vol. XV, #1, at p. 11), in which the Board held that a separate Arizona offense of aggravated driving under the influence is a crime involving moral turpitude because it requires a showing that the offender drove knowing that his or her license to drive had been suspended, cancelled or revoked, and did not require demonstration of such a culpable mental state.

What this appears to mean for New York defense lawyers and their noncitizen clients is that a New York VTL 1192 conviction of simple DUI will probably not be considered a crime involving moral turpitude even where preceded by other DUI convictions. However, a VTL 511 conviction of aggravated unlicensed operation of a vehicle, which does include a “knowing” element, may be considered a moral turpitude offense even where the offense has a DUI element. See e.g., NY VTL 511(3).

Defense lawyers should be aware that the issue of whether a driving while intoxicated conviction is a crime involving moral turpitude is separate and distinct from the issue of whether such a conviction is an aggravated felony for immigration purposes. In Matter of Puente-Salazar, Interim Decision #3412 (BIA 1999), the Board ruled that a felony offense of driving while intoxicated under Texas law is a conviction of a crime involving moral turpitude and, where a prison sentence of one year or longer is imposed, is therefore an aggravated felony for immigration law purposes. See the Backup Center REPORT, Vol. XIV, #9, at p. 4.

BIA Says Misdemeanor Sexual Abuse of a Minor Not Necessarily an Aggravated Felony

On March 21, the BIA held that a conviction for sexual abuse of a minor must be for a felony offense in order for the conviction to be considered an aggravated felony under INA § 101(a)(43)(A), 8 USC 1101(a)(43)(A) (“a crime of violence for which the term of imprisonment is at least one year”). In addition, such an offense could be charged as a crime involving moral turpitude.

2nd Circuit Holds Offense Involving Mere Possession of Counterfeit Securities not Necessarily an Attempt to Commit Offense involving Fraud or Deceit, an Aggravated Felony

On May 11, the 2nd Circuit held that a federal conviction for knowingly and unlawfully possessing counterfeit securities with the intent to deceive another in violation of 18 USC 513(a) does not necessarily constitute an “attempt” to pass these securities and is, therefore, not an aggravated felony under INA § 101(a)(43)(M)&(U), 8 USC 1101(a)(43)(M)&(U) (attempt to commit an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000). Sui v INS, 2001 US App LEXIS 8934 (2d Cir. 2001). The 2nd Circuit stated that the petitioner’s conviction did not constitute an “attempt” as it did not require a finding or admission that he completed a substantial step toward actually passing the checks.

California Finds Wrong Advice about Immigration Consequences of a Guilty Plea is IAC

On April 2, the California Supreme Court held that a criminal defense attorney provides ineffective assistance of counsel when he or she gives wrong advice to a noncitizen defendant about the immigration consequences of a proposed guilty plea. In re Resendiz, 25 Cal4th 230, 19 P3d 1171, 2001 Cal LEXIS 1812 (2001).

1-Page Immigration Consequences of Convictions Checklist Available on NYSDA Web Site

NYSDA Criminal Defense Immigration Project staff attorney Sejal R. Zota has prepared a one-page checklist providing the basic information a defense attorney needs to know regarding the immigration consequences of criminal convictions for a noncitizen client. The one-page checklist, which was designed as a quick reference tool that defense attorneys could easily carry to court with them, is available for downloading from NYSDA’s website. Also available on NYSDA’s website are the following practice aids for defense lawyers who represent noncitizen defendants: Tips on How to Work With an Immigration Lawyer to Best Protect Your Noncitizen Client, and Immigration Resources for Criminal Defense Lawyers, which offers a listing of some published materials, Internet resources, and immigration consultation possibilities for lawyers representing noncitizen defendants. To access and/or download these resources, visit NYSDA’s website at www.nysda.org and click on Immigration Project Resources.
The DWI Defense Manual: Pleadings, Motions and Forms
by Michael S. Taheri and James F. Orr
J&E Publishing† (2001)
$64.75

by Robert D. Lonski*

The DWI Defense Manual is another critical element of the growing set of resources available to defense counsel in DWI cases. While every other manual that I am aware of consists primarily of text that discusses statutes and caselaw with some sample forms included, this book is just the opposite. It consists of templates for nearly 50 pleadings, motions, letters, and forms which anticipate virtually every need that the practitioner is likely to experience in this area of practice.

Most law manuals prohibit photocopying without the author’s written permission. Not only is permission not required to photocopy these materials, but the user is encouraged to copy, change, and use them. In fact, with that in mind, each manual includes a floppy disk containing all of the forms in either WordPerfect or Word format. Michael Taheri is well known as one of the premier defense attorneys in Western New York, particularly in the field of DWI and related matters. His attention to detail, tenacious pursuit of every possible defense, and skill at developing good relationships with his clients are reflected in the materials that he and Mr. Orr have produced here. There are few attorneys who would not benefit from incorporating at least some of these forms into their own practice. Just one example is a very detailed four-page letter to the client reviewing his explanation of possible fines, penalties and other consequences, enclosing a two-page chart of such penalties. It is just this type of communication that is so important, yet is sometimes lacking, when representing clients.

This manual is organized to correspond with the order of events normally encountered when handling a case. It begins with the sample letters to the client, and moves to motions to be made at arraignment, discovery pleadings and related forms, and 15 distinct trial memoranda. Examples of such memoranda include one dealing with sufficiency of corroboration to admission of operation pursuant to People v Booden, 69 NY2d 185, a second asserting insufficient proof that the gas chromatograph was functioning properly, and a third arguing that in order to convict of a misdemeanor DWAI, proof of prior NY Vehicle and Traffic Law § 1192 offenses is an element of the offense pursuant to People v Jemison, 170 Misc2nd 974 (City Ct Rochester 1996). The manual goes on to include materials related to sentencing and post-conviction activity, such as an application for a Certificate of Relief from Disabilities.

While there is a useful chapter describing a practical approach to pretrial hearings, the strength of this book is in the forms that make up 90% of its content. Indeed, the table of contents can serve as a checklist of actions and issues for the attorney to consider throughout the case.

Taheri and Orr’s manual is like a well-stocked toolbox. Some of the tools will be used often, others infrequently, but when you need one, it will likely be there. If you don’t know when or how to use the tools properly, trying to do so can be ineffective or even dangerous. Used in conjunction with other, more text-based materials on the market, such as Peter Gerstenzang’s Handling the DWI Case in New York, Ed Fiandach’s New York Driving While Intoxicated, or even Taheri and Orr’s own DWI Reference Guide, however, these templates can make the lawyer’s work both more efficient and more effective.  

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Scenes from the 2001 Basic Trial Skills Program
HOT TOPIC:
MEGAN’S LAW

Current Developments

• New Jersey man convicted of sexual assault for using telephone contact to compel a minor to perform a sex act. ‘Virtual’ Rape Case Tests Legal System, Saginaw News, June 21, 2001

• New Jersey Supreme Court considers application of Megan’s law to 10-year old offender. 10-Year-Old’s Crime Tests Limits of Megan’s Law, New York Times, June 16, 2001

• Federal child pornography conviction required registration as sex offender in New York according to a Manhattan Supreme Court. Federal Crime Held to Require Registration as Sex Offender, New York Law Journal, June 7, 2001

Key Documents
Megan’s Law is Amended to Comply with Doe v. Pataki: A Review of the New Statutory Scheme (NYSDA 2000)
Sex Offender Registration Act: Risk Assessment Guidelines and Commentary (NY Board of Examiners of Sex Offenders 1997)
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 published.

**United States Supreme Court**

**Speech, Freedom of (General)**

**SFO; 353(10)**

**Legal Services Corporation (LSC) v Velazquez, Nos. 99-603 and 99-960, 2/28/01**

Congress imposed restrictions on funding to Legal Services Corporation (LSC) lawyers under the Omnibus Consolidated Recissions and Appropriations Act of 1996 by prohibiting challenges to the federal or state welfare system. The respondents claimed that the restrictions violated the 1st Amendment. The district court denied a preliminary injunction. The 2nd Circuit affirmed with regard to prohibitions on litigation, lobbying, and rulemaking, and struck the restriction that representation could “not involve an effort to amend or otherwise challenge existing law” as impermissible viewpoint-based discrimination.

**Holding:** Viewpoint-based funding decisions have been upheld when the government was the speaker (see Board of Regents of Univ of Wis System v Southworth, 529 US 217, 229, 235 [2000]), or when the government “‘used private speakers to transmit information pertaining to its own program.’” Rosenberger v Rector & Visitors of Univ. of Va, 515 US 819, 833 (1995). “The LSC lawyer, however, speaks on the behalf of his or her private, indigent client.” Cf Polk County v Dodson, 454 US 312, 321-322 (1981). If a court asked an LSC lawyer during litigation whether any constitutional concerns existed, the lawyer “simply could not answer.” Congressional restriction of argument by those receiving LSC funding imposed a serious and fundamental constraint on the advocacy of attorneys and the functioning of the judiciary. “We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge.” Judgment affirmed.

**Dissent:** [Scalia, J] The LSC Act doesn’t create a public forum or discriminate on the basis of viewpoint. It places restrictions on its use of funds by declining to subsidize a certain class of litigation.

**Federal Law (General) (Procedure)**

**FDL; 166(20) (30)**

**Sentencing (Appellate Review)**

**SEN; 345(8)**

**Buford v United States, No. 99-9073, 3/20/01**

A federal district court sentenced the petitioner as a career offender based on two prior felony convictions, one stemming from four robbery charges in a single indictment and the second a drug conviction. The petitioner argued that the drug conviction was functionally, i.e., factually or logically, related to the robberies. The district court disagreed. The 7th Circuit reviewed the district court’s decision “deferentially” rather than de novo and affirmed.

**Holding:** Deferential review was the appropriate standard for assessing a district court’s decision as to whether to consider prior convictions as functionally consolidated for purposes of the career offender statute. The trial judge was in the best position to evaluate the case-specific details needed to make a functional consolidation decision. See Koon v United States, 518 US 81, 98-99 (1996). Uniformity in appellate review of sentencing decisions is best achieved through the United States Sentencing Commission, not de novo review. Cf Braxton v United States, 500 US 344, 347-348 (1991). Judgment affirmed.

**Death Penalty (Penalty Phase)**

**DEP; 100(120) (155[oo])**

**Sentencing (Instructions to Jury)**

**SEN; 345(45)**

**Shafer, Jr. v South Carolina, No. 00-5250, 3/20/01**

The petitioner was convicted of murder in state court. During the sentencing phase, the jury had two options once they unanimously agreed on the presence of a statutory aggravator: death or life without parole. The defense called as a witness. The defense theory relied on using the baby-sitter as an alternative suspect. In court, she asserted her 5th Amendment privilege “although she had done nothing wrong.” The court granted her transactional immunity from prosecution. The witness’s testimony revealed that she had no involvement in the baby’s death. On appeal, the conviction was reversed on unrelated grounds. The Ohio Supreme Court affirmed on the ground that the witness had no valid 5th Amendment privilege and the wrongful grant of immunity prejudiced the respondent.

**Holding:** The witness’s assertion of the 5th Amendment privilege was appropriate where the witness had “‘reasonable cause to apprehend danger from a direct answer.’” Hoffman v United States, 341 US 479, 486 (1951). The fact that a witness claimed innocence did not deprive her of the privilege. Grunewald v United States, 353 US 391 (1957). As an alternative suspect, the witness had reasonable grounds to assert the privilege. Judgment reversed.

**Ohio v Reiner, No. 00-1028, 3/19/01**

During the respondent’s trial for involuntary manslaughter of his infant son, the family baby-sitter was
argued that evidence of future dangerousness, such as post-arrest assault, had been introduced, requiring the court to instruct the jury that a life sentence carries no possibility of parole. See Simmons v South Carolina (512 US 154 [1994]). The court declined, because future dangerousness was not argued by the prosecution. The trial court instructed the jury that “life imprisonment means until the death of the offender.” The jury returned a verdict of death. The South Carolina Supreme Court affirmed, finding Simmons inapplicable to the state’s current sentencing scheme, which eliminated parole for capital life sentences.

**Holding:** The state Supreme Court misapplied Simmons. That case says that “Where the State puts the defendant’s future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.” Under the state’s new sentencing scheme, there were three options for capital sentencing when the jury began deliberating: 1) death, 2) life without the possibility of parole, or 3) a mandatory minimum thirty year sentence. Once the jury found that statutory aggravators existed, the choice was narrowed to death or life without the possibility of parole. When future dangerousness is at issue under South Carolina’s new capital sentencing scheme, due process requires that the jury be told that a life sentence carries no possibility of parole. Whether future dangerousness was in fact raised is left to the state court to decide. Judgment reversed.

**Dissent:** [Scalia, J] Simmons should be limited to its facts, not extended.

**Dissent:** [Thomas, J] Given the instructions regarding what life imprisonment meant, the jury’s later question referred not to parole eligibility on a life sentence, but to what would happen if no aggravator had been found.

**Search and Seizure (Consent SEA; 335(20[f]) (42)**

[Coercion and Other Illegal Conduct] (General)

**Women’s Rights (General) WOM; 392(10)**

**Ferguson v City of Charleston, No. 99-936, 3/21/01**

The respondent, a public hospital, screened prenatal patients for cocaine use and worked with law enforcement to prosecute them for child abuse. The petitioners, obstetrical patients at the hospital arrested for cocaine use, filed suit claiming that the warrantless and nonconsensual drug tests conducted for criminal investigatory purposes were unconstitutional. At trial, the jury found they had consented. The 4th Circuit affirmed without addressing consent, holding that the searches were valid under the “special needs” exception for searches conducted for non-law-enforcement purposes.

**Holding:** The respondent’s policy had the immediate objective of generating evidence for law enforcement purposes. The primary and direct purpose of the policy was ensuring the use of law enforcement means, thus removing the policy from the “special needs” doctrine despite the long-term goal of getting patients into drug treatment. The 4th Amendment’s prohibition “against nonconsensual, warrantless, and suspicionless searches” necessarily applies to such a policy.” Chandler v Miller, 520 US 305 (1997). Taking of urine samples by state agents to test for the presence of cocaine constituted a search even before being reported to the police. “The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with non-medical personnel without her consent.” For this decision it is assumed that the searches were conducted without informed consent. Judgment reversed, case remanded.

**Concurrence:** [Kennedy, J] None of the special needs precedents sanctioned routine inclusion of law enforcement in designing the police and in using arrests to implement the system designed for the special needs objectives.

**Dissent:** [Scalia, J] The urine samples were not forcibly taken. “There was no unconsented search in this case. And if there was, it would have been validated by the special-needs doctrine.”

**Confessions (Counsel)**

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

**Texas v Cobb, No. 99-1702, 4/2/01**

Police questioned the respondent about a burglary case, and he confessed to the burglary but denied knowledge about the disappearance of two residents from the building. A lawyer was appointed to represent the respondent on the burglary charge. Later, the police arrested the respondent for murder of those missing. He confessed after waiving his Miranda rights. Convicted of murder and sentenced to death, he appealed claiming that the confession was obtained in violation of his right to counsel, which had attached on the burglary case. The Texas Court of Criminal Appeals reversed the conviction.

**Holding:** The 6th Amendment right to counsel is offense specific. McNeil v Wisconsin, 501 US 171 (1991). It did not include factually related offenses. The requirements of Miranda v Arizona (384 US 436 [1966]) were met and the police were not precluded from speaking with a suspect already charged with other offenses. Burglary and murder were sufficiently distinct under Texas law to meet the test for distinguishing offenses, ie, “whether each provision requires proof of a fact which the other does not.”
The police questioning did not violate the petitioner’s right to counsel. Judgment reversed.

**Concurrence:** [Kennedy, J] The conclusion here was reached without reaffirming the questionable decision in *Michigan v Jackson* (475 US 625 [1986]).

**Dissent:** [Breyer, J] “Offense” should include “criminal acts that are ‘closely related to’ or ‘inextricably intertwined with’ the particular crime set forth in the charging instrument.” The decision here undermines the 5th Amendment.

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**Constitutional Law (General)**

| CON; 82(52) |

**Prisoners (Correspondence)**

| PRS 1; 300(6) |

**Speech, Freedom of (General)**

| SFO; 353(10) |

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**Shaw v Murphy, No. 99-1613, 4/18/01**

The respondent, an inmate law clerk in high-security custody, sent a letter to a fellow inmate, in maximum security, offering his opinion about an assault case filed by a guard. The letter was intercepted by a prison officer, and the respondent was cited for violating prison rules prohibiting correspondence between inmates at different security levels. The respondent filed a 42 USC 1983 class action, alleging a violation of the 1st Amendment right to provide legal assistance to other inmates. The district court dismissed his constitutional claim. The 9th Circuit reversed, finding that prisoners have a 1st Amendment “right to assist other inmates with their legal claims.”

**Holding:** The 1st Amendment does not support a special right of inmate-to-inmate legal assistance that would add a new level of protection to inmate correspondence. A prison regulation that impinges on inmates’ constitutional rights is valid if “it is reasonably related to legitimate penological interests.” *Turner v Safley*, 482 US 78, 89 (1987). An alteration of the *Turner* standard that would entail additional federal-court oversight is rejected, leaving prison management to prison officials. Affording special protection to legal advice communicated between inmates would frustrate the ability of prison officials to address the problems of prison administration, like discipline. *Johnson v Avery*, 393 US 483, 488, 490 (1969). The respondent must meet a heavy burden of overcoming the presumption that prison officials acted within their broad discretion. Judgment reversed, case remanded for further proceedings.

**Concurrence:** [Ginsberg, J] The remand should not impede the respondent from reasserting claims so far untouched, such as allegations that the rules under which he was disciplined are vague and overbroad as applied.

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**Atwater v City of Lago Vista, No. 99-1408, 4/24/01, 532 US ___**

A Texas police officer arrested the petitioner for misdemeanor seat belt violations involving herself and her children, punishable by fine only, and took her into custody. The petitioner pled no contest and paid a fine. She subsequently filed a 42 USC 1983 action based on a violation of 4th Amendment rights. The district court dismissed the lawsuit as lacking in merit. A 5th Circuit Court of Appeals panel reversed, concluding that the arrest was an unreasonable seizure. The circuit court sitting *en banc* vacated the panel’s decision.

**Holding:** The 4th Amendment does not prohibit a warrantless arrest for a minor offense, such as a fine-only seat belt violation that does not threaten violence, committed in the officer’s presence. See *United States v Watson*, 423 US 411, 420 (1976). Under a rule addressing only the facts of this case, the petitioner might prevail, given that “the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.” However, the arrest was not constitutionally unreasonable. The petitioner has not shown “an epidemic of unnecessary minor-offense arrests, did not dispute probable cause, nor show that the arrest was conducted in an extraordinary manner unusually harmful to her privacy interests. See *Whren v US*, 517 US 806, 818 (1996). Police cannot be expected to know the details of often complex sentencing schemes, so a line between “jailable” and “fine-only” offenses is rejected. See *Berkemer v McCarty*, 468 US 420, 431 (1984). Judgment affirmed.

**Dissent:** [O’Connor, J] The availability of citations to promote a State’s interests when a fine-only offense has been committed does not support a rule which deems a full custodial arrest to be reasonable in every circumstance. See *Wyoming v Houghton*, 526 US 295, 300 (1999). A citation should be required for fine-only offenses unless the officer is “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion” of a full custodial arrest. See *Terry v Ohio*, 392 US 1, 21 (1968).

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**Prior Convictions (Right to Challenge Generally)**

| PRC; 295(21) |

**Sentencing (Enhancement)**

| SEN; 345(32) |

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**Lackawanna County District Attorney v Coss, No. 99-1884, 4/25/01, 532 US ___**, 149 LEd2d 608

In 1986, the petitioner was convicted on misdemeanor charges. He filed a petition for state post-conviction relief, alleging ineffective assistance of counsel;
the Pennsylvania courts have never ruled on the petition. In 1990, after he had served the full sentences for his 1986 convictions, he was convicted in state court of aggravated assault. He successfully challenged his sentence on direct appeal, but on remand the court imposed the same sentence, making reference to, *inter alia*, his “prior criminal record.” The petitioner challenged this in *habeas corpus* proceedings, 28 USC 2254, arguing that the 1986 convictions were the result of ineffective counsel. The federal district court found that the sentencing judge had considered the 1986 convictions, but that the petitioner had not been prejudiced by his 1986 counsel’s ineffectiveness. The 3rd Circuit found the ineffectiveness had been prejudicial and remanded.

**Holding:** A sentence cannot be challenged in *habeas corpus* under 2254 on the ground that it was enhanced based on an allegedly unconstitutional prior convictions unless there was a violation of the right to counsel in securing those convictions. The policy considerations informing the treatment of 28 USC 2255 motions—ease of administration and the interest in promoting the finality of judgments (*Daniels v United States*, 532 US ___ [2001])—apply equally in the 2254 context. The 1986 convictions here did not adversely affect the sentence that is the subject of the *habeas* petition, thus taking the case outside the right to counsel exception. Judgment reversed.

**Dissent:** [Souter, J] *Daniels* is repeated. Here, the issue of whether the convictions to which the defendant raised never-resolved challenges adversely affected the later sentence was not adequately determined below. The matter should be remanded.

**Dissent:** [Breyer, J] Whether the consideration of the 1986 convictions was harmless has not been determined. The case should be remanded.

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Prior Convictions (Right to Challenge Generally)

Sentencing (Enhancement)

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**Daniels v United States**, No. 99-9136, 4/25/01, 532 US ___, 149 LEd2d 590

The petitioner, convicted in federal court for firearm possession, received an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA). After an unsuccessful direct appeal, he filed for relief under 28 USC 2255, asserting that his sentence was based in part on convictions that were themselves unconstitutional, because they were based on inadequate guilty pleas or ineffective assistance of counsel. The 9th Circuit affirmed a denial of the petitioner’s motion.

**Holding:** Prior convictions cannot be collaterally attacked at federal sentencing proceedings unless there was a violation of the right to counsel in securing those convictions. *Custis v United States*, 511 US 485, 490-497 (1994). The considerations supporting that conclusion—ease of administration and the interest in promoting the finality of judgments—apply equally in the 2255 context.

A defendant may pursue still-available avenues of direct or collateral review as to prior convictions used to enhance a federal sentence, but if a prior conviction is not open to attack in its own right the defendant has no recourse. Only if the defendant claims the prior conviction was obtained in violation of the right to counsel, and that claim was raised at the federal sentencing proceeding in which the prior was used for enhancement, can the prior be attacked via 2255. This case does not present the question of whether a defendant could use a 2255 motion to challenge a prior conviction where “no channel of review was actually available to a defendant with respect to [that] conviction, due to no fault of his own.” Judgment affirmed.

**Concurrence:** [Scalia, J] The text of 2255 does not cover a claim that an enhancement of a federal sentence with prior convictions violates due process.

**Dissent:** [Breyer, J] Congress intended for courts to read the silences in federal sentencing statutes as permitting challenges to sentence-enhancing prior convictions at the time of sentencing.
decision-making that brought the law into conformity with reason and common sense. Further, it never served as a ground for a decision in a Tennessee murder prosecution. While the two Clauses under discussion do safeguard common interests, that does not justify applying the prohibitions of the Ex Post Facto Clause (which expressly applies only to legislatures) to courts through the rubric of due process.

Dissent: [Stevens, J] The majority has undervalued the threat to liberty posed by retroactive changes in the criminal law.

Dissent: [Scalia, J]: The petitioners did not have fair warning that the state courts would abolish the year and a day rule, affecting “one of the elements of the crime of murder,” and then apply it retroactively. “The ratio decidendi of Boute was that the principle applied to the legislature through the Ex Post Facto Clause was contained in the Due Process Clause insofar as judicial action is concerned.”

Dissent: [Breyer, J] The majority’s basic approach is correct, but its application of due process is wrong; the defendant had no fair warning of the change in law.

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Defenses (Necessity) DEF; 105(43)

Narcotics (Marijuana) NAR; 265(40)

United States v Oakland Cannabis Buyers’ Cooperative, No. 00-151, 5/14/01, 532 US ___

California’s Compassionate Use Act of 1996 permitted the respondent to cultivate and distribute marijuana for medical purposes. The petitioner maintained that such activities violated the Federal Controlled Substances Act (CSA), 21 USC 801, and obtained an injunction. The respondent continued to operate and received a contempt citation from the court. An attempt to modify the injunction to permit medically necessary cases was rejected, but on appeal, the 9th Circuit recognized the defense of medical necessity and remanded the case for the injunction to be modified. The modified injunction was appealed.

Holding: The CSA provides only one exception to the prohibitions on manufacturing and distributing marijuana—government-approved research projects—which was not available to the respondents. The argument that there is an implied common law defense of medical necessity is rejected; the defense of necessity cannot succeed when the legislature itself has made a determination of values. While courts enjoy some discretion at equity to consider the public interest or conveniences of the parties, they cannot ignore Congress’s judgment expressed in legislation. Virginian R.Co. v Railway Employees, 300 US 515, 551 (1937). In any case, such considerations are limited to evaluating how such interests or conveniences are affected by the selection of an injunction over other enforcement mechanisms. Judgment reversed.

Concurrence: [Stevens, J] The scope of the decision is limited to manufacturers and distributors. This case does not involve patients cultivating and possessing marijuana upon a physician’s recommendation, making the majority’s overbroad language dicta.

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Constitutional Law (General) CON; 82(20)

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

Bartnicki v Vopper, Nos. 99-1687 and 99-1728, 5/21/01, 532 US ___

During negotiations between a teachers’ union and the local school board, an unknown person intercepted a cell phone conversation between the chief union negotiator and the union president (hereinafter petitioners). A tape of the conversation was broadcast by two radio stations and published in local newspapers. The disclosures violated wiretapping statutes: the respondents knew or had reason to know that the phone call was illegally intercepted. 18 USC 2511(1)(c). The issue was the constitutionality of the statutes’ application in such circumstances (ie lawful access to, and disclosure of, illegally intercepted information of public concern). On interlocutory appeal, the 3rd Circuit found application of the statutes violated the 1st Amendment.

Holding: It has repeatedly been held that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order.” See Smith v Daily Mail Publishing Co., 443 US 97, 103 (1979); Florida Star v BJF, 491 US 524 (1989). The interests served by 2511(1)(c)—removing an incentive to intercept private conversations and ensuring privacy of communications—did not justify its restrictions on speech and must yield to the interest in publishing matters of public importance. Reasoning parallel to that employed in New York Times Co. v Sullivan, 376 US 254 (1964) supports a holding that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.” The statutes as applied violated the 1st Amendment. Judgment affirmed.

Concurrence: [Breyer, J] The Court is not creating a “public interest” exception that swallows the statute’s privacy-protecting general rule.

Dissent: [Rehnquist, CJ] The interest in individual privacy “must embrace the right to be free from surreptitious eavesdropping on, and involuntary broadcast of, our cellular telephone conversations.”
Booth v Churner, No. 99-1964, 5/29/01, 532 US ___

The petitioner, a Pennsylvania state prison inmate, filed a 42 USC 1983 action in federal district court claiming that prison authorities assaulted him, used excessive force, and denied medical attention to treat his injuries, in violation of the 8th Amendment. He asked for an injunction, transfer to another facility, and money damages. He had originally filed a grievance, which was denied, and he did not seek administrative review. The court dismissed the complaint for failing to meet the grievance system did not allow for monetary reparations.

Holding: The administrative exhaustion requirements of the PLRA did not allow an exception for cases seeking monetary relief alone. The statute states that “no action shall be brought with respect to prison conditions . . . until such administrative remedies as are available are exhausted.” 42 USC 1997e(a). The petitioner pointed to exceptions granted by other courts in cases where only money damages were sought; Congress may have thought the Court shortsighted in cases such as McCarthy v Madigan, 503 US 140 (1992). In examining the statutory language, it is clear that “exhausted” refers to processes, not forms of relief. Statutory history confirms that “exhausted.” 42 USC 1997e(a). The petitioner pointed to exceptions granted by other courts in cases where only money damages were sought; Congress may have thought the Court shortsighted in cases such as McCarthy v Madigan, 503 US 140 (1992). In examining the statutory language, it is clear that “exhausted” refers to processes, not forms of relief. Statutory history confirms that Congress did not intend for prisoners to circumvent grievance proceedings by limiting their requests for relief. Judgment affirmed.

Holding: The state supreme court erred by relying upon the subjective motivation of the arresting officer, which was declared irrelevant in Whren. Whren held that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis. 517 U.S. at 813.” The state court also erred by claiming that it could interpret the federal constitution more broadly than the US Supreme Court to provide more rights. Oregon v Hass, 420 US 714 (1975). Judgment reversed.

Arkansas v Sullivan, No. 00-262, 5/29/01, 532 US ___

A police officer stopped the respondent for speeding. During the encounter the officer remembered “intelligence” connecting the respondent to narcotics. After arresting the respondent for traffic violations and carrying a weapon (a roofing hatchet), the officer conducted an inventory search of the car, finding drugs and paraphernalia. The respondent successfully moved to suppress the evidence because the traffic stop was a pretext. The prosecution claimed that the court relied upon the police officer’s subjective motivation contrary to Whren v United States, 517 US 806 (1996). The Arkansas Supreme Court declined to follow Whren.

Holding: Imperfections in noticing an appeal are not fatal where “no genuine doubt” exists as to who is appealing, from what judgment, and to which court. See Smith v Barry, 502 US 244, 245, 248-249 (1992); Foman v Davis, 371 US 178, 181 (1962). Federal Rule of Appellate Procedure 4(a)(1) and Federal Rule of Civil Procedure 11(a) require a handwritten signature on the notice of appeal. In Mattingly v Farmers State Bank, 153 F3d 336 (6th Cir 1998), the 6th Circuit held that the omission of a signature cannot be cured by giving the appellant an opportunity to sign after the time to appeal has expired. However, Civil Rule 11(a) says an “omission of the signature” may be “corrected promptly after being called to the attention of the attorney or party”. The omission here was not a jurisdictional defect and was therefore curable. Judgment reversed.
Florida v Thomas, No. 00-391, 6/5/01, 532 US ___

The respondent drove to a home where the police were making drug arrests. He stepped out of the car and walked toward the back; a police officer asked him for identification and connected him to an outstanding warrant. The respondent was placed in custody inside the house while the officer searched the car, discovering small bags of drugs. The trial court granted a motion to suppress the evidence. The 2nd District Court of Appeal reversed, finding the search valid under New York v Belton, 453 US 454 (1981). The Florida Supreme Court held that Belton was inapplicable and remitted the case to the trial court to apply the rule in Chimel v California, 395 US 752 (1969) and conduct additional fact-finding.

Holding: The parties did not raise any question of jurisdiction, but that issue must be determined. The state supreme court’s judgment was not final, so the case must be dismissed for lack of jurisdiction. 28 USC 1257(a); Duquesne Light Co. v Barasch, 488 US 299 (1989). Finality in a criminal case “is defined by a judgment of conviction and the imposition of a sentence.” Fort Wayne Books Inc. v Indiana, 489 US 46, 54 (1989). The Florida court’s decision did not fit into any of the exceptions for reviewing nonfinal judgments: 1) federal issue is conclusive; 2) federal issue will survive despite the outcome of further state-court proceedings; 3) federal issue decided but unreviewable in later proceedings; and 4) federal issue decided by state courts and no longer controlling the outcome of the case but failure to review may result in erosion of federal policy. Cox Broadcasting Corp. v Cohn, 420 US 469 (1975). Writ of certiorari dismissed.

Penry v Johnson, No. 00-6677, 6/5/01, 532 US ___

The death sentence imposed following the first penalty phase of the petitioner’s capital murder trial in Texas was reversed because the jury was not adequately instructed to consider mitigating evidence of mental retardation and child abuse. The jury was denied the opportunity to express “a reasoned moral response to the defendant’s background, character, and crime.” Penry v Lynaugh, 492 US 302, 319 (1989) (Penry I). In the second penalty phase, the prosecutor elicited information from a psychiatric report from an old unrelated case which concluded that the petitioner would be a danger to others if released. The court's instruction about mitigation did not refer to mental retardation or child abuse. The jury returned a verdict of death. The state high court affirmed, and the 5th Circuit Court of Appeals denied a certificate of appealability after the federal district court denied habeas relief.

Holding: Finding that admission of the future dangerousness evidence from a psychiatric report from an earlier unrelated case did not violate the petitioner’s 5th Amendment privilege cannot be said to be an unreasonable application of precedent. This case is distinguishable from Estelle v Smith, 451 US 454 (1981). This petitioner had placed his mental condition in issue and selected the psychiatrist, the information was elicited during cross-examination of a defense expert, and the report was made in a non-capital case where future dangerousness was not an issue. However, the “mere mention of ‘mitigating circumstances’” during instructions to a capital sentencing jury was insufficient under Penry I and the 8th Amendment. The instructions were ineffective and illogical. To give weight to the mitigating evidence required jurors to violate their oath to render a “true verdict” as to the three special issues that control whether a death sentence was to be given. Judgment affirmed in part, reversed in part, and remanded.

Dissent: [Thomas, J] The Texas Court of Criminal Appeals decision upholding the death sentence was objectively reasonable and compelled by precedent and common sense.

Search and Seizure (Electronic SEA; 335(30) (35)(s)) Searches (Entries and Trespasses [Visual Entries])

Kyllo v United States, No. 99-8508, 6/11/01, 532 US ___

Federal agents used a thermal-imaging device to scan the petitioner’s home to detect heat images of high-intensity lamps required to grow marijuana indoors. The scans were conducted across the street from the petitioner’s home. Based on the thermal imaging, informants’ tips, and utility bills, a search warrant was issued. Marijuana plants were found and the petitioner was charged with manufacturing marijuana. His motion to suppress was denied and he entered a conditional plea of guilty. The district court did not find thermal imaging invasive. The 9th Circuit Court of Appeals affirmed.

Holding: Thermal imaging surveillance was intrusive and violated the petitioner’s right to privacy in his home under the 4th Amendment. The threshold question of whether a search occurred in a private home depends upon whether “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and society’s willingness “to recognize that expectation as reasonable.” California v Ciraolo, 476 US 207, 211 (1986). The use of sense-enhancing technology to gain information about the interior of a home was a physical “intrusion into a constitutionally protected area.” Silverman v US, 365 US 505, 510-512 (1961). “Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would pre-
viously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.” Judgment reversed.

Dissent: [Stevens, J] Heat waves enter the public domain if and when they leave a building.

**US Supreme Court continued**

**Detainers (General)** DEF; 106(10)

**Federal Law (Procedure)** FDL; 166(30)

**Alabama v Bozeman, No. 00-492, 6/11/01, 532 US ___**

The petitioner, the State of Alabama, sought temporary custody of the respondent, a federal prisoner serving a sentence in Florida, to arraign him and secure appointment of counsel on violations of Alabama state law. Local officials transported the respondent to Alabama, where he appeared in local court, was appointed counsel and then transported back to Florida the same day. A month later, respondent was brought to Alabama for trial. The respondent moved to dismiss the case because he was returned to federal prison before trial violating article IV(e) of the Interstate Agreement on Detainers (IAD). The court denied the motion and the respondent was convicted. The Alabama State Supreme Court reversed, based on the literal language of the IAD.

**Holding:** The “antishuttling” provision of the IAD, article IV(e), prohibits returning a prisoner to the sending state before holding a trial in the receiving state, regardless of the reason. The goals behind the IAD were to expedite delivery of prisoners to the receiving state for trial and to minimize interruption of their rehabilitation. Article IV(e) states that “If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner’s being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.” The language of the IAD, “shall,” was absolute and mandatory, not technical. Anderson v Yungkau, 329 US 482, 485 (1947). There were no exemptions for short stays for specific purposes, such as arraignment. Judgment affirmed.

**New York State Court of Appeals**

**Accomplices (General)** ACC; 10(22)

**Jurisdiction (General)** JSF; 227(3)

**People v Kassebaum, No.15, 2/15/01**

The defendant was convicted of first-degree attempted possession of heroin and second-degree conspiracry to supply. He challenged the jurisdiction as to the attempted possession offense, which had been consummated in Massachusetts; the prosecutor had relied on significant conduct in New York. The Appellate Division affirmed.

**Holding:** An attempt offense requires conduct which comes “dangerously near” commission of the complete crime: “a person who arranges for the delivery of drugs and actually examines them has come sufficiently close to the completed crime to qualify as an attempt.” See People v Acosta, 80 NY2d 665, 670; Penal Law 110.00. The defendant and his accomplices here came “sufficiently close.” They had been arrested after an aborted deal with an undercover DEA officer, had sufficient funds to purchase the heroin in question, had been afforded an opportunity to test it, and had declined on the basis that it was of insufficient purity. Conduct within the state sufficient to establish an element of the offense can support jurisdiction. CPL 20.20(1)(a); see People v Stokes, 88 NY2d 618, 624. The jury could reasonably infer that the CPL 20.20(1)(a) “element” requirement was met beyond a reasonable doubt where the evidence as to intent was “concrete actions … toward accomplishing the purchase of drugs with the intent to possess them in New York.” Under New York’s concept of accomplice liability, jurisdiction over all accomplices could be predicated on the conduct of the accomplice who had directed the others’ actions from New York. See People v Guidice, 83 NY2d 630, 636; People v Cullen, 50 NY2d 168 distinguished. Order affirmed.
are significant factors to consider, “a penalty only ‘shocks one’s sense of fairness’” where there is “‘grave moral turpitude and grave injury to the agency involved or to the public weal.’” Matter of Pell v Board of Educ., 34 NY2d 222, 235. The one officer’s acts of issuing false firearms certificates could have jeopardized public safety. That the other officer forfeited, for use of excessive force, 10 vacation days after opting for an administrative trial while another officer forfeited only five days for the same behavior is foreseeable given the plea bargaining process. People v Pena, 50 NY2d 400, 412. Orders reversed, petitions dismissed.

Search and Seizure (Plain View Doctrine) (Search Warrants Issuance)

People v Brown, No. 23, 3/27/01

Police obtained a warrant to search for four particular items and “any other property the possession of which would be considered contraband.” Executing officers did not find any of the enumerated items, but did find weapons in plain view. The Supreme Court found that the overbroad language could be severed so that police could be said to be acting lawfully when seizing the weapons. The Appellate Division affirmed.

Holding: The portion of the warrant authorizing a search for any contraband violated the 4th Amendment, because it is not sufficiently specific as to leave no discretion to the executing officer. People v Darling, 95 NY2d 530, 537. “The phrase is obnoxious to the principles of the Fourth Amendment and has no valid place in search warrants.” However, the portion of the warrant authorizing a search for four particular items was valid. When a search warrant is partially invalid, only evidence acquired under the invalid portion need be suppressed. People v Hanson, 38 NY2d 17. To determine if evidence was acquired under a valid portion of a warrant, a court should first sever the invalid directive, then apply the plain view doctrine to the remainder. Cases such as People v Giordano (72 AD2d 550), under which the plain view doctrine is inapplicable when a warrant contains an invalid directive under which seized evidence fits, should not be followed. The weapons here came under the plain view doctrine because they were found in a place where one reasonably would look for the enumerated items of the warrant and before all the enumerated items were found. Order affirmed.

Freedom of Information (General) Records (Access)

FOI; 177(20) REC; 327(5)

Matter of Fappiano v NYC Police Dept, Nos. 30, 31, 32, 3/27/01

Holding: The petitioners sought to compel the respondent law enforcement agencies to comply with Freedom of Information Law (FOIL) requests for records relating to convictions for sexual offenses; they needed the documents for collateral review. The police agencies refused, citing Civil Rights Law 50-b(1), which permits the non-disclosure of material that would tend to identify the victim of a sexual offense. The petitioners sought to rely on the exception in 50-b(2), allowing disclosure to persons “charged” with a sexual offense against that victim. The Appellate Division found that the petitioners were similarly situated to persons charged with a crime and seeking to mount a defense. The natural and obvious meaning of the term “charged” placed the petitioners outside the scope of the statute: “[a] person charged with a crime is distinctly different from one who already has been convicted”. Nor did the legislative history support the petitioners’ interpretation. The reason for allowing access was to protect the constitutional right of confrontation: CPL 440 motions and habeas corpus review are not of constitutional dimensions. However, the police did not meet the burden of showing that the statutory privilege of Civil Rights Law 50-b applied to each of the records sought. Section 50-c mandates caution, but “does not justify a blanket denial of a request for any documents relating to a [sexual offense]”. Orders reversed, matters remitted.

Civil Practice (General) Jails (Civil Liabilities)

CVP; 67.3(10) JAL; 212(3)

Rangolan v County of Nassau, No. 26, 3/29/01

The plaintiff was seriously beaten while incarcerated at Nassau County Correctional Center. Contrary to a warning on his file, he had been housed in the same dormitory as an inmate against whom he had informed. The County sought to apportion liability for negligence between itself and that other inmate, citing CPLR 1601(1), which modifies the common law rule of joint and several liability by limiting a joint tortfeasor’s liability for non-economic losses to its proportionate share where it is no more than 50% at fault. The federal district court concluded that CPLR 1602(2)(iv) precludes apportionment where liability arises from a breach of a non-delegable duty. The 2nd Circuit Court of Appeals certified the question to the Court of Appeals.

Holding: CPLR 1602(2)(iv) is not an exception to the rule of apportionment. Reading it as an exception would impose joint and several liability on the low-fault, deep-pocket defendants the statute was meant to protect. The interpretations of courts adopting such an approach were incorrect. See Nwaru v Leeds Management Co., 236 AD2d 252; Cortes v Riverbridge Realty Co., 227 AD2d 430.
CPLR 1602(2)(iv) is a savings provision that preserves principles of vicarious liability. It ensures that a defendant is liable to the same extent as its delegate or employee, and that CPLR article 16 does not alter this liability. The answer to the certified question is that CPLR 1602(2)(iv) does not preclude a defendant from seeking apportionment between itself and other tortfeasors for whose liability it is not answerable.

**Discovery (General)**

DSC; 110(12)

**Motions (Suppression)**

MOT; 255(40)

**People v Jones, No. 27, 3/29/01**

The defendant was arrested in a buy and bust operation, and ultimately sentenced to eight to 16 years for third-degree sale of a controlled substance. He sought to suppress physical evidence resulting from his arrest. The purchasing officer’s description of the alleged seller had not been disclosed to the defendant. The defense alleged two possible deficiencies in the description given by the purchasing officer to the back-up team: that the defendant may not have matched the description but was arrested and searched nonetheless, or the description may have been so general as to also apply to other persons present at his arrest. Summary denial of suppression was upheld by the Appellate Division on the basis that the defendant’s allegations were insufficient to support his claim. CPL 710.60(1); People v Mendoza, 82 NY2d 415.

**Holding:** Allegations of deficiencies in the description relied upon to identify and arrest a defendant may support a challenge to probable cause as grounds for suppression. While the defendant could not be required to allege facts about which he had no knowledge, this did not relieve him of the burden to supply the court with any facts he did possess pertinent to his challenge. He could submit facts as to his own appearance, which would have allowed a Dott comparison after disclosure of the description radioed to the arresting officer. See People v Dott, 61 NY2d 408. The defendant could also submit the general description of other persons in the vicinity at the time of the arrest.

As a footnote, “suppression motions would be more expeditiously handled if the People were to disclose the description outright to a defendant within the time in which a motion to suppress must be made.” Order affirmed.

**Sentencing (Persistent Felony Offender)**

SEN; 345(58)

**Sex Offenses (Sentencing)**

SEX; 350(25)

**First Department**

**Juries and Jury Trials (General)**

JRY; 225(37) (55) (50) (Selection) (Qualifications)

**People v Burgess, No. 3149, 1st Dept, 2/1/01**

The defendant was convicted, after a jury trial, of second-degree assault and third-degree criminal possession of a weapon. Over objection, the court designated the second-drawn juror to be a foreperson after the first-drawn juror refused to serve in that capacity.

**Holding:** Although CPL 270.15 (3) requires the first-drawn juror to be designated as the foreperson, the designation of the second-drawn juror did not cause any prejudice. The law recognizes no special function for the foreperson other than acting as the jury’s spokesperson. See People v Marchese, 261 AD2d 104 lv den 93 NY2d 1022. Furthermore, the court properly denied the defendant’s mistrial motion when, during deliberations, one juror had health problems and another expressed concerns about a personal problem creating time constraints. The court inquired into the concerns of both jurors and determined that the concerns had abated and that both were fully capable of continued service. See People v Page, 72 NY2d 69. Judgment affirmed. (Supreme Ct, New York Co [Figueroa, J])

**Arrest (Warrantless)**

ARR; 35(54)

**Search and Seizure (Motions to Suppress)**

SEA; 335(45)

**People v Jie, No. 3211, 1st Dept, 2/6/01**

**Holding:** The defendant was convicted after a jury trial of four counts of first-degree kidnapping. The
court properly denied suppression of a statement made by the defendant at the prosecutor’s office. The prosecution sustained its burden of showing that the statement was attenuated from the taint of an arrest which violated Payton v New York (445 US 573 [1980]). See Brown v Illinois, 422 US 590 (1975); People v Harris, 77 NY2d 434. The record disclosed a seven-hour lapse of time between the defendant’s warrantless arrest and interrogation. Furthermore, there was a break of three and a half hours between an initial statement at police headquarters, which was suppressed, and the second interrogation, which occurred at the prosecutor’s office. At the second interrogation, a different translator was present, the questioning was not part of a continuous interrogation begun at police headquarters, and no reference was made to the earlier session. The court also correctly found that the Payton violation was not flagrant, because the police were unaware, and had no reason to believe, that the defendant had an expectation of privacy at his girlfriend’s home. The court properly admitted evidence regarding the defendant’s bad acts because they provided information that explained the relationship between the defendant and a cooperating witness who approached him with the kidnapping scheme. See People v Dauphinee, 240 AD2d 222 lv den 90 NY2d 892. (Supreme Ct, New York Co [Fried, J])

Civil Practice (General) CVP; 67.3(10)

Housing (General) HOS; 186(15)

Application of Romero v Martinez, No. 3105, 1st Dept, 2/8/01

The petitioner has lived in a federally funded housing development for 23 years. Her son unlawfully entered another apartment in the development and caused physical injury to a resident. The respondent housing authority charged the petitioner with nondesirability and breach of rules and regulations. In lieu of a hearing, the petitioner entered into a stipulation agreement that the petitioner would agree that a family member proven to be a danger to others not be allowed to reside in or visit the apartment. Lastly, the penalty was not excessive where the evidence permits an inference that the barred individual slept in the apartment overnight with the petitioner’s knowledge and consent. Determination confirmed, petition denied, and proceeding dismissed. (Article 78 transferred from Supreme Ct, New York Co [Lehner, J])

Motor Vehicles (General) MVH; 260(17)

People v Sikorski, No. 2964, 1st Dept, 2/22/01

Holding: The court erred by finding that the prosecutor established that the defendant committed first-degree aggravated unlicensed operation of a motor vehicle. Such offense requires that the defendant operate a vehicle with 10 or more license suspensions in effect (Vehicle and Traffic Law 511[3][a][ii]) and the abstract of the defendant’s driving record introduced as evidence was not properly certified. CPLR 4540 [b]; see People v Smith, 258 AD2d 245 lv den 94 NY2d 829. The evidence was sufficient to establish second-degree aggravated unlicensed operation of a motor vehicle (see Vehicle and Traffic Law 511 [2][a][iv]), where evidence of eight notices of suspension were not challenged. Judgment modified, sentence vacated and matter remitted for resentencing, and otherwise affirmed. (Supreme Ct, Bronx Co [Sheindlin, J])

Defenses (Justification) DEF; 105(37)

Homicide (Murder [Defenses] HMC; 185(40[a] [g]) [Degrees and Lesser Offenses])

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

People v Roberts, No. 3000, 1st Dept, 2/22/01

Holding: The defendant was convicted, after a jury trial on a second-degree murder charge, of first-degree manslaughter. The jurors were instructed that a unanimous guilty verdict on a greater charge precluded consideration of any lesser charges and on the defense of justification. The trial court erred by failing to instruct the jury that a finding of not guilty of the greater charge, based on the defense of justification, precluded consideration of any lesser charges. See People v Castro, 131 AD2d 771, 773. There is no way to determine whether the acquittal
on the murder counts was based on a finding of justifica-
tion. Judgment reversed, indictment dismissed without
prejudice to represent appropriate charges (no higher
than first-degree manslaughter) to another grand jury.
(Supreme Ct, New York Co [Shea, J])

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

People v Labode, No. 3328, 1st Dept, 2/22/01

Holding: The defendant was convicted by guilty
plea of first-degree attempted criminal sale of a controlled
substance. His suppression motion was properly denied
because the arresting officer, who knew the defendant and
his drug-selling activities after surveillance for more than
a year, had probable cause to arrest him. The defendant’s
conviction should be modified because at the plea pro-
ceeding both sides mistakenly believed that the defendant
was pleading to a class A-II felony when he actually pled
to a class A-I felony. The defense asserted on appeal that
the matter should be remanded for imposition of the high-
er sentence required for an A-I felony, thereby entitling
the defendant to withdraw his plea. However, the effect of
the error was to convict the defendant of a higher degree
of offense than intended; correction of that error is ap-
propriate. CPL 470.20; see also People v Alvarez, 166 AD2d 603
lv den 77 NY2d 835. Judgment modified, conviction of
first-degree attempted criminal sale of a controlled sub-
stance reduced to second-degree attempted criminal sale
of a controlled substance, and otherwise affirmed.
(Supreme Ct, New York Co [Torres, J])

Identification (In-court)  IDE; 190(24)

Juries and Jury Trials (General)  JRY; 225(37)

People v Zhao, No. 3341, 1st Dept, 2/22/01

Holding: The defendant was convicted, after a
jury trial, of two counts of first-degree burglary. Where the
defendant’s language was relevant to the issue of identity,
the court properly informed the jury, at the prosecution’s
request, that the defendant was using a Cantonese inter-
preter at trial. See People v Gomez, 406 NE2d 886, 889-890;
compare Commonwealth v Garcia, 661 AD2d 1388, 1395 n. 13
(Pa Super) lv den 672 A2d 304. There was in any event no
prejudice as defense counsel had already made the jury
aware of the Cantonese interpreter. Furthermore, the
court properly denied the defendant’s request during trial
for an in-court lineup composed of courtroom spectators.
See People v Hardy, 186 AD2d 447 lv den 81 NY2d 789. The
witness had ample opportunity to view the defendant
during the incident and had already made a reliable out-
of-court identification. See People v Davis, 256 AD2d 49 lv
den 93 NY2d 872. (Supreme Ct, Bronx Co [Torres, J])

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

Sentencing (Pre-sentence Investigation and Report)
Application of Hughes v NYC Dept of Probation,
No. 3495, 1st Dept, 3/13/01

In a proceeding pursuant to CPLR article 78, the
petitioner challenged the respondent probation depart-
ment’s refusal to delete certain information from the pre-
sentence report prepared in connection with his criminal
proceedings. The respondent’s motion to dismiss the pro-
cceeding was granted.

Holding: The petition was properly dismissed.
The challenges to the pre-sentence report should have
been made before sentencing. See Matter of Sciaraffo v NYC
Dept of Probation, 248 AD2d 477 citing, inter alia, Matter of
Gayle v Lewis, 212 AD2d 919 lv den 86 NY2d 701. Order
affirmed. (Supreme Ct, New York Co [Solomon, J])

Sentencing (Excessiveness)  SEN; 345(33)

Trial (Public Trial)  TRI; 375(50)

People v Colon, No. 3541, 1st Dept, 3/15/01

The defendant was convicted of third-degree sale
of a controlled substance and sentenced, as a second
felony offender, to a term of seven to 14 years. The court-
room had been closed during an undercover officer’s tes-
timony.

Holding: The prosecutor had made a sufficient
showing to warrant closure during the officer’s testimony.
See People v Ramos, 90 NY2d 490, 499 cert den 522 US 1002.
The officer was still actively engaged in undercover oper-
ations in the area, which was in close proximity to the
courthouse, and had made drug purchases from persons
not yet arrested. He had received death threats from drug
dealers, and routinely employed security precautions for
court appearances. While not based on improper criteria,
the sentence was excessive and is reduced to a term of five
to 10 years. Order modified, and otherwise affirmed.
(Supreme Ct, New York Co [Shea, J])

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

Records (Access)  REC; 327(5)

Application of Mims v Chichester, No. 3549,
1st Dept, 3/15/01

In a proceeding pursuant to the Freedom of Information Law
(FOIL), the petitioner sought to compel the access office of
the Bronx County District Attorney’s Office to produce certain
records relating to the indictment underlying the petitioner’s conviction of
certain crimes. The respondent argued that the “anti-contact”
rule (Code of Professional Responsibility, DR 7-104 [22
NYCRR 1200.35) prohibited direct communication with the petitioner while represented by counsel in a pending appeal, and therefore precluded a response to the request. The motion court rejected this argument, saying that responding would not require any discussion of the ongoing appeal. On appeal, the respondent argued that the motion court’s ruling involved an unacceptable burden, insofar as it would require a judicial determination as to whether discussions were needed in every case.

Holding: “[T]he standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced nor restricted because he is also a litigant or potential litigant” (Matter of John P. v Whalen, 54 NY2d 89, 99 [citations omitted]).” The criminal prosecution and the FOIL request involve the same “subjects” but they are clearly different “matters” within the meaning of the anti-contact rule. Order affirmed. (Supreme Ct, Bronx Co [Saks, J])

Second Department

Discovery (General) (Prior Statements DSC; 110(12) (26)
of Witnesses)

People v Dockery, No. 98-10630, 2nd Dept, 12/18/00

Holding: Evidence at the Huntley hearing (see People v Huntley, 15 NY2d 72) indicated that an undercover officer had met with the defendant before the incident in which money was allegedly exchanged for a vehicle stolen by the defendant. Those prior meetings were taped, but despite requests and a motion to compel production, the tapes were never turned over to the defense. The prosecutor did not admit or deny the existence of the tapes, but argued that they were irrelevant. In such an instance, the court must determine if relevant statements exist. See People v Poole, 48 NY2d 144, 149. The court must determine if Rosario material exists and if it does, decide after an in camera inspection whether the defendant is entitled to it. See People v Adger, 75 NY2d 723. Matter remitted, appeal held in abeyance. (Supreme Ct, Queens Co [McDonald, J])

Accomplices (Accessories) (General) ACC; 10(5) (22)

Robbery (Elements) ROB; 330(15)

People v Murdough, No. 99-07727, 2nd Dept, 12/18/00

Holding: The defendant was alleged to have alerted his codefendants that the complainant was going to a bank where she would cash several paychecks to disburse wages to coworkers. The complainant was robbed of the cash by the codefendants, one of whom had a handgun. The prosecution did not have to prove as an element of first-degree robbery that the defendant shared his codefendant’s intent to perpetrate the robbery while armed with a deadly weapon. See People v Gage, 259 AD2d 837. The defendant’s guilt was “predicated upon the forcible taking of property, coupled with the aggravating factor of a participant in the crime being armed...” See Penal Law 160.15[2]. Which participant engaged in the aggravating factor of being armed with a deadly weapon, and the defendant’s knowledge or lack of knowledge that a gun would be used, is immaterial. See People v Miller, 87 NY2d 211. Judgment affirmed. (County Ct, Westchester Co [Angiolillo, J])

Evidence (General) EVI; 155(60)

Sex Offenses (General) SEX; 350(4)

People v Juara, No. 99-02859, 2nd Dept, 1/8/01

Holding: The conviction of first-degree course of sexual conduct against a child, incest, first-degree sexual abuse, and endangering the welfare of a child (two counts).

The defendant had been convicted of first-degree course of sexual conduct against a child, incest, first-degree sexual abuse, and endangering the welfare of a child (two counts).

Holding: The conviction of first-degree course of sexual conduct against a child is vacated as a matter of justice in the interest of justice. Penal Law 130.75(a) requires two or more acts of sexual conduct over a period of no less than three months. No evidence had been adduced as to the time period over which the sexual abuse here was said to have occurred. The defendant also argued that the other convictions should be vacated because the unsworn testimony of the infant complainant was not corroborated by independent evidence. However, this issue had not been asserted at trial, and so was not preserved for appeal. See CPL 470.05[2]; People v Bynum, 70 NY2d 858, 859. Judgment affirmed as modified. (Supreme Ct, Queens Co [Katz, J])

Guilty Pleas (Withdrawal) GYP; 181(65)

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

People v Smith, No.99-07861, 2nd Dept, 1/8/01

Holding: The plea was entered into upon the mistaken belief of the court and the parties that Parole had the discretion to run any undischarged sentence concurrently with the sentence imposed here; in fact, the terms had to be run consecutively. People v Scott, 237 AD2d 543, 544. In the exercise of interest of justice jurisdiction, the defendant is to be permitted to withdraw his plea, although the issue had not been preserved for appellate review. See CPL 470.15[6]. Judgment reversed, matter remitted. (Supreme Ct, Queens Co [Kron, J])
Second Department continued

Juries and Jury Trials (General) JRY; 225(37) (50)
(Qualifications)

People v Ruggiero, No. 98-06139, 2nd Dept, 1/16/01

The defendant had been convicted of second-degree grand larceny and second-degree possession of stolen property. A juror who had already been sworn in interrupted the court’s questioning of three newly-chosen jurors, saying “Judge, I don’t know if this has any bearing.” The court did not allow him to continue, and refused the defendant’s request to question the juror in camera.

Holding: When a sworn juror’s comments or actions raise an issue as to the juror’s ability to be impartial, the court must question that juror individually in camera in the presence of the attorneys and defendant. See People v Rodriguez, 71 NY2d 214. The court should evaluate the nature of what the juror has seen, heard, or acquired knowledge of, and assess the importance and bearing of that information on the case. The failure to conduct a “probing and tactful inquiry” meant that the implied finding that the juror was not “grossly unqualified” necessarily rested upon impermissible speculation. See People v McClenton, 213 AD2d 1. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Giaccio, J])

Search and Seizure (Stop and Frisk) SEA; 335(75) (85)
(Weapons-Frisk)

People v Newhirk, Nos. 99-01031; 00-00899,
2nd Dept, 1/16/01

Over a 1½-hour period, an undercover police officer observed the defendant walk between a street corner and a vacant lot where other people were. Due to complaints that drugs were being sold and a rise in bicycle-related robberies in the area, the officer believed that the defendant was involved in narcotics or robbery. The officer approached the defendant in the lot and asked what was going on. The defendant, keeping his hand in his pocket, replied that he was “just walking by.” Because the defendant and his friends seemed “very apprehensive,” the officer grabbed the defendant’s hand in the pocket. Feeling bullets, he pulled the defendant’s hand out and found narcotics packaging.

Holding: The officer’s observations gave rise only to the right to request information, and did not provide any reasonable suspicion permitting the officer to exercise the common-law right of inquiry. See People v De Bour, 40 NY2d 210, 223. Nor did the defendant’s response provide any reasonable suspicion permitting a forcible stop and frisk. See People v Prochilo, 41 NY2d 759, 761-762; see also People v Diaz, 81 NY2d 106, 109-114. Judgment reversed, defendant’s plea vacated, motion to suppress physical evidence and statements made to law enforcement authorities granted, indictment dismissed. (Supreme Ct, Queens Co [Blumenfeld, J])

Guilty Pleas (General) GYP; 181(25)

Sentencing (Enhancement) SEN; 345(32)

People v Burns, No. 99-08495, 2nd Dept, 1/22/01

The defendant pled guilty to, and was convicted of, first-degree sexual abuse and third-degree rape. He had been sentenced to concurrent indeterminate terms of 3½ to 7 years imprisonment and 1½ to 4 years imprisonment, respectively.

Holding: The court was not authorized to unilaterally impose an enhanced sentence on the basis of its conclusion that by protesting his innocence during a pre-sentence interview, the defendant violated a condition of his plea that he would fully cooperate with the probation department. See People v Parker, 271 AD2d 63; People v Gerena, 219 AD2d 734. Sentence modified, reducing the term imposed for the conviction for sexual abuse to 3 to 6 years imprisonment. (County Ct, Suffolk Co [Spinner, J])
Counsel had not argued in opposition to the motion, become a witness against him, or made any adverse statements. Counsel had said nothing that could have been determinative in the sentencing court’s denial of the motion. See People v Nawabi, 265 AD2d 156. The court properly denied the defendant’s motion to withdraw his plea without assigning new counsel. Judgment affirmed. (Supreme Ct, Suffolk Co [Klein, J])

New York State Agencies
NYA; 266.5(75)
(Correctional Services, Department of)

Matter of Pierson v Kralik, No. 99-11336, 2nd Dept, 1/29/01

The petitioner sought CPLR article 78 review of a determination of the respondent Sheriff of Rockland County finding the petitioner guilty of certain charges and terminating his employment as a Corrections Officer. The petitioner had permitted two inmates to engage in an organized fight. He failed to obtain immediate medical treatment for the injured inmate, failed to report the incident, and perjured himself during the related investigation.

Holding: Termination was not disproportionate to the offenses. The fact that it exceeded the punishment recommended by the Hearing Officer and imposed on other officers involved in the incident does not shock one’s sense of fairness. “Much deference is to be afforded to an agency’s determination regarding a sanction, especially in situations where, as here, matters of internal discipline in a law enforcement organization are concerned.” Matter of Santos v Chesworth, 133 AD2d 1001, 1003. Determination confirmed.

Third Department

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

Guilty Pleas (General) GYP; 181(65)

People v Thomson, Nos. 10878; 11022, 3rd Dept, 1/4/01

The defendant pled guilty to attempted second-degree murder and was sentenced to 12½ to 25 years in prison. The defendant moved to vacate the judgment pursuant to CPL 440.10 due to ineffective assistance of counsel. The motion was denied without a hearing.

Holding: The defense attorney’s failure to inform the defendant that intent to cause the death of another person is an element of second-degree murder that could be negated by the defense of intoxication constituted ineffective assistance of counsel. See People v Norfleet, 267 AD2d 881, 883 to den 95 NY2d 801. The defendant had a history of alcoholism and told an officer that he was drinking heavily on the day of the incident. The defendant said that his attorney failed to obtain medical records.
Third Department continued

showing the defendant’s intoxication and told the defendant that neither his intoxication nor intent were relevant to the case. These facts are sufficient to raise a question of fact regarding the effectiveness of defense counsel and the validity of the plea. Without a discussion in the plea allocution that indicated the defendant’s awareness and knowing waiver of his right to present evidence of intoxication to negate the element of intent, a hearing is necessary to resolve the factual issues raised by the defendant. See People v Shields, 205 AD2d 833, 834-835. (County Ct, Albany Co [Breslin, J])

Criminal Law and Procedure (General) CPL; 98.8(10)
Instructions to Jury (General) ISJ; 205(35)

People v Bleau, No. 11857, 3rd Dept, 1/4/01

Following an incident involving the defendant’s ex-girlfriend, a temporary order of protection was issued against the defendant. He pled guilty to disorderly conduct and second-degree harassment in satisfaction of the charges resulting from that incident. Shortly afterward, he was arrested for violating the order of protection; after his release, he broke into his ex-girlfriend’s residence. As a result of these two incidents, he was found guilty of second-degree criminal trespass and second-degree criminal contempt.

Holding: The action from which the temporary order of protection emanated was no longer pending at the time of the alleged violations of the order, because the defendant had already pled guilty in that action. See CPL 1.20 [16][c]. As a result of the plea, the temporary order became null. Because there was no issuance of a new temporary order after the defendant’s guilty plea in the prior action, the conviction for second-degree criminal contempt must be dismissed. Although a guilty plea may terminate a protective order, the court may extend its reach beyond a conviction or a plea by the issuance of an order of protection. See CPL 530.13 (4). This court failed to do so. By neglecting to issue a portion of the supplemental instruction relating to the effect of the violation of the temporary order of protection on the trespass, the court failed to fashion a response that meaningfully answered the jury’s inquiry while working no prejudice to the defendant. See People v Williamson, 267 AD2d 487, 489 lv[s] den 94 NY2d 882, 886. The trespass conviction must be reversed. (County Ct, St Lawrence Co [Nicandri, J])

People v William “II”, No 12217, 3rd Dept, 1/4/01

An anonymous tip regarding a robbery committed by three men included a description of one of them. The caller mentioned that this person had a gun and his name was “Will.” The police approached three men based on this tip, and an officer recognized one man as Will Cruz. The defendant, one of the other two men, was carrying a backpack, which could conceal a weapon. The defendant was asked to face a police car to be frisked, but he fled. He was pursued, and the officer drew his gun and told the defendant to lay on the ground. After other officers drew their weapons and pointed them at the defendant, he was handcuffed and his backpack was searched revealing marijuana.

Holding: The initial intrusion was reasonable because of the facts acquired by the police at the initial confrontation, the officer’s independent corroboration of the anonymous tip, and the defendant’s flight without the officer’s gun being drawn. See People v Salaman, 71 NY2d 869. The defendant’s flight combined with the other circumstances justified the police pursuit. See People v Martinez, 80 NY2d 444. By drawing their weapons and handcuffing the defendant after his flight, the officers took reasonable measures to assure their safety. See People v Allen, 73 NY2d 378, 380. Judgment affirmed. (County Ct, Tompkins Co [Barrett, J])

Dissent: [Crew III, JP] The facts acquired by the officer weren’t enough to corroborate the anonymous tip, showing that the tipster had knowledge of concealed criminal activity. See Florida v JL, 529 US 266. There were no observations of criminal conduct at the scene giving reasonable suspicion for pursuit. See People v Sierra, 83 NY2d 928.

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

People v Hildreth, No 11250, 3rd Dept, 1/18/01

The defendant was charged with first-degree murder and other offenses. The court submitted to the jury extreme emotional disturbance as an affirmative defense; first-degree manslaughter was offered as a lesser included offense. At the request of the prosecution, the court offered second-degree felony murder as a lesser-included offense of first-degree murder. The court instructed the jury that if it found the defendant not guilty on first-degree murder then it should move on to second-degree felony murder. Alternatively, if the jury found the defendant guilty of first-degree murder, it should move on to first-degree manslaughter. If the jury found that there was extreme emotional disturbance, it was to find the defendant guilty of first-degree manslaughter then move on to second-degree felony murder. If the jury did not find extreme emotional disturbance, then they were to find the defendant guilty of first-degree murder. The jury initially returned a guilty verdict on all three homicide...
counts. After further instruction and deliberation, it found first-degree manslaughter and second-degree felony murder.

**Holding:** The lesser-included offenses were inconsistent and the jury should not have been allowed to render a guilty verdict on both. See CPL 300.50 [4]. Although each offense is inconsistent with the other, the conviction of the defendant on second-degree felony murder and first-degree manslaughter will stand because the defendant failed to object to the court’s erroneous instructions to preserve the issue for appeal. See People v Alfaro, 66 NY2d 985, 987. With proper instruction, the jury would have considered second-degree murder first, resulting in the same sentence imposed here. Judgment affirmed. (County Ct, Schenectady Co [Giardino, J])

**Appeals and Writs (General)(Briefs)** APP; 25(35)(15)

**People v Espino, No 11491, 3rd Dept, 1/18/01**

The defendant negotiated a plea to third-degree criminal possession of a controlled substance with the promise of a three-to-nine-year sentence. The court informed the defendant that if he did not appear for sentencing, an enhanced sentence would be imposed. The defendant failed to appear on the date set for sentencing, ultimately resulting in an enhanced sentence of five to 15 years. On appeal, the defendant’s counsel submitted an *Anders* brief (*Anders v California*, 386 US 738 [1967]) seeking to be relieved of assignment on the ground that no non-frivolous appealable issues existed. The defendant requested that his sentence be reduced in the interest of justice and new appellate counsel be assigned.

**Holding:** The defendant had a statutory right to argue on appeal that a lawful, enhanced sentence was harsh and excessive and should be reduced in the interest of justice, where he pled guilty but did not waive his right to appeal and the enhanced sentence was based on the violation of a plea agreement. See CPL 470.15 [6][b]; 470.20 [6]; 450.10[2]. An appeal raising the issue of the harshness and excessiveness of the enhanced sentence would not be “wholly frivolous,” and is arguable on its merits. See People v Vasquez, 70 NY2d 1, 3. This entitles the defendant to assignment of new counsel. See People v Cruwys, 113 AD2d 979, 980 lv den 67 NY2d 650. Where there has been no waiver of appeal, the proper course is to submit a brief addressing the issues raised rather than to submit an *Anders* brief, assuring that an indigent criminal appellant receives effective assistance of counsel. See People v Gonzalez, 47 NY2d 606, 610. Decision withheld, counsel relieved, new counsel to be assigned. (County Ct, Broome Co [Smith, J])

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

**Sentencing (Determinate)** SEN; 345(30) (37) (55)

**People v Phillip, No 11535, 3rd Dept, 1/18/01**

The defendant, incarcerated, struck a correction officer. The defendant’s cell was subsequently searched and contraband was found. After a trial, the defendant was convicted of assault on a peace officer and second-degree assault for which he was sentenced to concurrent 10-year terms, as well as first-degree promoting prison contraband.

**Holding:** The trial evidence was not legally sufficient to support the court’s implicit finding that the defendant caused the officer serious physical injury, an essential element of the crime of assault on a peace officer. See Penal Law 120.08. Although the officer suffered a fractured jaw causing great pain and inconvenience, the injury did not cause death, a substantial risk of death, serious and protracted disfigurement, or protracted loss or impairment of the function of any bodily organ. See Penal Law 10.00 [10]; People v Wright, 221 AD2d 577 lv den 87 NY2d 978; People v Hildenbrandt, 125 AD2d 819 lv den 69 NY2d 881; People v Gray, 47 AD2d 674. The 10-year determinate sentence for the second-degree assault was illegal because second-degree assault was a class D felony, punishable of only up to seven years. See Penal Law 70.04 [3][c]. Judgment modified and affirmed. (County Co, Clinton Co [McGill, J])

**Death Penalty (Guilt Phase)** DEP; 100(85) (155[gg])

**Guilty Pleas (General)** GYP; 181(25)

**People v Mower, Jr., Nos. 10365, 12171, 3rd Dept, 2/1/01**

The defendant was charged with first-degree murder for the death of his parents in 1996. On the last day of the 120-day period in which the prosecutor could have filed a notice of intent to seek the death penalty—and without any notice being filed—the defendant pled guilty to one count of first-degree murder in satisfaction of four murder counts and other charges here and in Texas. The defendant appealed after he was sentenced to life imprisonment without parole. More than three years later, he unsuccessfully moved to vacate his conviction under CPL 440.10.

**Holding:** The prohibition announced by the Court of Appeals against pleas and plea negotiations during the pendency of a death penalty notice is not implicated where no notice was filed. See Matter of Hymes v Tomei, 92 NY2d 613 cert den 527 US 1015. The court had authority to sentence the defendant to life without parole. The failure to define “same criminal transaction” as an
aggravating factor does not render Penal Law 125.27(1)(a)(viii) unconstitutionally vague. People v Reed, 265 AD2d 56 nos den 95 NY2d 832, 859. Nor is the statute vague as to what constitutes being “more than eighteen years old.” A person concludes the first 18 years of life on their 18th birthday, commencing their 19th year on that day. People v Davis, 43 NY2d 17, 29 cert den 435 US 998, 438 US 914.

The contention that the defendant was entitled to heightened due process is rejected, such heightened scrutiny being required only in a capital case’s penalty phase. Where a defendant has not yet been convicted, only 14th Amendment, not 8th Amendment, review is required. Judgment and order affirmed. (Supreme Ct, Otsego Co [Coccoma, J])

Fourth Department

Conflict of Interest (General) COI; 75(10)
Counsel (Right to Counsel) COU; 95(30)

People v Gaines, No. KA 99-05496, 4th Dept, 11/13/00, 277 AD2d 900, 716 NYS2d 207

Before pretrial motions, the defendant’s assigned attorney was relieved of his representation of the defendant to take a position at the District Attorney’s office. The court did not tell the defendant of a possible conflict or obtain a waiver of any objection.

Holding: The defendant’s right to counsel was violated when his assigned attorney became an employee of the office that was prosecuting the ongoing case and the court failed to inform the defendant of any possible conflict, as well as failed to obtain a waiver from him. People v Shinkle, 51 NY2d 417. While he did not object, the issue is reviewed in the interest of justice. This particular prosecutor’s office “is not ‘a huge metropolitan office’ where there is no contact between prosecutors in different bureaus.” People v English, 88 NY2d 30, 34. This created the appearance of impropriety and “risk of prejudice attendant on abuse of confidence.” The defendant should not have been required to depend on the good faith of his former attorney turned adversary to protect and honor confidences shared during their former relationship. See People v Herr, 86 NY2d 638, 641. Judgment reversed, plea vacated, matter remitted. (County Ct, Ontario Co [Harvey, J])

Dissent: [Wisner, J and Scudder, J] This case is distinguishable from Shinkle where there was more contact between the attorney and client. Nothing in the record indicates that an abuse of confidence by former counsel influenced the defendant’s decision to plead guilty.

People v Button, No. KA 97-05166, 4th Dept, 12/27/00

The defendant was accused of sexually molesting two nine-year old girls. The police were informed and, based in part on a written statement the defendant submitted from a remote location, he was indicted. When the defendant left the jurisdiction, an unlawful flight to avoid prosecution warrant was filed. An FBI agent then took over the investigation. FBI agents conducted interviews, computer checks and posted the defendant’s picture in a local newspaper in an effort to locate the defendant. The defendant was eventually arrested and convicted.

Holding: The request by the defendant to strike the FBI agent’s testimony at the pre-trial hearing was properly denied because the defendant’s contention that the FBI agent’s file was Rosario material did not entitle the defendant to the file. His Rosario right to the FBI file was not a constitutional right. See United States v Palermo, 360 US 342, 345 reh den 361 US 855. In this joint State and Federal investigation, the FBI’s right to refuse to produce the material pursuant to 28 CFR 16.22 (a) takes precedence in this state prosecution. See People v Heller, 126 Misc2d 575, 576. In addition, the defendant’s speedy trial motion was properly denied. There was sufficient support for the determination that the defendant attempted to avoid prosecution. The prosecution was not chargeable with the time during which the FBI didn’t know the defendant’s whereabouts. See CPL 30.30 [4][c][i]. Judgment affirmed. (County Ct, Niagara Co [Hannigan, J])

Defenses (Affirmative Defenses Generally) DEF; 105(2)
Guilty Pleas (General) GYP; 181(25)

People v Powell, No. KA 97-05310, 4th Dept, 12/27/00

The defendant used a fake gun to commit a robbery. He pled guilty to attempted first-degree robbery.

Holding: The defendant’s guilty plea wasn’t knowingly, voluntarily, and intelligently entered. Penal Law 110.00, 160.15 [4]. The defendant’s statement during the plea colloquy that a fake gun was used in the robbery raised an affirmative defense to attempted first-degree robbery, because the gun “‘was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.’” Once the defendant stated that a fake gun was used, the court was required to make a further inquiry to determine whether the defendant knew about the defense and was knowingly and voluntarily waiving that defense. See People v Costanza, 244 AD2d 988, 989. The defendant did not need
to move to withdraw his plea or to vacate the judgment of conviction because this is one of the rare instances where preservation is not required. See People v Lopez, 71 NY2d 662, 665-666. Finally, the defendant’s contention was not affected by his waiver of the right to appeal. See People v Seaberg, 74 NY2d 1, 10. Judgment reversed. (County Ct, Monroe Co [Bristol, J])

Accomplices (Witnesses) ACC; 10(35)
Instructions To Jury (General) ISJ; 205(35)

People v McGlotten, No. KA 98-05510, 4th Dept, 12/27/00

The defendant allegedly took stolen property to his girlfriend’s house. Subsequently, he and his girlfriend sold the items at a pawnshop and used the proceeds to purchase a wedding dress. The defendant’s girlfriend knew the property was stolen. In exchange for the dismissal of the charges against her, the girlfriend testified against the defendant at trial. The defendant was convicted after a jury trial of second-degree burglary, third-degree larceny, and third-degree criminal possession of stolen property.

Holding: The court erred in failing to charge the jury that the girlfriend was an accomplice as a matter of law as to the charge of third-degree criminal possession of stolen property. See People v Berger, 52 NY2d 214, 220. Penal Law 165.65 [2] does not apply to these facts because the statute provides that a defendant may only be convicted of criminal possession of stolen property “solely upon the testimony of one to whom he disposed of such property.” The actions of the defendant and his girlfriend did not reflect the classic separation between a thief and the thief’s fence.

Viewed in a light most favorable to the prosecution (People v Contes, 60 NY2d 620, 621), the evidence established that the value of the allegedly stolen items exceeded three thousand dollars. The defendant failed to preserve for review his contention that he was denied a fair trial when a juror fell asleep. See People v Daughtry, 254 AD2d 193, 194 lv den 93 NY2d 872; cf People v South, 177 AD2d 607, 607-608. Judgment modified, conviction of third-degree criminal possession of stolen property vacated, new trial on that indictment ordered. (County Ct, Jefferson Co [Clary, J])

Burglary (Degrees and Lesser Offenses) (Elements)

People v Murray, No. KA 99-1267, 4th Dept, 12/27/00

The defendant was convicted of second-degree burglary in connection with the burglary of a vacant two-family house. The lower unit was boarded up to prevent illegal gambling activity and the defendant was found by police in a closet of that unit with a deck of cards and an envelope containing change. He admitted that he took those items from the kitchen and testified that he was homeless and broke in to find a warm place to sleep. He further testified that he knew there had been a gambling operation at the apartment as he had played cards there, knew the boarded up apartment had been vacant for several weeks, and believed it to be empty at the time of his entry.

Holding: The evidence is legally sufficient with respect to the element of intent, which was satisfied by evidence that the defendant possessed items which he admitted taking from the kitchen counter and his statement to police that he hoped to find food in the vacant apartment. See eg People v Rodriguez, 200 AD2d 775, 776 lv den 83 NY2d 876. The evidence is legally insufficient with respect to the element of second-degree burglary requiring that the defendant knowingly enter or remain “unlawfully in a building with intent to commit a crime therein when the building is a dwelling.” Penal Law 140.25[2]. That element was not satisfied where the building was unoccupied, the owner lived elsewhere, and neither unit was rented at the time of the burglary. Judgment modified by reducing the conviction of second-degree burglary to third-degree burglary, matter remitted for resentencing on that conviction. (Supreme Ct, Onondaga Co [Brunetti, J])

Plea Bargaining (General) PLE; 284(10)
Sentencing (Restitution) SEN; 345(71)

People v Oehler, No. KA 99-05044, 4th Dept, 12/27/00

Holding: The waiver by the defendant of the right to appeal does not encompass a challenge to the severity of the sentence because the court failed to advise the defendant of the potential periods of incarceration during the plea proceedings. See People v Mayham, 272 AD2d 951. The waiver of the right to appeal does not encompass the defendant’s challenge to the restitution ordered because the terms of the plea bargain did not include restitution. See People v Nichols, 276 AD2d 832. The court erred in ordering the defendant to pay restitution in the amount of $614 based solely on the presentence investigation report, without conducting a hearing. Judgment modified by vacating the amount of restitution, matter remitted for a hearing to determine the amount of restitution. (County Ct, Erie Co [DiTullio, J])

Prisoners (Crimes) PRS I; (300)10

People v Mathis, No. KA 99-05217, 4th Dept, 12/27/00

Holding: The defendant was convicted of first-degree promoting of prison contraband for possessing a bat and/or a weight bar in a detention facility. The prose-
cution failed to prove that the item was contraband, which is defined as “any article or thing which a person confined in a detention facility is prohibited from obtaining or possessing by statute, rule, regulation or order.” Penal Law 205.00[3]. Although the prosecution cited a regulation providing that “[i]mates shall not make, possess, sell or exchange any item of contraband that may be classified as a weapon by description, use or appearance’ (7 NYCRR 270.2[B] [14] [i])” and presented evidence that a bat and/or weight bar had been used as a weapon at Mohawk Correctional Facility, the prosecutor presented no proof that the defendant was prohibited from possessing a bat and/or a weight bar. In fact, he was authorized to possess the item. Judgment reversed on the law and indictment dismissed. (County Ct, Oneida Co [Dwyer, J])

Civil Practice (General)  CVP; 67.3(10)

Sentencing (Presentence Investigation and Report)  SEN; 345(65)

Steiner v University of Rochester, No. CA 00-00921, 4th Dept, 12/27/00

The plaintiff was a participant at a drug treatment center operated by the defendants. In an action for breach of the duty of confidentiality and prima facie tort, she alleged that a clinical coordinator improperly disclosed information to a representative of a probation department for preparation of a presentence investigation report concerning a charge against the plaintiff for criminal possession of a controlled substance.

Holding: The court properly granted the defendants’ motions for summary judgment by dismissing the complaint. The defendants’ satisfied their burden with respect to the claim for breach of the duty of confidentiality by submitting evidentiary proof that the plaintiff had waived any claim of privilege by executing consents expressly permitting disclosure of information which concerned the plaintiff’s treatment at the center. See Clark v Geraci, 29 Misc2d 791, 793-794. With respect to the prima facie tort claim, the defendants established that they did not act with the intent to harm the plaintiff. See ATI, Inc. v Ruder & Finn, 42 NY2d 454, 458. The court also did not abuse its discretion by denying the plaintiff’s motion for a default judgment against the corporate defendants, as they had demonstrated a reasonable excuse for their default in appearing in the action and also demonstrated a meritorious defense to the complaint. See Di Lorenzo, Inc. v Dutton Lbr. Co., 67 NY2d 138, 141. Order affirmed. (Supreme Ct, Monroe Co [Affronti, J])

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

Trial (Presence of Defendant)  TRI; 375(45)

People v Vargas, No. KA 99-05317, 4th Dept, 12/27/00

Holding: The court erred in providing supplemental instructions to the jury in the absence of the defendant. A “defendant has a fundamental right to be present at all material stages of a trial” (People v Mehmedi, 69 NY2d 759, 760 rearg denied 69 NY2d 985 ...)” Giving supplemental instructions to the jury is a material stage of the trial. See CPL 310.30; People v Cain, 76 NY2d 119, 123-124. Contrary to the prosecutor’s contention, harmless error analysis is not appropriate here, nor is reversal limited to the one charge to which the supplemental instruction related.

Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Ark, J])

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

People v Jones, No. KA 00-00444, 4th Dept, 12/27/00

The defendant allegedly stole a minivan while its driver was inside a gas station paying for gas. The defendant stopped the vehicle after driving a short distance and allowed the driver’s wife and child, who were in the middle seat, to leave the car. The defendant was arrested after he crashed the vehicle into a guardrail during a police pursuit and convicted of second-degree robbery, first-degree unlawful imprisonment, and seventh-degree possession of a controlled substance.

Holding: The conviction of second-degree robbery was supported by legally sufficient evidence. See People v Bleakley, 69 NY2d 490, 495. The court violated CPL 310.30 when responding to the question of a single juror who asked for clarification of the term “immediate force,” after the court had provided a readback of the elements of robbery as per a written request from the jury. The court attempted to define the term “immediate” by equating it with “imminent”. This exchange between the court and the jury included substantive discussions of matters not raised in the original written question. See People v DeRosario, 81 NY2d 801, 803. The court erred by answering the juror without providing counsel with an opportunity to participate in the formulation of the response and by requiring counsel to state any objection in the presence of the jury. See People v Carballo, 158 AD2d 701, 704. Judgment on specified counts reversed, new trial granted on those counts. (County Ct, Erie Co [D’Amico, J])
Fourth Department continued

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

Matter of Greenland v Hannigan, No. OP 00-01488, 4th Dept, 12/27/00

The petitioner, pursuant to CPLR article 78, sought to compel the respondents to classify him as a level two rather than a level three sex offender. The court clerk gave the petitioner a form entitled “Notice of Risk Level Assessment” which detailed an appeals process to the Division of Probation and Correctional Alternatives. The petitioner pursued that process, rendering this proceeding untimely.

Holding: The proceeding is dismissed because it was not commenced in a timely manner. See CPLR 217[1]. The petitioner’s claim that the article 78 was timely brought because there was no “unambiguously final decision” under Matter of Carter (NY2d __ [10/17/01]) until the administrative appeal was completed, and he detrimentally relied upon the form outlining an administrative process given to him by the court clerk, is without merit. The form was blank in that it omitted the petitioner’s risk level and it contained no signatures. Furthermore, the determination of a County Court can not be appealed to an administrative agency. The petitioner did not show that he was entitled to rely on the form. See Matter of McManus v Board of Educ., 87 NY2d 183, 186-187. The proceeding is dismissed. (Original proceeding, from County Ct, Niagara Co [Hannigan, J])

Accomplices (Corroboration) ACC; 10(20)

Misconduct (Juror) MIS; 250(12)

People v Adams, No. KA 00-01529, 4th Dept, 12/27/00

Holding: A juror’s inadvertent failure to admit on a juror questionnaire that he had a friend who was a victim of an unsolved murder didn’t constitute juror misconduct. The defendant failed to establish that the information was used by the juror to influence the jury or that the juror was inclined to find the defendant guilty. In order to receive a new trial, the defendant was required to show that the juror’s conduct was prejudicial to a substantial right. See People v Trzarny, 83 NY2d 557, 561. The court correctly charged the jurors that they could consider the interest or bias of any witness in assessing credibility. See People v Inniss, 83 NY2d 653, 659. There was no basis to charge that a close friend of the defendant’s accomplice who testified was an interested witness as a matter of law. The court’s reference to the evidence in explaining the legal principle requiring corroboration of accomplice testimony didn’t place undue emphasis on the prosecution’s contentions. See People v Simpson, 270 AD2d 507 lv den 95 NY2d 858. The testimony of additional witnesses provided legally sufficient evidence to corroborate the accomplice’s testimony. See People v Martinez, 266 AD2d 847 lv den 94 NY2d 904. Since the prosecution was not able to show that the weapon used by the defendant was loaded, as well as operable, the evidence was legally insufficient to establish first-degree burglary. See Penal Law 140.30 [1] and 10.00 [12]. There was no showing that the weapon was loaded. See People v Shaffer, 66 NY2d 663, 664. Judgment modified, and as modified, affirmed. (Supreme Ct, Herkimer Co, [Kirk, J])

Census of Prisoners (Disciplinary Infractions) PRS I; 300(13)(17)

(General)

Cipher v Goord, TP 00-01656, 4th Dept, 12/27/00

A hearing took place alleging that the petitioner violated inmate rule 107.11 (7 NYCRR 279.2[B][8][ii][i]) and rule 107.20 (7 NYCRR 270.2[b][8][iii]). While there was enough evidence to support a finding that the petitioner made false statements (rule 107.20), the petitioner claimed that he had an outdated rule book which did not contain the current version of the harassment rule (107.11). To prove he had the outdated book and hadn’t received the newer version, the petitioner requested from the hearing officer the receipt for the book. The request was denied.

Holding: The determination of the hearing officer as to the harassment violation was annulled because the respondent conceded that the hearing officer should have provided the petitioner with the receipt. Nothing in the record distinguishes the separate violations from the single penalty that was imposed, so the case must be remitted for imposition of a proper penalty for the valid violation. Determination modified and as modified, confirmed. (Supreme Ct, Wyoming Co [Dadd, J])

Sex Offenses (General) SEX; 350(4)

Restituyo v Berbary, CA 00-01798, 4th Dept, 12/27/00

Holding: “Supreme Court erred in granting the CPLR article 78 petition seeking reinstatement of petitioner into the sexual offenders treatment group at Collins Correctional Facility. “It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion”’ (Matter of Pell v Board of Educ., 34 NY2d 222, 232, quoting Matter of Diocese of Rochester v Planning Bd., 1 NY2d 508, 520; see, Matter of Arrocha v Board of Educ., 93 NY2d 361, 363-364; Matter of Wagshall v Board of Examiners, 69 NY2d 672, 674). The court failed to find that respondents’ determination was arbitrary and unreasonable or an abuse of discretion, nor would the record support such a finding.” (Supreme Ct, Erie Co [Sedita, Jr, J])
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