



Public Defense Backup Center REPORT

Volume XVI Number 2

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Defender News

Court of Appeals Reaffirms *Anders* as State Procedural Rule

Appellate lawyers who seek to be relieved as counsel for an indigent client on the ground that the appeal is “wholly frivolous” must continue to adhere to the procedure outlined in *Anders v California*, 386 US 738 (1967). The New York State Court of Appeals so held on Feb. 8, 2001 in *People v Roger Stokes* (see p. 20). Counsel must continue to furnish the court with a brief, which includes a statement of facts and a discussion of all issues that “might arguably support the appeal.” Last year, in *Smith v Robbins*, 528 US 259 (2000), the U.S. Supreme Court held that *Anders* did not establish minimum procedural requirements for state courts to follow in the evaluation of purportedly frivolous criminal appeals; states were free to adopt alternative methods to safeguard an indigent client’s right to the effective assistance of counsel on appeal.

In *Stokes*, the Court of Appeals declined to alter New York’s longstanding procedure: “Because New York has repeatedly adhered to the protocol outlined in *Anders*, we see no compelling reason at this time to revisit, alter or refine New York State’s ‘*Anders*’ rule.” The Court held that the “brief” filed by Stokes’ assigned counsel, which failed to contain a statement of facts and was filled with factual and legal errors, deprived Stokes of the effective assistance of counsel on appeal. The Court remitted the case to the Appellate Division, 3rd Department for a *de novo* appeal with new assigned counsel. Backup Center Staff Attorney Al O’Connor represented Stokes in the Court of Appeals. His brief, which was also filed in CD-ROM form (see *Backup Center REPORT* Vol. XV, #6) is available on NYSDA’s web site.

Nowak’s Update, Ofshe on Confessions, and More: NYU Materials Available

For \$20, get the materials from NYSDA’s 15th Annual Metropolitan Trainer (March 24, 2001), where sessions included:

- “Recent Developments in Criminal Law and Procedure,” —Edward Nowak, *Monroe County Public Defender*
- “Hot Topics Panel: *Apprendi*, FOIL, *Bagley*, Sexual Assault Reform Act and more . . .” —Andy Fine, *Senior Supervising Attorney of the Criminal Appeals Bureau of the NYC Legal Aid Society, Laura Johnson, director of the Special Litigation Unit LAS, and Al O’Connor, Staff Attorney with the NYSDA Public Defense Backup Center*
- “Criminal Histories and Their Mysteries,” —Jackie Corey Smith, *New York State Division of Criminal Justice Services*
- “Issues in Defense Ethics,” —Vince Aprile, *Kentucky Department of Public Advocacy*
- “Coerced Confessions: The Decision to Confess Falsely,” —Richard Ofshe, *University of California, Berkeley*

Contact the Backup Center.

Suspect Confessions

Neatly wrapped confessions obtained by police and handed to prosecutors on a silver platter are often suspect. The injustice resulting from false police-induced confessions was among the topics discussed at the 15th Annual New York Metropolitan Trainer. Richard Ofshe, Professor of Sociology at the University of California Berkley and an expert on false confessions, spoke to over 250 defense lawyers on “Coerced Confessions: The Decision to Confess Falsely.” He discussed the problems generated by psychological interrogation techniques and the disproportionate weight of “I did it” statements with judges and prosecutors. Ofshe has discovered that “American police are poorly trained about the dangers of interrogation and false confession.” They are rarely instructed in how to avoid eliciting false confessions, in what causes false confessions, or how to recognize the forms

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false confessions take and their distinguishing characteristics. Some interrogation manual writers and trainers persist in the unfounded belief that contemporary psychological methods will not cause the innocent to confess, which Ofshe calls "a fiction so thoroughly contradicted by all of the research on police interrogation that it can be labeled a potentially deadly myth."

Unsurprisingly, studies show that "confession evidence substantially biases the trier of fact's evaluation of the case in favor of prosecution and conviction, even when the defendant's uncorroborated confession was elicited by coercive methods and the other case evidence strongly supports his innocence." False confessions lead to unjust deprivations of liberty, wrongful conviction and incarceration, even execution. See Richard A. Leo and Richard J. Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 *J. Crim. L. & Criminology* 429 (1998). This, along with other resources about false confessions, can be found on the NYSDA web site under "Defense News."

The dubious nature of confessions has also been addressed in a new book by Peter Brooks, Chester D. Tripp Professor of Humanities and Director of the Whitney Humanities Center at Yale University, entitled *Troubling Confessions*. Brooks surveys the historical and psychological antecedents of the "queen of proofs" and continuing doubts about confessions' value. (See BOOK REVIEW, p. 12.)

Reasonable Doubt Jury Instruction Has Its Day in Court

Last year, the State Committee on Criminal Jury Instructions (CJI) issued a new standard instruction for the Presumption of Innocence, Burden of Proof (in cases without an affirmative defense) and Proof Beyond a Reasonable Doubt. (See *Backup Center REPORT*, Vol. XV, #10.). The new CJI charge was put to the test in an assault case before Acting Justice Guy J. Mangano Jr. in *People v Danton Duncan*, No. 21-106 (Sup. Ct. Kings County, 2/20/01). After the defendant was convicted at trial, the defense moved to set aside the verdict and challenge the instruction because, among other things, the court denied a defense request to charge. Counsel asked that the jury be told "that a reasonable doubt can be found from the 'lack of evidence as well as from evidence'" and said the court should have charged the jury "that a juror need 'not have to be able to articulate his or her doubt, as long as it is reasonable,'" and that the jury could acquit based upon "the slightest doubt, as long as it is reasonable.'" Justice Mangano, in the first published decision interpreting the new CJI instruction, rejected the defendant's arguments. He found that the new charge, viewed as a whole as given in the case, "clearly relayed the proper standard of proof

to the jury." He added that "the charge has been streamlined and phrased in such a manner so as to succinctly convey the meaning of reasonable doubt to the jury," so that the court had not erred by following its language. Justice Mangano concluded that the "Court is not required to charge that the slightest doubt, so long as it is reasonable, is mandated language in the reasonable doubt charge." (*New York Law Journal*, 2/26/01.)

Public Defense Services Improvements Sought

Momentum is mounting in the movement to improve public defense in New York State. As set out below, new reports and increasing public recognition that the current situation is a calamity are raising the profile of the issue in Albany. Still, the state budget is late again, forcing public defense programs not included in the executive budget to take time away from substantive planning and offering services to engage in the now-annual activity of seeking refunding. (See *Backup Center REPORT*, Vol. XVI, # 1.)

NY Times Calls for Public Defense Reform

Decrying the effects of stagnant compensation rates for assigned counsel and underfunding of institutions that provide public defense, *The New York Times* editorialized on April 20, 2001 that public defense in New York is broken and must be repaired. It recognized that while a three-part *Times* series preceding the editorial had focused on New York City, the same difficulties exist to varying degrees across the state, and that "the immediate responsibility for fixing the problem lies squarely with Governor Pataki and the Legislature." The *Times* called for an increase in assigned counsel rates to at least the level recommended by the Chief Judge (\$75/hour for felony and

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Family Court cases, \$60/hour for non-felony cases). Noting that “money is not enough,” the editorial also urged the Legislature to “provide for a strong state role—preferably through a politically insulated commission—in setting quality standards for defense services, including reasonable caps on attorney caseloads, and in exercising vigorous oversight to make sure those standards are met.” (*New York Times*, 4/12/01.)

NYSDA Presents Position Paper to Task Force and Legislature

Meanwhile, NYSDA has presented a position paper to the Task Force to Study Compensation Rates for Law Guardians and Assigned Counsel. Entitled “**Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services**,” the paper describes current problems in public defense statewide. It describes and supports four principles necessary for the efficient and effective provision of public defense services: reliable and sufficient funding; an independent, politically-insulated governing board or commission; creation and enforcement of standards regarding selection, training, workload, and performance of lawyers, and eligibility of clients; and a formal role for clients and the client community in the oversight of public defense services and a role for public defense services providers in improving the entire justice system. Finally, it makes a series of legislative recommendations.

- Raise assigned rates to seventy-five dollars per hour.
- Create an indexing procedure to keep assigned counsel rates in line with increases in the cost of living.
- Eliminate in-court/out-of-court and other differentials for such compensation as well as per-case caps.
- Establish a schedule of state appropriations to subsidize the increase that will not simultaneously undermine the provision of public defense services by organized providers (public defenders, legal aid societies and not-for-profit providers).
- Create an independent and politically insulated statewide Public Defense Commission to oversee both the distribution of state funds and the provision of defense services through an office that would establish and monitor compliance with standards; evaluate and improve current methods of providing defense services; administer distribution of state funds to assigned counsel and organized providers; provide direct representation for eligible persons where required or requested; and report annually to the Governor, the Legislature and the Judiciary, making recommendations needed to improve the provision of public defense services in New York State.

The paper has also been sent to the legislature, county executives and others, and all NYSDA members. It is available on the web site or from the Backup Center.

1st Dept. Committee Reports on Funding Crisis

Many of the points made in the NYSDA paper are also made in a more jurisdiction-specific context by a report of the Appellate Division First Department Committee on the Representation of the Poor. It states near the beginning, “[t]he outmoded, underfunded, overburdened, and organizationally chaotic system in operation today dishonors New York’s long-standing commitment to an individual’s right to meaningful and effective representation, often with devastating effects on the thousands of children and indigent adults who pass through that system each year.” “Crisis in the Legal Representation of the Poor” (3/23/01). The Committee was charged with scrutinizing the quality of governmentally funded legal representation provided to poor people in New York City and with recommending a new plan for such services. The most significant conclusions of the Committee were that: (1) the poor are receiving inadequate legal representation; (2) the written Assigned Counsel Plan should be “expanded to cover the representation of persons who cannot afford counsel in all court proceedings in which governmentally funded lawyers are now required to be provided”; and (3) the New York State Legislature should immediately increase assigned counsel rates, and also reconsider the entire legislative structure relating to public defense services “in order to assist counties and New York City in overcoming the current crisis in the legal representation of the poor.” The report is available on the Internet at <http://www.nysda.org> or the Office of Court Administration web site: <http://www.courts.state.ny.us/1AD-rep-poor.htm>

Gideon Day

A few days before the First Department Committee issued its report recognizing the need for restructuring public defense funding and services in New York City, the need for change in public defense services statewide was trumpeted on “Gideon Day.” Over 50 local, state, and national organizations that make up the Gideon Coalition were well represented in the state’s capital near the anniversary of *Gideon v. Wainwright*, 372 US 335 (1963). Coalition members met with legislators, asking them to address the unconscionably low assigned counsel rates (New York ranks forty-ninth in the country) and the need to assure adequate funding for public defense.

During a crowded midday press conference, the concerns of defense lawyers and defendants were eloquently underscored. Vincent E. Doyle III, Chairman of the New York State Bar Association’s Criminal Justice Section, spoke about spiraling caseloads:

“What you have is a group of very dedicated lawyers who are up against an impossible task. Clients feel as though their lawyers don’t care about them or don’t have the time to meet with them. Nothing could be further from the truth. But because of the caseloads, because of the work they are asked to do, clients do not feel they are getting the type of service that they deserve, and they are correct.”

Kathryn M. Kase said that, “The National Association of Criminal Defense Lawyers is shocked and dismayed that today New York is a leader in how not to do public defense. If you had told us that we would be saying this about a state such as Mississippi or perhaps West Virginia, we would not be surprised. But organizationally, we are surprised, and we are appalled that it has come to this in New York.” Kase is a member of the NACDL Board. Also at the press conference were Edward Nowak, President of NYSDA’s Board of Directors; Russell Gioiella, President of the New York State Association of Criminal Defense Lawyers; Susan Hendricks, Deputy Attorney in Charge of the Criminal Defense Division, New York City Legal Aid Society; Leonard Noisette, Director of the Neighborhood Defender Service of Harlem; Marion Hathaway, Chair of the NYSDA Client Advisory Board; Tom Terrizzi, Executive Director of Prisoners’ Legal Services of New York; Jonathan Gradess, NYSDA’s Executive Director; and Lenore Banks of the League of Women Voters of New York State. (*New York Law Journal*; Gideon Coalition Press Release, 3/20/01.)

Other members of the League’s state and local chapters were also among the Coalition members participating in Gideon Day legislative activity. The League is, with NYSDA and others, continuing a series of fact-finding hearings, which are revealing unfairness in the criminal justice system linked to problems with public defense



Marion Hathaway, Chair of the NYSDA Client Advisory Board, speaking on Gideon Day



Artist Ellen McPherson in front of her “Tree of Justice”

funding. Overall, Coalition members and supporters reminded the legislature of the crisis in defense funding, the high caseloads, and the vital services provided by offices cut from the current State Budget.

The Coalition’s message was graphically conveyed to visitors to the Empire State Plaza concourse by “The Tree of Justice,” a transformational mural by Ellen McPherson. The forlorn state of justice due to the under-resourcing of public defense was aptly illustrated by withering, desiccated tree branches on one side of the tree, while flourishing green leaves on the other side showed justice restored with proper defense resources.

Drug Law Reform Draws Crowds to Albany

Supporters for drug reform have also been making their voices heard at the capitol, beginning with the children on Mar. 20, 2001. Youngsters whose parents have been incarcerated under the Rockefeller Drug Laws told stories of isolation, living in foster care and spending nearly their whole lives without the constant presence of their parents. “I want everybody to know that you are not only hurting the person incarcerated, you’re also hurting their family. Couldn’t there be an alternative to prison?” was the poignant question raised at a press conference by 13-year-old Aisha De Los Santos. (*New York Law Journal*, 3/20/01.)

From a completely different perspective, original sponsors of the Rockefeller Drug Laws have also come out in favor of reform. Former State Senator Douglas Barclay was recently quoted as saying, “It got to the point where it wasn’t working. If you haven’t solved the problem, you’ve got to start thinking about how you’re going to do it.” Barclay and other Republican sponsors of the law made inroads into the legislative mindset, a necessary condition for reform, having realized that inflating the

prison population was not the solution to the drug problem. (*Newsday*, 3/11/01.)

The largest gathering of people seeking legislative reform of the drug laws came under the slogan, "Drop the Rock." Hundreds of people from different parts of the state attended the March 27 Albany rally to decry the devastating effect of the drug laws on thousands of lives. Robert Gangi, Director of the Correctional Association of New York commented, "It's becoming a social movement. It isn't just organizations and advocates calling for repeal anymore. People who are directly affected by the laws are here." (*Albany Times Union*, 3/28/01.)

Information about the legislative proposals can be found on the web. See Governor's Press Release, 1/17/01: http://www.state.ny.us/governor/press/year01/jan17_01.htm; The Drug Law Reform, Drug Treatment, and Crime Reduction Act of 2001 (Assembly): <http://www.assembly.state.ny.us/reports/drugreform/>; Senate Press Release, 3/14/01: http://204.168.97.3/Docs/press/press_018.html.

Plea Bargain Basement

Plea bargains should only be permitted when the scales of justice are balanced as a result. Lately, courts have been dealing with questions of whether someone's thumb has been placed on the scales.

Pressure to Waive Civil Claims Disapproved

Asking criminal defendants to relinquish civil police brutality claims in exchange for plea bargains violates public policy and undermines the integrity of the criminal justice system. In *Cowles v Brownell*, 73 NY2d 382, the Court of Appeals held that a prosecutor's obligation to represent the People, and therefore to exercise independent judgment in deciding whether to prosecute, cannot be fulfilled when the prosecutor "undertakes also to represent a police officer for reasons divorced from any criminal justice concern." The Court declined to enforce a release-dismissal agreement. Last December, the 3rd Department reiterated that rule where a DWI suspect had been compelled to withdraw his lawsuit against Otsego County in exchange for a reduced sentence recommendation. Instead of undoing the plea bargain, the Appellate Division decided that "the appropriate remedy for the impermissible extraction of a criminal defendant's release of a civil claim is to deny enforcement of the release when and if it is asserted by way of defense in a civil action." *People v Grune*, 717 NYS2d 750 (3rd Dept 2000).

The American Bar Association's standards prohibit prosecutors from threatening meritless prosecutions to extract civil liability waivers. "[T]he prosecuting attorney should not bring or threaten to bring charges against the defendant or another person, or refuse to dismiss such charges, where admissible evidence does not exist to sup-

port the charges or the prosecuting attorney has no good faith intention of pursuing those charges." Standard 14-3.1 (h), *ABA Standards for Criminal Justice Pleas of Guilty* (3rd ed. 1999).

Nevertheless, according to a recent press report, defense attorneys and others in the Capitol Region contend that this practice persists. "Things get worse for a defendant once the district attorney's office has any knowledge or inkling that a defendant might want to sue," according to one Albany County defense lawyer. "I've certainly had a number of experiences where it has been clear to me that the district attorney's office is taking a position in a criminal case that is guided less by the facts and the circumstances of the criminal case and more by their desire to try to provide some protections to police officers." The President of the Albany NAACP expressed a belief that the problem is systemic. "We keep seeing these mundane charges like resisting arrest and disorderly conduct. I believe once they (police) have the criminal charges lodged against them, and if there's an effort being made for a civil lawsuit, they just make those charges stick." Monroe Freedman, Professor of Legal Ethics at Hofstra University Law School was quoted as saying, "There's very little to discourage prosecutors from doing what as law enforcement officials they ought to know is unlawful." He then added: "One of the scandals is that prosecutors typically are not disciplined." The District Attorneys' offices in the region have denied that such practices exist. (*Albany Times Union*, 3/24/01.)

Waiver of Brady Not Allowed in 9th Circuit

In California, Angela Ruiz faced federal charges for importing marijuana from Mexico. The federal jurisdiction has a "fast track" program under which defendants receive plea bargains in exchange for waiving their rights to indictment, appeal, file motions and *Brady* material. A recommendation for a sentence below the sentencing guidelines is the reward for conserving government resources. Ruiz rejected a fast track plea bargain "because it contained an unconstitutional waiver of *Brady* rights." She instead pled guilty and sought a fast-track-type sentence reduction by complying with all the requirements except the *Brady* waiver. Lacking the prosecutor's recommendation, the court rejected her claim and sentenced her to 18 months in prison. On appeal, Ruiz argued that "prosecutors cannot withhold the benefits of a plea bargain simply because a defendant refuses to waive her unwaivable *Brady* rights."

The 9th Circuit noted that the "disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea." A prosecutorial incentive to withhold *Brady* information would arise if guilty pleas extinguished *Brady* rights or if plea agreements could extinguish those rights. The court held

that “the due process right to receive undisclosed Brady material cannot be waived without offending another due process requirement, namely, that plea agreements be entered voluntarily and intelligently . . . [I]t is unconstitutional for prosecutors to withhold a departure recommendation based on a defendant’s refusal to accept such a waiver.” Ruiz’s sentence was vacated and the case remanded for an evidentiary hearing to ascertain the basis for the prosecution withholding its fast track recommendation. *US v Ruiz*, No. 00-50048 (9th Cir. 3/5/01).

In light of *Ruiz*, defense counsel may want to take note of the responsibilities of prosecutors under the ABA standards: “The prosecuting attorney should not, because of the pendency of plea negotiations, delay any discovery disclosures required to be made to the defense under applicable laws or rules.” Standard 14-3.1 (g) ABA *Standards for Criminal Justice Pleas of Guilty* (3rd ed. 1999).

Prosecutor Cannot Pretend to Be Defense Counsel

Prosecutorial excess may have hit bottom, below even the plea bargain basement, in Colorado recently, where Chief Deputy District Attorney Mark Paulter masqueraded as a public defender to facilitate the capture of an accused murderer. He faces disciplinary action for misrepresenting himself when he convinced the defendant, now a death row inmate, to surrender to the police. Defense lawyers believe he should be disbarred. “The notion that if the crime is bad enough, government lawyers are entitled to lie is a flawed one,” Attorney Jeffrey Pagliuca was quoted as saying. “Any attempt to justify this kind of conduct is the epitome of arrogance.” A Colorado judge has found that Paulter was guilty of misconduct for intentional deception. The disciplinary panel has a month to make its recommendation. (*Findlaw Legal News*, 3/8/01.)

Defense Counsel Shouldn’t be Client’s Adversary

“Don’t ask for help. You’re all alone. PRESSURE.” These words from a Billy Joel song may express the way criminal defendants feel when they believe their attorneys are working against them. Charged with bribing a public official to avoid paying taxes, Danny Davis entered a guilty plea under an agreement negotiated by his attorney. Before sentencing, Davis asked the court to withdraw his plea, asserting that counsel was not working on his behalf. Davis stated that he “had asked counsel to investigate his arrest but that counsel had told him, ‘I am not going to investigate into this case. I am not submitting any type of pretrial motions in this case. The only thing that I am interested in is you taking a plea.’” The trial judge offered defense counsel an opportunity to respond. Davis’ lawyer said, “I am always uncomfortable being in an adversarial position with my client. It is inappropriate and I prefer not to.” Davis appealed claiming ineffective-

ness of counsel at the plea withdrawal hearing due to a conflict of interest.

The 2nd Circuit noted that while “[d]efense counsel took the prudent course of declining to respond to Davis’s allegations of coercion while acknowledging that the plea withdrawal motion placed him in an adversarial relationship with his client,” counsel’s silence illustrated his actual conflict of interest. Davis did not provide a knowing and voluntary waiver of his right to conflict-free counsel at the plea withdrawal hearing, and his “particularized allegations” that his attorney had refused to investigate the case or file motions deserved close scrutiny. If true, it could mean that the defendant’s plea was coerced. The case was remanded for an evidentiary hearing on the plea withdrawal motion. *United States v Davis*, No. 99-1246 (2nd Cir. 2/6/01).

Davis illustrates a common ethical dilemma for defense attorneys according to Roy Simon, Professor of Ethics at Hofstra University School of Law, and author of *Simon’s New York Code of Professional Responsibility Annotated*. “It puts lawyers and it puts the system in a very uncomfortable position. Because you don’t want to mandate lawyers to contradict their clients and yet you don’t want to let clients, particularly those that are desperate, just make up a story out of whole cloth.” Professor Simon believed that Davis’s lawyer did not have to remain silent “if Mr. Davis invented the allegations.” (*New York Law Journal*, 2/13/01.)

Mental Illness Fact and Fiction

The history of society’s reaction to mental illness is a long, sad tale of misunderstanding and mistreatment. Mental illness still conjures up images of mayhem and bedlam. Fortunately, science has made great strides in painting a realistic portrait of the mentally ill. A recent study by the Royal College of Psychiatrists, conducted by two professors from the Institute of Psychiatry in London, reinforced that “[m]entally ill patients pose a low risk to the public.” Homicides committed by people with mental disorders were found to have decreased steadily over a 25-year period. The psychiatrists concluded that “people are more likely to win the National Lottery jackpot than to die at the hand of a stranger with a mental illness.” Upon releasing the report, Dr. Robert Kendell, President of the Royal College, was quoted as saying: “If any one of us in this room is frightened of being murdered, the people we should worry about are people who are drunk or intoxicated.” (BBC News, 1/5/01.)

Meanwhile, the New York law mandating treatment for the mentally ill under certain circumstances has been interpreted expansively to include violent acts committed by mentally ill patients while hospitalized. The Kingsboro Psychiatric Center in Kings County petitioned the court for an authorization for assisted outpatient treatment, under Mental Hygiene Law 9.60 (Kendra’s Law), for one

of its patients. They claimed that he assaulted a staff psychiatrist while in their care. A commitment order under Kendra's law requires evidence that a patient has committed "one or more acts of serious violent behavior toward self or others." The man's counsel argued that a violent act committed during the present hospitalization did not qualify under the statute. The court reasoned that "the purpose behind the language of this section is to expand the number of months in which a petitioner may look back . . . and not to exclude the current hospitalization, nor any violent acts occurring in the current hospitalization itself from consideration for an AOT [Assisted Outpatient Treatment] order." The court ruled that it would "take into account any and all violent acts in the present hospitalization when it satisfies the criterion of MHL 9.60 (c) (4) (ii)." *In Re Julio H.*, No. 300109/00 (Sup. Ct. Kings County 3/6/01). (*New York Law Journal*, 3/12/01.)

Prisoners' Rights and Wrongs

Work release permits prisoners to work and live outside of prison. Collecting public assistance while on work release is one benefit that prisoners will be denied under a new regulation. After a prisoner successfully applied for benefits while in the work release program, he was charged with "inmate misbehavior" for welfare fraud by the Department of Correctional Services. His work release status was revoked and a 1983 action followed, which was dismissed by the federal district court. The 2nd Circuit found that the inmate stated a cause of action and remanded the case. *Friedl v City of New York*, 210 F3d 79 (2nd Cir. 2000). Ultimately, the state and the city settled. To forestall future litigation, the new regulation will require "inmates to sign a work-release contract in which they promise not to apply for public assistance." Inmates must also acknowledge that they know a violation of the agreement can lead to disciplinary action. (*New York Post*, 3/10/01.) A Pennsylvania man who became eligible for parole objected when the Pennsylvania Department of Corrections offered him the option of participating in Alcoholics Anonymous or Narcotics Anonymous before recommending his release. He noted that both programs were religiously grounded. Corrections denied the prisoner's parole, transferred him to another facility far away from his family, and lowered his job classification. He filed a 1983 action in federal court alleging retaliation by prison officials for exercising his religious freedom. His claims were dismissed on summary judgment. On appeal the 3rd Circuit reversed: "Rauser has presented a great deal of evidence from which a reasonable jury could conclude that the prison officials penalized him because he insisted on exercising his First Amendment rights." The case has been remanded for further proceedings. *Rauser v Horn*, 241 F3d 330 (3rd Cir. 2001). (*Legal Intelligencer*, 3/1/01.)

Pushing the Envelope: Court of Appeals Eases Filing Requirements for Inmates

The New York State Court of Appeals has made it substantially easier for *pro se* inmate-litigants to comply with the short four-month Statute of Limitations for Article 78 proceedings. In *Matter of Grant v Senkowski*, ___ NY2d ___, No. 10 (2/13/01), the court held that *pro se* inmate pleadings initiated by order to show cause are properly "filed" the moment legal papers are received in the court clerk's office. Previously, a prisoner's legal papers were not considered filed, and the Statute of Limitations was not tolled, until a judge signed the order to show cause. That process frequently resulted in lengthy delays and unjust dismissals of *pro se* inmate Article 78 proceedings. In *Grant* the court held that a 1999 amendment to CPLR 1101 abolishing traditional poor person relief and replacing it with a system of reduced filing fees for *pro se* inmate legal filings changed the general rule. The court found that the statute now directs that actions and special proceedings by inmates are "commenced" upon receipt of an unsigned order to show cause and accompanying papers in the clerk's office.

However, the Court also held that the language of CPLR 304 precluded adoption of the federal mailbox rule in New York (see *Houston v Lack*, 487 US 266 [1988]). The federal rule treats a *pro se* prisoner's legal papers as "filed" the moment they are delivered to prison officials for mailing to the court. "We recognize the greater impediments *pro se* prisoners may face over most other litigants in filing their legal papers on time. But . . . we cannot depart from the statutorily mandated filing requirements by incorporating a *pro se* prisoner mailbox exception." Therefore, after *Grant v Senkowski*, ***pro se* inmate litigants in New York must mail their legal papers early enough for the papers to at least be received in the clerk's office by the last day of the limitations period.** In *Grant*, the petitioner waited until 5 days before the deadline to deliver his papers to prison officials. He also opted for certified mail, which lead to bureaucratic delay in the debiting of his inmate account. Consequently, it took seven days for his legal papers to arrive at the courthouse. Since *Grant* missed the deadline by two days, the Court affirmed the dismissal of his Article 78 proceeding.

Brendan O'Donnell of Prisoners' Legal Services and Alfred O'Connor of NYSDA's Backup Center represented *Grant*. A summary of the decision will appear in the Case Digest section of a future issue of the *REPORT*.

Criminal Defense Immigration Issue Amicus Brief Filed in Supremes

Manuel D. Vargas, Director of NYSDA's Criminal Defense Immigration Project, recently filed an *amicus* brief in the U.S. Supreme Court on behalf of fifteen defender

organizations in *INS v St. Cyr*. Enrico St. Cyr, a native of Haiti and a lawful permanent resident of the US, pled guilty in March 1996 to an aggravated felony. He pled before Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which abolished discretionary relief from deportation in many instances, including where a lawful permanent resident has been convicted of an aggravated felony. In 1997, following enactment of AEDPA and IIRIRA, the INS sought to deport St. Cyr based on his 1996 criminal conviction. He sought discretionary relief from deportation under the former section 212 (c) of the Immigration and Nationality Act. The INS denied St. Cyr's 212 (c) application as retroactively barred by AEDPA and IIRIRA. However, on *habeas* review, the 2nd Circuit held that Congress had expressed no clear intent that AEDPA and IIRIRA be applied retroactively against lawful permanent residents who had pled guilty before enactment of the new statutory scheme. The Court found that AEDPA and IIRIRA would have an impermissible retroactive effect if they were applied to pre-enactment guilty pleas because the legislation attaches new substantive legal consequences to a lawful permanent resident's guilty plea to a deportable offense. The Supreme Court granted the government's petition for *certiorari* on Jan. 12, 2001. The case is scheduled for argument on April 24. Sejal Zota of the Criminal Defense Immigration Project assisted with the brief.

Racial Profiling in New York State

The gravity of racial profiling first came to light for many in New Jersey. That light is now shining on communities throughout New York. In Dutchess County, a yearlong study is slated to begin requiring the Sheriff's Office and police agencies to collect data to assess whether people are being stopped based on their race. John Lamberth, who conducted the well-known New Jersey study, will analyze the data. The impetus behind the study was Mario Johnson, an African-American Dutchess County Legislator, who "was stopped several times while driving and asked to prove that he was, indeed, the Dutchess County lawmaker that his specialized license plates indicated he was." At forums conducted over the last several months, more than 100 people came forward with similar stories, according to Shirley Adams, a member of the Dutchess County Criminal Justice Council's Community Involvement Committee. (*Daily Freeman*, 3/2/01.)

In Erie County, a class action lawsuit is being filed against the Town of Cheektowaga and its police department based on allegations of "harassment, discrimination and racial profiling against African-Americans and other minorities." The Rev. Darius Pridgen, Pastor of True Bethel Baptist Church, along with other religious leaders and the local NAACP formed a coalition to collect stories

of racial profiling by the police and mall security officers to build their case. (*Buffalo News*, 2/27/01.) Existing numbers already tell a story: "More than half the 200 people arrested for driving with a suspended registration last year . . . were African-Americans, Cheektowaga crime statistics show. About 45 percent of the approximately 725 motorists charged with driving with a suspended or revoked license were black." At the Walden Galleria, the town's major shopping mall, "[m]ore than half of the more than 800 people arrested at the mall last year—54 percent—were black." (*Buffalo News*, 3/4/01.)

Other upstate communities are also expressing concerns. In Schenectady County, the police department issued an order prohibiting racial profiling. Still, Louise Roback, Director of the New York Civil Liberties Union for the region, criticized the order for lacking guidelines as to what conduct is prohibited. She pointed out that there was no provision for data collection. Public officials have responded that it will take time to develop a system of data collection to meet their needs. (*Albany Times Union*, 3/20/01.)

On a final, federal note, President Bush sent a directive to Attorney General Ashcroft on Feb. 28, 2001, ordering him to "review the use by Federal law enforcement authorities of race as a factor in conducting stops, searches, and other investigative procedures . . . [to] work with the Congress to develop methods or mechanisms to collect any relevant data from Federal law enforcement agencies and [to] work in cooperation with State and local law enforcement in order to assess the extent and nature of any such practices." Ashcroft is to report his "findings and recommendations for the improvement of the just and equal administration of our Nation's laws." The memorandum can be found on the Internet at <http://usinfo.state.gov/topical/rights/hrpage/01022803.htm>.

Drug Courts—Planning Imperative, Defense Participation Vital

Last summer Chief Judge Judith Kaye vowed to put a drug court in every New York county. Due to the success of established courts, the support of the Unified Court System (and perhaps also to the continued availability of federal money for start-up), counties are moving toward creating this type of alternative to incarceration. Ontario County recently held a public forum, organized by the Geneva League of Women Voters, to flesh out the issues of drug reform and drug courts. The District Attorney, the director of the local treatment services center, and a defense attorney were panelists. Each presented their views on the effectiveness of drug treatment as opposed to jail. (*Finger Lake Times*, 3/21/01.)

Evident from this meeting was the fact that drug court programs properly take shape only through the concerted efforts of every part of the system, including prosecutors,

court officials, treatment personnel, and the public defense community. The need to include the defense perspective in the planning is recognized at the highest levels. In last year's report by the New York State Commission on Drugs and the Courts, one recommendation for a successful treatment program was: "a high degree of cooperation and agreement among court representatives, prosecutors, *defense attorneys*, treatment providers, probation representatives, and any other parties to the treatment process. For procedural as well as political reasons, **there must be consensus on central issues** such as eligibility criteria; the procedural status (pre-plea, post-plea, etc.) of those who are to enter treatment; and other program parameters." (emphasis added.) "Confronting the Cycle of Addiction & Recidivism" (June 2000).

Deputy Chief Administrative Judge Joseph J. Traficanti Jr., the Unified Court System's director of court drug treatment programs, recently met with NYSDA about the work being done toward establishing drug courts across upstate New York. (Traficanti is said to be the basis for Chief Administrative Judge Jonathan Lippman's faith that the programs will be in place statewide by the end of 2003. [*New York Law Journal*, 1/26/01.]) Emphasizing that drug treatment offered through drug court programs saves lives, Traficanti talked with enthusiasm about his mission. He listened while Executive Director Jonathan E. Gradess described defense concerns. Those included the perceived preference in new plans for post-plea courts despite the success of pre-plea courts in some jurisdictions such as Monroe County and the too-frequent failure to include public defense representatives in initial discussions. Defense input is necessary "from day one," Traficanti agreed. In counties without a full time institutional public defense provider, it can be logistically difficult to get the defense perspective, he said—it is not possible to talk to every assigned counsel lawyer in every jurisdiction.

NYSDA provided Traficanti with a copy of the American Council of Chief Defenders' now finalized "Ten Tenets of Fair and Effective Problem Solving Courts." These include the need for meaningful defense participation in the design, implementation and operation of such courts, resource parity between the prosecution and the defense, only voluntary participation by individual defendants after review with counsel of program requirements and possible outcomes and without entering a guilty plea, protection of the defendant's rights including self-incrimination rights, and program requirements that are the least restrictive possible to achieve agreed-upon goals.

Copies of the Tenets are available from the Backup Center, which continues to respond to inquiries about drug courts and to gather information. If there are drug court developments or concerns in your jurisdiction, please contact Staff Attorney Mardi Crawford.

Judging the Judges

The New York State Commission on Judicial Conduct has rendered a number of determinations of discipline in 2001. The decisions can be found at the Commission's web site through links on NYSDA's web page or directly at <http://www.scjc.state.ny.us>.

Michael J. Brennan, a Justice of the Supreme Court, Richmond County, has been censured by the New York State Commission on Judicial Conduct for inappropriate behavior. On July 19, 2000, Judge Brennan made several comments while arraigning a defendant alleged to have been involved in the death of a police officer, including, "If this had been the old west, there would have been a lynch mob waiting at the door for you. Because of police officers like Officer Kelly, who insist on the laws being enforced and due process being obeyed, you will get your day in court." The Commission concluded that the judge used the arraignment as an "opportunity to make an inflammatory speech, which conveyed the appearance that he was pandering to public sentiment against the defendant." The Commission continued:

"At a time when the defendant was entitled to a presumption of innocence, respondent made statements which assumed the defendant's guilt, called him a 'sociopath' and a 'loser,' chastised him for 'hav[ing] no concern for the values and norms of this society,' and even stated that the defendant would shoot respondent if given the opportunity. Respondent's taunting, provocative comments elicited from the defendant an incriminating response, expressing remorse. Respondent's conduct was antithetical to the proper role of a judge at an arraignment, which is to be an impartial arbiter, and was inconsistent with the fair and proper administration of justice."

In Re Brennan (2/8/01).

Judges are required to remain neutral. Roger C. Maclaughlin, Justice of the Steuben Town Court, Oneida County was censured for acting "not only as judge, but as a self-appointed investigator and prosecutor." Lawrence Bizjak appeared before Maclaughlin on code violations related to his livestock. Judge Maclaughlin "failed to follow the law, solicited and received *ex parte* information, and relied upon that information to Mr. Bizjak's detriment." Most seriously, the judge "deprived Mr. Bizjak of his liberty without regard for his rights under the law." The judge sentenced Bizjak to jail on contempt for not making ordered repairs in time, without notice, a hearing, or bail, which the Commission found to be "a shocking abuse of judicial power" that conveyed "the impression of bias." *In re Maclaughlin* (2/8/01).

Another judge disciplined by the Commission had earlier been at the center of celebrity or notoriety. Joseph C. Teresi, Justice of the Supreme Court, Albany County, had allowed television cameras into his courtroom during

(continued on page 27)

CONFERENCES & SEMINARS

Sponsor: New York State Defenders Association
Theme: Criminal Defense Tactics and Techniques 3
Date: **May 19, 2001** [PLEASE NOTE DATE CHANGE; WAS MAY 5]
Place: Rochester, NY
Contact: Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail nsteuhl@nysda.org; web site www.nysda.org

Sponsor: National Drug Court Institute
Theme: Comprehensive Drug Court Public Defenders' Training
Dates: May 7-10, 2001
Place: Williamsburg, VA
Contact: Colby Miller, NDCI, 901 North Pitt Street, Suite 370, Alexandria VA 22314; fax (703) 706-0577

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Date: May 11, 2001
Place: NYC
Contact: Patricia Marcus, tel (212) 532-4434; email nysacdl@aol.com; web site www.nysacdl.org

Sponsor: New York State Bar Association
Theme: Do or Die – Vital Aspects of Your Case
Dates & Places: May 11, 2001 Huntington Station
May 18, 2001 NYC
May 18, 2001 Albany
June 1, 2001 Buffalo
Contact: 1 Elk Street, Albany, NY 12207; tel (800) 582-2452 [In Albany 463-3724]; fax (518) 487-5618; web site www.nysba.org

Sponsor: University of Michigan Law School
Theme: Darrow Death Penalty Defense College
Dates: May 12-17, 2001
Place: Ann Arbor, MI
Contact: Andrea D. Lyon, Director; tel (734) 647-4088; email tlcornel@umich.edu

Sponsor: Forensic Sciences & Crime Scene Technology
Theme: FRENZY Expo
Dates: May 14-17, 2001
Place: Washington, DC
Contact: FRENZY Registration, c/o Worldwide Registration, 218 Darby Rd, Havertown, PA 19083; tel (888) 249-0368; fax (610) 853-9958; web site www.frenzyexpo.com

Sponsor: New York State Bar Association
Theme: DWI On Trial: The Big Apple Seminar
Dates: May 25-26, 2001
Place: NYC
Contact: 1 Elk Street, Albany, NY 12207; tel (800) 582-2452 [In Albany 463-3724]; fax (518) 487-5618; web site www.nysba.org

Sponsor: National Legal Aid and Defender Association
Theme: Defender Advocacy Institute
Dates: June 1-6, 2001
Place: Dayton, OH
Contact: National Legal Aid & Defender Association, 1625 K Street, NW, Suite 800, Washington, DC 20006-1604 Phone: (202) 452-0620, Fax: (202) 872-1031; email info@nlada.org; web site www.nlada.org/t-dai01.htm

Sponsor: National Association of Sentencing Advocates
Theme: Death Penalty Mitigation Institute
Dates: June 6-7, 2001
Place: Nashville, TN
Contact: NASA Conference, 514 10th NW, Suite 1000, Washington DC, 20004; tel (202) 628-0871; fax (202) 628-1091; email nasa@sentencingproject.org; web site <http://www.sentencingproject.org>

Sponsor: National Association of Sentencing Advocates
Theme: Annual Conference
Dates: June 7-9, 2001
Place: Nashville, TN
Contact: NASA Conference, 514 10th NW, Suite 1000, Washington DC, 20004; tel (202) 628-0871; fax (202) 628-1091; email nasa@sentencingproject.org; web site www.sentencingproject.org

Sponsor: New York State Defenders Association
Theme: 34th Annual Meeting and Conference
Dates: July 26-29, 2001
Place: Lake George, NY
Contact: Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail nsteuhl@nysda.org; web site www.nysda.org

Sponsor: Santa Clara University Law School
Theme: Death Penalty College
Dates: August 4-9, 2001
Place: Santa Clara, CA
Contact: Ellen Kreitzberg, Santa Clara University Law School, tel (408) 554-4724; email ekreitzberg@scu.edu; web site www.scu.edu/law/dpc

☞ **Always check the NYSDA Web site for the latest job notices:**
www.nysda.org

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

PLS also seeks applicants for **Staff Attorney** positions in Albany, Plattsburgh, and Poughkeepsie. Previous legal service or civil rights experience preferred. Recent graduates with interest in Public Interest law are encouraged to apply. Serious need for Spanish-speaking staff. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references to address above.

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 resume to Robin Steinberg, Executive Director, Bronx Defenders, 890 Grant Avenue, Bronx NY 10451.

THE DUTCHESS COUNTY PUBLIC DEFENDER'S OFFICE is accepting resumes from law students for the 2001 **Summer Law Internship** program. The ten-week summer program will pay a \$3500 stipend. Summer law interns will assist on client intakes, case preparation, and legal research. They will also provide support services to attorneys in court. Applications will be accepted until May 1, and may be sent to David Goodman, Dutchess County Public Defender, 22 Market Street, Poughkeepsie NY 12601. No telephone calls, please.

THE LAW OFFICES OF BENNET 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 resume to Stephen K. Harper, Law Offices of Bennet H. Brummer, 1320 N.W. 14th Street, Miami FL 33125; tel (305) 545-1659; fax (305) 545-1744.

THE KERN COUNTY (CA) PUBLIC DEFENDER'S OFFICE is recruiting for **Trial Attorneys I-IV** (salary range \$46,000-\$92,000 DOE), a Non-Trial Writs and Appeals Lawyer to assist with training (salary range \$75,000-92,000, plus benefits). Membership in California Bar is 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 (661) 868-3480.

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

THE OSBORNE ASSOCIATION is seeking a **Family Ties Counselor** to implement parenting courses, child visitation services, and provide outreach to promote increased and improved relationships between incarcerated mothers and their minor children at Albion Correctional Facility. Required: Bachelor's degree in early childhood education, social work, or child psychology; 3 years experience as a counselor; experience working with families at risk and incarcerated women; excellent writing and communications skills; ability to multi-task; and a working knowledge of the NYS criminal justice system. Preferred: post-graduate courses in family development and family counseling. Send cover letter and resume to The Osborne Association, Inc., 135 East 15th Street, New York NY 10003; fax (212) 979-7652. ♀

Book Review

Troubling Confessions: Speaking Guilt in Law and Literature

By Peter Brooks

University of Chicago Press (2000)

207 pages; \$24.00

by Barbara DeMille*

Peter Brooks, Chester D. Tripp Professor of Humanities and Director of the Whitney Humanities Center at Yale University, has written on the problematic nature of confession: its complex psychological impetus as well as its pragmatic extraction in interrogation rooms, often the product of deceit and intense pressure. It is his aim in this work to meld the two. Towards this effort he cites both legal and literary, as well as religious and psychological, sources: the Roman Catholic Church; Talmudic law; former U.S. Supreme Court Justices Abe Fortas and Felix Frankfurter; Fred Inbau and John Reid's 1962 manual on police interrogation, *Criminal Interrogations and Confessions*; and authors Rousseau, Stendhal, Tolstoy, Dostoevsky, Koestler, and J.M. Coetzee. It is probably the epigraph from Coetzee heading the second chapter that sums up the tone of the book best:

Because of the nature of consciousness, Dostoevsky indicates, the self cannot tell the truth of itself to itself and come to rest without the possibility of self deception.

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

The above metaphysical speculation is, however, light years away from the down and dirty methods, coercion, deception, and outright trickery, with which law enforcement often extracts confessions, *Miranda v Arizona* notwithstanding. And herein lies the difficulty.

Brooks writes well. His instances are well chosen and documented, both literary and legal. In spite of his careful scholarly work, it seemed to me that his attempt to meld the obscure reasons of the spirit and soul for self-display and self-flagellation via confession with the very immediate circumstances of a person in custody continually beleaguered by less than honorable interrogators—whose chief purpose is to obtain a written and signed statement of guilt—largely fails. The gulf is too wide. One doubts these widely separated forms of “confession” would ever meld. One comes from within—the deep torment of Poe’s murderer in “The Tell Tale Heart” confessing out of the horror of his inner torment as the beating “heart”

appears to him beneath the floorboards of the room. Its opposite comes from without—the prisoner threatened with the death penalty, guilty or not, forced to plead to a lesser charge of manslaughter.

There is much linguistic and speech-art theory here. There is a good discussion of the origin of both *Miranda v Arizona* as well as the prior *Culombe v Connecticut*. This is a scholarly work, probably most useful to study of the inner motivations of confession and probably not as useful in any practical way to defense attorneys bedeviled by clients who “talk” without their attorneys present even when advised of their rights. ♪



Resources Sighted, Cited, or Sited

- ✓ *Keeping Defender Workloads Manageable*. BJA 2001. To order a print copy of NCJ Number 185632, 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 askncjrs@ncjrs.org; web site: <http://www.ncjrs.org/pdffiles1/bja/185632.pdf>.
- ✓ *Compendium of Standards for Indigent Defense Systems*. BJA 2000. Administration of Defense Systems (Volume I); Attorney Performance (Volume II); Capital Case Representation (Volume III); Appellate Representation (Volume IV); Juvenile Justice Defense (Volume V). To order a print copy, contact The BJA Clearinghouse of the National Criminal Justice Reference Service (see contact information above); web site: <http://www.ojp.usdoj.gov/indigentdefense/compendium>.
- ✓ *Census 2000 Data for the State of New York*. US Census 2000. The official Census 2000 Redistricting Data Summary File for New York that could be used to redraw federal, state and local legislative districts. To order a print copy, contact The

U.S. Census Bureau, Washington DC 20233: 301-457-4608; e-mail webmaster@census.gov; web site: http://www.census.gov/Press-Release/www/2001/tables/redist_ny.html

- ✓ *Columbia Encyclopedia*. 6th ed. 2001. “The sixth edition of *The Columbia Encyclopedia* encompasses the discoveries, crises, and other events of the 1990s—and of the 1900s and the innumerable decades and centuries gone before. For a one-volume work, the scope is immense. The nearly 51,000 entries in the encyclopedia marshal six and a half million words on a vast range of topics.” Full-text searchable on the web. Web site: <http://www.bartleby.com/65/>
- ✓ [Drug Field Test Standards] *Color Test Reagents/Kits for Preliminary Identification of Drugs of Abuse* NIJ Standard-0604.01. NIST July 2000. Latest government standards for evaluating preliminary field tests used to identify narcotic substances. To order a print copy of NCJ Number 183258 contact The BJA Clearinghouse of the National Criminal Justice Reference Service (see contact information above); web site: <http://www.ncjrs.org/pdffiles1/nij/183258.pdf>. ♪

From My Vantage Point*

by Jonathan E. Gradess

Clients and the Client Community Deserve a Say in Defense Services

In our recent report written for the Task Force to Study Compensation Rates for Law Guardians and Assigned Counsel (“Resolving The Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services,” see p. 3) we urged that clients and the client community have a say in the design, maintenance and evaluation of the quality of public defense services, possible mechanisms for which are discussed below. This was not a new position for our Association.

Clients and Their Communities Have Taught Us Much

In 1979, our Board declared its belief that clients should play an important role in the defender system and in NYSDA. We created a Client Advisory Board as part of our corporate by-laws and opened membership in our Association to non-lawyers, including prisoners. That same year we created a Board position for a non-lawyer representative and began the development of a community legal education program in a host of client community organizations. We thereafter worked with the National Clients Council, the Alliance For Legal Rights, the Economic Opportunity Commission of Nassau County and other Community Action Programs not only to shape programs and joint responses to issues affecting defense services but also to learn directly from people who have the real stake in public defense reform.

In those days we urged the National Legal Aid and Defender Association to follow our lead. We developed community legal education materials, and, as early as 1981, incorporated client satisfaction surveys into our evaluations of defender systems. We have been host to important client community activities, have facilitated small grants to client advocacy groups, and have conducted hearings with clients’ family members. In the campaign to abolish civil death for life termers our Association was the home for the Working Group On Lifer’s Right to Marry, an organization comprised of hundreds of individuals whose rights were finally vindicated in *Langone v Coughlin*, 712 FSupp 1061 (No. Dist. N.Y. 1989) [ban on lifer’s right to marry held unconstitutional].

Our client members have often acted as an early warning system, helping us learn about community problems before those problems emerged in criminal court proceedings. For example, in the mid 1980s, before crack cocaine was being prosecuted, we were being informed of

* The REPORT will periodically feature a column by the Association’s Executive Director on major issues concerning public defense in New York State.



both its scope and existence by client community groups on Long Island. More recently, letters from prisoner members of NYSDA formed a basis for much of my testimony before the New York State Senate Democratic Task Force on Criminal Justice Reform on Dec. 7, 2000 concerning Special Housing Units, the Rockefeller Drug Laws, and Transitional Services.

Client-Centered Representation Works—and Requires That Clients be Heard

The Defender Institute’s Basic Trial Skills Program (BTSP), which we began in cooperation with the Chief Defenders, has trained hundreds of lawyers to be more sensitive to their clients. With its focus on client-centered representation, BTSP has taught attorneys to overcome the obstacles that race, class, and sex sometimes place in the way of healthy client-attorney relationships. Since its inception in 1987, BTSP has proven invaluable because it makes participants better lawyers. The teaching of client-centered representation is not an idealistic goal but a practical skill. I believe that involving clients and the client community in the broader aspects of public defense will have a similar, salutary effect on the representation individual clients receive.

Representing a person, not a file, in every case keeps lawyers from inadvertently working to their clients’ detriment. For example, if lawyers do not find out that clients are noncitizens, they may urge as “the best possible deal” plea bargains that result in deportation. If they do not know that a young client has suffered abuse, they may miss a winning defense. If lawyers do not take the time and effort to gain their clients’ trust, these and other important facts will not be disclosed.

Gaining trust takes more than saying, “I’m your lawyer, trust me.” Clients and others who see defense lawyers with an office in the same building as the prosecutor and court, who see lawyers greeting district attorneys and court officers with more warmth than they bestow on clients and their families, who learn that their lawyers talk to the prosecutor about a plea bargain before even speaking to a client, will doubt that the lawyers have their clients’ best interests in mind or at heart.

That is why the Defender Institute's trial skills training focuses as much on client interviews as it does on cross-examination. That is why the National Advisory Commission's *Report on Courts* said in 1973 that public defenders should avoid excessive and unnecessary camaraderie around the courthouse and with law enforcement officials (Standard 13.9) and should be sensitive to the problems of the client community and locate, when possible, in client neighborhoods and not where the office would be excessively identified with the other components of the judicial system (Standard 13.13). That is why the National Study Commission on Defense Services said in 1976 that defense systems should devise means of systematically obtaining client feedback and using the information gained to enhance the system's sensitivity to client needs and improve the quality of representation provided (Guideline 5.10).

Defining a Formal Role for Clients and the Client Community

Today, as the challenge lies before us to create a new public defense system, it is no accident that we urge "[a] formal role for clients and the client community in the oversight of public defense services. . . ." Last July our Board passed a resolution that informs the position expressed in our recent legislative report. The *Statement On Client Involvement and Satisfaction, Quality Representation and Vigorous Advocacy* states in part:

New York needs a public defense system that is exclusively focused on providing committed and competent representation to people who cannot afford legal counsel. Public defense providers should seek the advice and continued assistance of the client community in assessing and insisting upon a system providing for such representation.

The system for providing public defense services should have a client advisory board that assists administrators in planning and helps in the design, maintenance and administration of the system. Client satisfaction should be a primary component of defender professionalism as well as an important measure of defender performance. Tools for the assessment of client satisfaction should be developed and methodically used by defender offices.

Quality of representation should not be exclusively measured by outcome, but also by the strength and measured value of the client-attorney relationship.

As the opportunity to improve public defense services statewide continues to unfold (see my last column and DEFENDER NEWS at p. 2), we look to our members, the Chief Defenders, and the public defense community to speak out on the need for a client and client

community voice, and on the best ways to implement this resolution.

No one expects clients or their representatives to participate directly in defense programs' day-to-day administrative decisions. But clients need more than one token seat on a large board in whose meetings they are neither considered nor consulted. There are many possible formal mechanisms through which clients and their representatives can let public defense lawyers, staff, and administration know what clients need and what the program is doing right, and wrong. Our clients are a richly diverse group. It is important for everyone who works for public defense clients to hear their points of view, which are no more monolithic than the opinions of those in the public defense community itself. The mechanism for delivering those views may be a genuine presence on a program's board, a separate client advisory board, regularly scheduled meetings of a program director with designated clients or client representatives, or some other means. Whatever its form, it must give clients a voice that is heard and heeded, resulting in representation of clients, not of files.

Efforts and examples already exist. The client community work done at the Neighborhood Defender Service of Harlem, the evaluation of client satisfaction done at Bronx Defenders (see *Backup Center REPORT*, Vol. XV, #5), the Genesee County Public Defender's efforts to elicit client comment, the weekly Monday night jail interviews by the entire Monroe County Public Defender staff, and that office's "suggestion box" all move us in the right direction.

New developments outside the defense community also offer new paradigms and pitfalls for the relationship of attorneys to their clients. Collaborative criminal justice initiatives are requiring attorneys to re-examine and perhaps re-define their roles. Drug courts, for example, focus the attention of the court, treatment providers, the prosecution, and the defense on an entire range of impediments to client drug abstinence. Job, housing, family, and health problems must be addressed. There is pressure on defense lawyers not only to become familiar with these aspects of their clients' lives, but to become "team members," to embrace as a therapeutic tool, rather than ward off, the coercive power of the court. The observations and opinions of individual clients and families, and groups involved in non-legal advocacy for clients and their families, should play a key role in our efforts to analyze our clients' best interests in these new environments.

I am confident there are many bold ideas in the client and defense communities for defining a formal role for clients and the client community in the provision of public defense services. We want to hear them all and use the best. Please write me, call me, or e-mail me (jeg@nysda.org) at the Backup Center regarding your views on this important principle. ♪

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

Habeas Corpus (Federal) HAB; 182.5(15)

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

Artuz v Bennett, No. 99-1238, 11/7/00, 531 S Ct ___

After unsuccessfully pursuing state post conviction relief, the respondent moved *pro se* in 1995 to vacate his conviction, which was orally denied. The respondent then sought federal *habeas corpus* relief in the Eastern District of New York. The court deemed the filing untimely, coming more than a year and nine months after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The 2nd Circuit reversed and remanded, finding that the state motion was still "pending" due to the lack of written disposition, and had been "properly filed." The petitioner had argued that the application was not "properly filed" because the claims it contained were subject to state procedural bars. (Those bars are that an issue previously determined in an appeal, or that could have been raised on direct appeal but was not, cannot be decided in post conviction proceedings (CPL 440.10[2][a] and [c]).

Holding: Whether an application for collateral review has been "properly filed" is separate from whether the claims contained in the application have merit and are not procedurally barred. Otherwise, a court would have to say in some instances that an application had been "properly filed" as to some claims but not "properly filed" as to other claims in the same application. The statute (28 USC 2244[d][2] [1994 ed, Supp IV]) "does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed.'" The state procedural bars in question do not purport to set forth a condition to filing. Judgment affirmed.

Search and Seizure (Automobiles and Other Vehicles [Roadblocks]) SEA; 335(15[s])

City of Indianapolis v Edmond, No. 99-1030, 11/28/00, ___ S Ct ___

Holding: A divided panel of the 7th Circuit Court of Appeals found unconstitutional the checkpoint program at issue here, which is aimed at discovering and interdicting illegal narcotics. Certain regimes of suspicionless

searches have been upheld because they served "special needs, beyond the normal need for law enforcement," such as drug tests for railway employees involved in accidents. See *eg Skinner v Railway Labor Executives' Assn.*, 489 US 602 (1989). Fixed border checkpoints designed to intercept undocumented noncitizens (*US v Martinez-Fuerte*, 428 US 543 [1976]) and drunk drivers (*Michigan Dept. of State Police v Sitz*, 496 US 444 (1990)) are permissible. No checkpoint program primarily aimed at detecting evidence of ordinary criminality has been approved. The checkpoint program here is "ultimately indistinguishable from the general interest in crime control" and violates the 4th Amendment. Judgment affirmed.

Dissent: [Rehnquist, CJ] The use of drug sniffing dogs at the roadblocks in question did not sufficiently distinguish these stops from other, plainly constitutional ones.

Dissent: [Thomas, J] ". . . I rather doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing." The respondents did not ask for the previous roadblock cases to be overruled, and those cases compel upholding the roadblocks here.

Federal Law (General) FDL; 166(20)

Prisoners (Early Release) PRS I; 300(15)

Lopez v Davis, No. 99-7504, 1/10/01

The defendant was convicted in federal court of possession with intent to distribute methamphetamine and possession of a firearm. While he was incarcerated, the Bureau of Prisons (BOP) found that the defendant qualified for its residential drug treatment.

Holding: Under 18 USCS 3621(e)(2)(B) the BOP "may" at its discretion reduce the sentence of a prisoner convicted of a nonviolent offense who successfully completes the drug program by up to one year. The defendant contested the application of 28 CFR 550.58(a)(1)(vi)(B), which denied him an early release because his current offense was a felony attended by the carrying, possession, or use of a firearm. He claimed that it was improper for the regulation to categorically disqualify inmates based on offenses collateral to the underlying offense. The 8th Circuit properly upheld the regulation. The BOP may categorically deny inmates early release eligibility based on their conduct before conviction. The agency may make categorical exclusions and need not rely strictly on case-by-case assessments. When Congress fails to answer a precise question in legislation, the actions of an agency empowered to administer the regulations in question are tested by whether the agency has done so "in a way that is reasonable in light of the legislature's revealed design." *NationsBank of N.C., N.A. v Variable Annuity Life Ins. Co.*, 513 US 251, 257 (1995). The agency's interpretation here was reasonable. Judgment affirmed.

US Supreme Court *continued*

Dissent: [Stevens, J] The BOP regulation redefines the set of prisoners categorically ineligible for sentence reduction as set out clearly in the statute.

Insanity (Civil Commitment) **ISY; 200(3)**

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

Seling v Young, No. 99-1185, 1/17/01

The respondent is confined as a sexually violent predator at the Special Commitment Center established by Washington State’s Community Protection Act of 1990. The act authorizes the civil commitment of people found to suffer from a mental abnormality or personality disorder making them likely to engage in predatory acts of sexual violence if not confined in a secure facility. Wash Rev Code 71.09.020(1) (Supp 2000). The respondent contended that the act “as applied” is not civil, but punitive in nature entitling him to federal constitutional relief based on double jeopardy, *ex post facto*, and due process grounds. The 9th Circuit remanded after the district court denied habeas relief.

Holding: This court held a similar commitment scheme to be constitutionally valid on its face. *Kansas v Hendricks*, 521 US 346 (1997). Without expressing a view as to how the respondent’s factual claims would bear on an initial determination of whether the Washington act is civil, it is held that the “respondent cannot obtain release through an ‘as-applied’ challenge to the Washington act on double jeopardy and *ex post facto* grounds.” A determination of whether an act is civil or punitive begins with references to its text and legislative history; evaluating an act by reference to its effect on a single individual has been disapproved. *Hudson v US*, 522 US 93, 100 (1997). Persons committed under the act have other potential causes of action in state and federal court. Judgment reversed.

Concurrence: [Scalia, J] There is no open question as to whether a court may look to actual conditions of confinement when making an initial determination of a statute’s civil or punitive nature.

Concurrence: [Thomas, J] A statute civil on its face cannot be made punitive by the manner in which it is implemented, and there is no distinction between an initial challenge to a statute and a subsequent one.

Dissent: [Stevens, J] A statute intended to be civil in nature can be deemed otherwise if a person in confinement provides the clearest proof that the statute is so punitive “in purpose *or effect* as to negate [the state’s] intention . . .” *Allen v Illinois*, 478 US 364, 369 (1986). [Emphasis in opinion.] The majority fails to inquire beyond statutory construction, and relies far too heavily on other rulings that the statute is civil.

New York State Court of Appeals

Search and Seizure (Electronic Searching) (Motion to Suppress [CPL Article 710]) **SEA; 335(30)(45)**

People v Darling, Nos. 151; 152, 12/14/00

The defendants were indicted for the sale and possession of a controlled substance. They moved to suppress evidence gained through a wiretapping warrant that specified a different telephone number from the one tapped. The suppression court agreed that the authorities were required to submit a new warrant application to tap the new telephone number, holding that a search warrant resulting from the wiretap was based on illegally intercepted communications and therefore lacked probable cause. The Appellate Division reversed.

Holding: Strict compliance with the eavesdropping statute, CPL article 700 (*People v Capolongo*, 85 NY2d 151), was met where the address was correctly listed and the wiretap was to be placed on the only line, registered to one defendant’s grandfather, at that address. A particular phone number is not required. Just because the phone number had changed, the investigator did not exceed the authority of the warrant in installing the wiretap. “There was no possibility for misdirection.” Order affirmed.

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

People v Filacouris, No. 153, 12/14/00

The defendants were convicted of several counts of offering a false instrument for filing, second-degree grand larceny, and one count of filing a false sales and compensating use tax return. They were acquitted of other identical counts. The Appellate Division dismissed the tax law count, and otherwise affirmed.

Holding: Contrary to the defendants’ contention, the verdicts were not repugnant. The jury could have found that the defendants offered false returns for filing but did not make and subscribe those returns. Tax Law 1817(b)(1). The defendants’ acquittal of the Tax Law charges was not “conclusive as to a necessary element” of the offering a false instrument for filing counts. *See People v Tucker*, 55 NY2d 1, 7. The prosecution did not appeal the dismissal of the one tax law violation. Order affirmed.

Misconduct (Judicial) **MIS; 250(10)**

Matter of Honorable Robert M. Corning, Sr., No. 156, 12/14/00

Holding: The State Commission on Judicial Conduct sustained five charges of judicial misconduct on the part of the petitioner. The petitioner admitted failing to report

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or remit court funds to the comptroller's office. In a dispute with a local attorney, the petitioner called the attorney's business client and when the attorney filed a complaint, the petitioner angrily confronted the attorney's secretary. Years after a different attorney had filed a complaint against the petitioner, when that attorney appeared before him, the petitioner became hostile and refused to recuse himself. A supplemental charge related to the petitioner's refusal to recuse himself despite an earlier agreement to do so because of hostility toward the attorney in that case, and suspension of that attorney's client's motor vehicle license in part because of animosity toward the attorney. The petitioner abused the power of his office, demonstrated a lack of judicial temperament, and mishandled court funds. His actions "on and off the bench demonstrate a pattern of serious disregard for the standard of judicial conduct," which "'exist to maintain respect toward everyone who appears in a court and to encourage respect for the operation of the judicial process at all levels . . .'" *Matter of Roberts*, 91 NY2d 93, 97. Determined sanction of removal accepted.

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

**Juries and Jury Trials
(Constitution-right to)** **JRY; 225(20)**

People v Artist, No. 159, 12/14/00

Holding: The defendant's argument that substitution of the trial judge during jury deliberations denied him the right to a jury trial and due process is unreserved. *See People v Tonge*, 93 NY2d 838, 839-840. Similarly unreserved was the defendant's argument that the substitute judge, when ruling that the jury could not be released from sequestration, failed to exercise her discretion. *See People v Shaw*, 90 NY2d 879, 880. Order affirmed.

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

People v Brown, No. 169, 12/14/00

Holding: "A determination whether exigent circumstances existed to justify the warrantless entry into defendant's home involves a mixed question of law and fact. Where, as here, there exists record support for the Appellate Division's resolution of this question, the issue is beyond this Court's further review (*see, People v Hallman*, 92 NY2d 840; *People v Cloud*, 79 NY2d 786; *People v Burr*, 70 NY2d 354)." Order affirmed.

**Counsel (Right to Counsel)
(Right to Self-Representation)** **COU; 95(30) (35)**

Identification (Lineups) **IDE; 190(30)**

Pro Se Representation (General) **PSR; 304.5(10)**

People v Rodriguez, No. 150, 12/19/00

The Appellate Division affirmed the defendant's conviction.

Holding: A criminal defendant is not entitled to representation by counsel and self-representation simultaneously. *See NY Const*, art I, §6; *People v White*, 73 NY2d 468, 477 *cert den* 493 US 859. The decision to allow such hybrid representation is within the court's discretion. *See eg US v Einfeldt*, 138 F3d 373, 378 (8th Cir.) *cert den* 525 US 851. That decision implicates the court's function in ensuring the orderly administration of proceedings before it, and no fixed rule is established for addressing *pro se* motions. The defendant here filed two *pro se* motions to dismiss the indictment based on a denial of speedy trial. Between the first and second motion, he sought to have counsel relieved for various alleged deficiencies in representation. The attorney joined the request to be relieved. During a discussion of that request, the court said that it understood the defendant had filed frivolous motions that the attorney had refused to adopt, and counsel agreed. The case was then adjourned for appointment of new counsel. Under these circumstances, the court had no duty to entertain the speedy trial motions.

Reversal is required due to a court-ordered line-up in the absence of counsel. *See People v Jackson*, 74 NY2d 787, 789. There must be a hearing to determine if the in-court identification testimony had an independent source. Order reversed, case remitted.

Criminal Mischief (Elements) **CMM; 99(10)**

People v Hills, No. 160, 12/19/00

While arguing with her neighbor over the border of their properties, the defendant pulled a marker stake out of the ground and threw it several feet. A land surveyor hired by the neighbor had placed the stake on the line separating the two properties. As a result of these actions and behavior toward police called to the scene, the defendant was convicted of fourth-degree criminal mischief and disorderly conduct. County Court affirmed.

Holding: The prosecution failed to offer the required proof that the defendant damaged the tangible property of another person without a right or reasonable grounds to believe there was a right to do so. Penal Law 145.00(1). No evidence was put forth to prove that the defendant's actions caused any damage, however slight. *See People v David*, 133 AD2d 277, 279. The defendant's further con-

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tention that the jury was erroneously charged as to disorderly conduct lacks merit. Order modified by dismissing fourth-degree criminal mischief, remitted for resentencing.

Juries and Jury Trials (Discharge) JRY; 225(30) (50)
(Qualifications)

People v Wynter, No. 161, 12/19/00

The defendant was convicted of second-degree robbery after a trial at which he unsuccessfully argued that a prospective juror was improperly disqualified because, although he appeared for jury service within the previous four years, he never sat as a juror. The Appellate Division affirmed.

Holding: The defendant’s contentions are without merit. The legislature did not intend to require that someone be impaneled as a trial or grand juror in order to be deemed ineligible for future juror service under Judiciary Law 524 and 525. Individuals who fulfilled their jury service obligations by actually attending in person or by telephone standby service are exempt from further jury service for four years. This statutory interpretation is mirrored in New York Rules of Court 128.8 and 128.9(b), which implement the statute in question. Order affirmed.

Informants (Production) INF; 197(30)

Search and Seizure (Motions to Suppress [CPL Article 710]) SEA; 335(45)

People v Edwards, No. 163, 12/19/00

After seeing a reward poster, an informant told police that someone he knew as Tony had admitted killing an auxiliary police officer and wounding another person in a shooting. The same person had allegedly committed an unrelated shooting. Working with this information plus information from the complainant in the unrelated shooting, the police focused on the defendant, who was arrested after police received anonymous tips about his description and whereabouts. A defense request for the known informant’s name, or alternatively for the court to examine the informant *in camera* to verify his existence and knowledge, was denied. The Appellate Division affirmed.

Holding: The court erred in refusing to follow the procedures of *People v Darden* (34 NY2d 177, 181). Holding a *Darden* hearing is a requirement, not a matter of discretion. That there are exceptions to this rule (eg informant cannot be found, see *People v Fulton*, 58 NY2d 914, 916; informant refuses to appear due to fear of injury, *People v Carpenito*, 80 NY2d 65, 68) shows that *Darden* did establish a rule, not a discretionary procedure. The *Darden* require-

ment does not become unnecessary when a police officer’s testimony about the informant’s information meets the *Aguilar-Spinelli* test for reliability and the source of the informant’s knowledge. *People v Adrion*, 82 NY2d 628, 634-636. The defendant need not make a threshold showing of the informant’s nonexistence or unreliability to be entitled to a *Darden* hearing. See *Matter of Pierre H.*, 260 AD2d 320, 320-321. Order modified, matter remitted for proceedings in accordance with this opinion, and as modified, affirmed.

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

Insanity (Civil Commitment) ISY; 200(3)

People v Lewis, No. 164, 12/19/00

The defendant, after being indicted in 1981 for first-degree manslaughter, was found incompetent to stand trial and committed to the custody of the State Commissioner of Mental Health under CPL 730.50(1). The commitment was extended under CPL 730.50(2) in 1982. After he sought habeas corpus relief in 1983, his status was converted to civil patient status under Mental Hygiene Law article 9. See *Jackson v Indiana* (406 US 715 [1972]). He remained in this status thereafter. In 1998, he sought dismissal of the indictment on the ground that he had been in custody for more than two-thirds of the maximum sentence. See CPL 730.50(3) and (4). The court granted the motion and the Appellate Division affirmed.

Holding: Relief under *Jackson* does not automatically entitle a defendant to dismissal of the charges. *People v Schaffer*, 86 NY2d 460. The statutory requirement of dismissal when a person has been committed for over two-thirds of the possible sentence does not apply to civil commitments. A rational basis exists for treating civilly committed individuals differently from those who remain under criminal commitment orders, so there is no denial of equal protection. Nor was the defendant denied due process by the placing of any improper burden on the exercise of a constitutional right. He exchanged his right for automatic dismissal after a certain time for the benefits of civil over criminal commitment, including eligibility for release under a less stringent standard, irrespective of any continued unfitness for trial. Order reversed, motion denied.

Trial (Public Trial) TRI; 375(50)

People v Garcia, No. 170, 12/19/00

Holding: The trial court erred by denying the defendant’s request to have his girlfriend and uncle attend his trial. The officers failed to address how their testifying in front of the girlfriend and uncle might compromise the officers’ safety interest. In fact, the officers “never even

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mentioned" any of the defendant's family or friends. See *People v Nieves*, 90 NY2d 426, 430. Order of the Appellate Division affirmed.

Civil Practice (General) CVP; 67.3(10)

Housing (General) HOS; 186(15)

Matter of Featherstone v Franco, No. 155, 12/21/00

Holding: The NYC Housing Authority did not abuse its discretion by terminating the petitioner's tenancy, which determination was confirmed by the Appellate Division. The violent behavior of the petitioner's teenage son, against whom she had obtained an order of protection and who had been convicted of harassment and menacing in the past, represented a threat to others in the community. Further, the petitioner persisted in keeping a dog in her apartment knowing that this was a chronic breach of the Authority's no-pet rules. It is well settled that a sanction must be upheld in the Appellate Division unless it shocks the judicial conscience, constituting an abuse of discretion as a matter of law. *Matter of Pell v Board of Educ.*, 34 NY2d 222, 232-234. Annulment and remittal to the Authority for reconsideration is not appropriate as the penalty here does not violate the *Pell* standard. Order affirmed.

Double Jeopardy (Collateral Estoppel) DBJ; 125(3)

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

People v Hilton, No. 157, 12/21/00

The defendant pled guilty to sexual abuse of a child and was sentenced to five years probation. Two years later he was indicted on one count of first-degree sexual abuse of a minor and one count of endangering the welfare of a child. At a probation revocation hearing the prosecution failed to prove by a preponderance of the evidence that the defendant violated his probation. Five months later the sexual abuse count was dismissed on collateral estoppel grounds. The Appellate Division reversed, holding that collateral estoppel did not apply.

Holding: Collateral estoppel principles are not to be applied liberally to criminal cases. *People v Fagan*, 66 NY2d 815, 816. The correct determination of guilt or innocence is paramount in criminal cases, and the prosecution has a far greater interest in litigating a felony prosecution. *People v Berkowitz*, 50 NY2d 333, 345. Order affirmed.

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

People v Henry, No. 158, 12/21/00

The defendant's trial attorney called an alibi witness who failed to provide testimony regarding the defendant's whereabouts on the night of the crime. The defendant was convicted. Citing *People v Cabrera* (234 AD2d 557, 558) the Appellate Division reversed, holding that the defendant was denied effective assistance of counsel because the failed testimony "went to the heart of the alibi," undermining the defense.

Holding: Counsel's failed attempt to create an alibi was no more than an unsuccessful tactic. See *People v Jackson*, 52 NY2d 1027, 1029. New York adheres to the following test for effective assistance of counsel: "So long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, a defendant's constitutional right . . . will have been met (*People v Baldi*, 54 NY2d 137, 147)." The prosecution's invitation to adopt the federal standard is declined. The defendant has been afforded meaningful representation. Order reversed, matter remitted.

Contempt (Elements) (General) CNT; 85(7) (8)

Double Jeopardy (General) DBJ; 125(7)

Family Court (Violation of Family Court Orders) FAM; 164(60)

People v Wood, No. 162, 12/21/00

The defendant's ex-wife had two orders of protection issued against him. One was issued by the family court, and the other was issued by city court pursuant to the Penal Law. Due to some prank phone calls, the defendant was found guilty in family court of willfully violating the order of protection and sentenced to six months incarceration. Thereafter, the defendant was found guilty in supreme court of five counts of criminal contempt for violating the city court order, as a result of the same prank phone calls. The Appellate Division reversed the criminal contempts on double jeopardy grounds.

Holding: Because the same acts violated both orders, the defendant can not be guilty of violating both the city court order and the family court order. See *McGovern v US*, 280 F 73, 75-76 cert den 259 US 580. The test used to determine whether a defendant committed two offenses or only one by one act is whether each provision requires proof of an additional fact that the other does not. *Blockburger v US*, 284 US 299, 304 (1932). Comparing the elements of the two contempt charges shows that the con-

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tempt provision of the Family Court Act is clearly a lesser-included offense of first-degree criminal contempt under Penal Law 215.51(c). Therefore, the defendant’s prosecution for criminal contempt is barred under double jeopardy principles. Order affirmed.

Defense Systems (Compensation Systems [Attorney Fees]) DFS; 104(25**[b]**)

Judges (Disqualification) JGS; 215(8)

Matter of New York State Association of Criminal Defense Lawyers v Kaye, Motion No. 1226, 12/21/00

After the fee for counsel assigned in death penalty cases (*See* Judiciary Law 35-b) was reduced by the Court of Appeals in 1998, the petitioners brought a CPLR article 78 proceeding asserting that the court’s judges acted beyond their authority in revising 1st Department rates, and that the new schedule for all departments did not meet the statutory standards for adequate compensation. The Appellate Division found that the petitioners lacked standing. With their motion for leave to appeal pending, the petitioners sought to disqualify the court’s judges from participating in the determination of that motion. The Chief Judge recused herself.

Holding: While the substitution of judges who recuse or are disqualified is provided for in NY Const, art VI, §2, such substitution is not appropriate here. Disqualification in these circumstances would leave “the most fundamental questions about the Court and its powers to persons whose selection and retention are not tested by constitutional processes’ (*Matter of Vermont Supreme Ct. Admin. Directive No. 17 v Vermont Supreme Ct.*, 576 A2d 127, 132 [Vt.]).” Disqualifying the judges would render self-defeating and nugatory the court’s administrative rule-making process. *Berberian v Kane*, 425 A2d 527, 528 (RI). Promulgation of a rule is not a prior determination that it is valid and constitutional. The court may reconsider its own decisions. *See Matter of Rules of the Court of Appeals for Admission of Attorneys & Counselors at Law*, 29 NY2d 653. The judges are not disqualified automatically because they are named parties. There are no traditionally recognized bases for finding conflict. Motion as to Chief Judge dismissed as academic, and motion otherwise denied.

Counsel (Anders Brief) (Competence/ Effective Assistance/Adequacy) COU; 95(7) (15)

People v Stokes, No. 2, 2/8/01

The defendant was convicted after a jury trial of the Class E felony of aggravated harassment of an employee by an inmate. He was sentenced as a discretionary persistent felony offender to 15 years to life. His assigned appellate lawyer filed a six page double-spaced “brief,” requesting that she be relieved of the assignment because, in her view, there were no non-frivolous issues upon which to base the appeal. The Appellate Division granted counsel’s application and affirmed the conviction.

Holding: In the wake of *Smith v Robbins* (528 US 259 [2000]), which held that the procedure outlined in *Anders v California* (386 US 738 [1967]) is not constitutionally compelled, the *Anders* procedure is reaffirmed as a matter of state procedural law. “Because New York has repeatedly adhered to the protocol outlined in *Anders*, we see no compelling reason at this time to revisit, alter or refine New York State’s ‘*Anders*’ rule.” Counsel seeking to withdraw must continue to furnish the court with a brief, including a statement of facts and a discussion of all issues that “might arguably support the appeal.” Because the brief filed by assigned counsel failed to contain a statement of facts, was filled with factual mistakes and legal errors, and neglected to address several “clearly arguable” issues, the defendant was deprived of the effective assistance of counsel on appeal. Order reversed, case remitted to the 3rd Department for a *de novo* appeal with new assigned counsel.

Second Department

Civil Rights Actions (USC §1983 Actions) CRA; 68(45)

Search and Seizure (Detention) SEA; 335(25)

Huck v City of Newburgh, No. 99-06457, 2nd Dept, 8/14/00

In an action under 42 USC §1983 to recover damages for a violation of civil rights, the plaintiff’s motion for judgment as a matter of law on the issue of liability made at the close of evidence was denied. A jury found against her with regard to a cause of action to recover damages and the action was dismissed.

Holding: The plaintiff was arrested for possessing an unlicensed dog in violation of the city code. She was taken to the police station where a matron strip-searched her. The record indicates “that neither the arresting officer nor the matron suspected that the plaintiff possessed any weapons or other contraband. Thus, the search was unreasonable and in violation of the plaintiff’s Fourth Amendment rights, and the City of Newburgh is liable under 42 USC §1983.” The court erred in denying the motion for judgment as a matter of law. *See Walsh v Franco*, 849 F2d 66. Judgment modified by granting the plaintiff’s

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motion for judgment as a matter of law, and remitted for trial on damages. (Supreme Ct, Orange Co [Murphy, JJ])

Speedy Trial (Statutory Limits) SPX; 355(45)**People v Stanley, No. 00-02292, 2nd Dept, 8/21/00**

Holding: The prosecution failed to demonstrate that the 168-day period during which the complainant remained in China was excludable because they did not satisfy the statutory due diligence requirement. See CPL 30.30[3][b], 4[g]; *People v Zirpola*, 57 NY2d 706. The contention that the complainant went to and stayed in China to seek medical attention for the injuries suffered as a result of the defendant's alleged assault is not supported by evidence. See *People v Marshall*, 91 AD2d 900, 901; cf. *People v Martinez*, 268 AD2d 354. Order affirmed. (Supreme Ct, Westchester Co [Perone, JJ])

Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) JRY; 225(10) (50) (60)**People v Burris, No. 97-03537, 2nd Dept, 9/25/00**

Holding: The verdict was not against the weight of the evidence. The defendant's other contentions lack merit. (County Ct, Nassau Co [Jonas, JJ])

Concurrence: [Goldstein, PJ] The prosecutor revealed during jury selection that he had run background checks of prospective jurors for prior arrests and convictions. Two prospective jurors were questioned in the robing room about prior arrests and convictions they had failed to divulge, including a disorderly conduct charge which may have been sealed. The court refused to allow questioning about a third juror's 23-year-old son's 1993 disorderly conduct charge that resulted in an adjournment in contemplation of dismissal. The prosecutor peremptorily challenged the two questioned jurors. Checking prospective jurors' criminal records has generally been upheld when challenged in other jurisdictions. See *Tagala v State*, 812 P2d 604, 611-612. Some states have given the defense equal access to jurors' rap sheets. See *eg State of New Hampshire v Goodale*, 740 A2d 1026. This defendant has made no showing that there was a failure to disclose material information. See *State of Vermont v Grega*, 721 A2d 445. However, "the spectre of the prosecutor investigating the 'rap sheets' of prospective jurors and their families, to me, is very troublesome." The practice here came dangerously close to violating the prohibition on conducting vexatious or harassing juror investigation. 22 NYCRR 1200.39[e] and [f]. "[T]his practice warrants further regulation, either by legislation or court rule."

Evidence (Hearsay) (Sufficiency) EVI; 155 (75)(130)**Impeachment (General)** IMP; 192(15)**People v Singh, No. 98-09826, 2nd Dept, 10/2/00**

The defendant was convicted, upon a jury verdict, of second-degree murder.

Holding: Viewed in the light most favorable to the prosecution (see *People v Contes*, 60 NY2d 620), the evidence was legally sufficient to establish the defendant's guilt of depraved indifference murder beyond a reasonable doubt. Three eyewitnesses testified that, while the defendant's friend engaged the decedent in a fistfight, the defendant retrieved a gun and fired one shot into the air, breaking a window near people. He then shot the decedent in the thigh at close range as the decedent lay on the ground. After the defendant was restrained, he struggled to free himself saying that he wanted to fire another shot. This established that "'under circumstances evincing a depraved indifference to human life, [the defendant] recklessly engage[d] in conduct which create[d] a grave risk of death to another person' (Penal Law §125.25[2])."

The court improperly admitted prior consistent statements that a prosecution witness had made to police. The prosecutor elicited the statements on direct examination, so it was premature as rehabilitation following an attack on the witness's testimony as recent fabrication. *People v McDaniel*, 81 NY2d 10. Further, the defense theory was that the motive to fabricate had arisen before the prior consistent statements were made. See *People v Davis*, 44 NY2d 269. However, the error was harmless. Order affirmed. (Supreme Ct, Queens Co [Finnegan, JJ])

Appeals and Writs (Mandamus) APP; 25(55)**Article 78 Proceedings (General)** ART; 41(10)**Matter of Watkins R. v Berry, No. 00-04175, 2nd Dept, 10/2/00**

Holding: Mandamus will lie only to compel the performance of a ministerial act and only when there is a clear legal right to the relief sought. See *Matter of Legal Aid Soc. Of Sullivan County v Scheinman*, 53 NY2d 12, 16. "The petitioner, a person found not responsible for criminal charges by reason of mental disease or defect, has a clear legal right to jury review of the issue of whether he is mentally ill and subject to a continued deprivation of liberty, and the Supreme Court was required to provide him with that review (see, CPL 330.20[16], Mental Hygiene Law §9.35; 14 NYCRR 541.13[b]; *Matter of Launcelot T. v Mullen*, 264 AD2d 697). " There is no right to a jury trial on whether someone suffers from a "dangerous mental disorder" under CPL 330.20(1)(c) requiring secure detention. See *Matter of Barber v Rochester Psychiatric Ctr.*, 250 AD2d

Second Department *continued*

87, 91. Petition granted, order vacated, matter remitted for rehearing and jury review. (Supreme Ct, Orange Co [Berry, J, order striking jury demand; DeRosa, J, order authorizing continued psychiatric confinement])

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

Robbery (Degrees and Lesser Offenses) ROB; 330(10)

People v Alford, No. 98-03501, 2nd Dept, 10/30/00

Holding: The defendant was charged with first-degree robbery. The trial judge erred by submitting the lesser-included offense of attempted first-degree robbery to the jury over the defendant’s objection. The complainant had testified that the defendant struck him with a hard object, and that as the complainant fell, he grabbed the defendant’s hand that was holding his wallet. There “was no reasonable basis upon which the jury could have simultaneously credited the testimony necessary to establish the lesser offense and rejected the exact same testimony insofar as it established the greater offense (see, Penal Law §160.15).” There is no reasonable view of the evidence that would support a finding that the defendant committed attempted first-degree robbery but did not commit first-degree robbery. CPL 300.50; *People v Glover*, 57 NY2d 61. The jury may not arbitrarily or irrationally dissect the integrated testimony of a single witness. See *People v Negron*, 91 NY2d 788, 792. Judgment reversed and indictment dismissed. (County Ct, Nassau Co [Honorof, JJ])

Assault (Evidence) ASS; 45(25)

Evidence (Sufficiency) EVI; 155(130)

People v Ramdeo, No. 97-04756, 2nd Dept, 11/6/00

The defendant was convicted of second-degree murder and second-degree assault.

Holding: The defendant’s motion to suppress a written statement he made to police was properly denied by the hearing court. “The totality of the circumstances indicates that the defendant’s statement was made voluntarily (see, *People v Tarsia*, 50 NY2d 1, 11 . . .).” The defendant was convicted of assault and murder based on two different incidents involving separate people. Although the assailant in the assault incident used a machete owned by the defendant, the record does not support the jury’s finding that the defendant, who was in a car, himself possessed the intent to cause physical harm to the com-

plainant. See *People v Padgett*, 145 AD2d 443. Judgment modified by vacating the assault conviction and dismissing that charge, and as modified, affirmed. (Supreme Ct, Queens Co [Robinson, JJ])

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

People v Thigpen, No. 97-06049, 2nd Dept, 11/6/00

The defendant was convicted of burglary, criminal possession of stolen property, and possession of burglar’s tools. The defendant contended that a police officer should not have been selected to be a juror because during *voir dire* the officer stated that policemen were more credible witnesses. The court had told the juror to treat police like anyone else, but did not explore the juror’s bias or elicit an expurgatory oath after the juror said, “I think so.”

Holding: To uncritically accept the testimony of police “constitutes a ‘state of mind that is likely to preclude [the juror] from rendering an impartial verdict based upon the evidence adduced at trial’ (CPL 270.20[1][b]; see, *People v Zachary*, 260 AD2d 514 . . .).” The court erred by failing require the juror to expressly state that his prior state of mind would not effect his verdict and that he would render his decision based solely on the evidence. *People v Torpey*, 63 NY2d 361, 367, citing *People v Biondo*, 41 NY2d 483, 485 *cert den* 434 US 928. The court denied the defendant’s challenge for cause, and the defendant exhausted all of his preemptory challenges before jury selection was complete. A new trial is required. CPL 270.20[2]; *People v Molinari*, 252 AD2d 532. Judgment reversed. (Supreme Ct, Kings Co [Gerges, JJ])

Discrimination (Race) DCM; 110.5(50)

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

People v McIndoe, Nos. 96-07635, 97-08908, 2nd Dept, 11/6/00

Holding: The discriminatory manner in which the prosecutor exercised his preemptory challenges warrants a new trial. See *Batson v Kentucky*, 476 US 79 (1986). The prosecutor’s reason for excluding a black juror, that the juror would not base his decision on the evidence, is unsupported by the record. In response to *voir dire* questions the juror stated that he would base his verdict on testimony. The nonracial basis advanced by the prosecutor was merely a pretext. See *People v Hernandez*, 75 NY2d 350, 355 *aff’d* 500 US 352. Judgment reversed. (Supreme Ct, Kings Co [Douglass, JJ])

Second Department *continued*

Assault (Evidence) ASS; 45(25)

Evidence (Sufficiency) EVI; 155(130)

**In the Matter of Wanji W., No 99-04928,
2nd Dept, 11/6/00**

Holding: The family court erred in finding that the evidence offered was legally sufficient to prove beyond a reasonable doubt that the defendant had committed an act that would have constituted third-degree assault if he were an adult. The “11-year-old appellant slapped the 15-year-old complainant in the back of the head and followed him into a laundromat.” Such conduct “did not rise above the level of petty slaps, shoves, or kicks and thus, does not allow a fact-finder to rationally infer that the appellant intended to cause physical injury to the complainant (*see, People v Henderson*, 92 NY2d 677 . . .).” Physical injury is physical impairment or substantial pain. *See* Penal Law 10.00(9). Disposition reversed, petition dismissed. (Family Ct, Queens Co [Lubow, JJ])

Third Department

Sentencing (Addiction, Effect on Sentencing) (Appellate Review) (Incarceration) SEN; 345(2) (8) (43)

People v Denué, No. 11435, 3rd Dept, 9/28/00

The defendant pled guilty to third-degree grand larceny and by doing so waived his right to appeal all issues except those relating to sentencing. He argued that he should be sentenced to parole with a mandatory drug treatment program. He received a prison sentence of 2½ to 5 years.

Holding: The defendant has not established that his sentence was illegal or that extraordinary circumstances warrant a reduction in his sentence. The court’s refusal to direct the Department of Correctional Services to place the defendant in the Willard drug treatment program was partly due to the defendant’s prior unsuccessful participation in the same and similar programs; the court’s comment about the defendant’s possible participation in a program while incarcerated did not amount to an impermissible delegation of sentencing authority. There is a lack of sufficient evidence that the defendant suffers from a history of chemical dependence significantly contributing to his current criminal conduct, putting his eligibility for parole supervision in doubt. *See* CPL 410.91(3); *see gen People v Black*, 253 AD2d 984 *lv den* 92 NY2d 980. It has not been shown that he was not subject to an undischarged term of imprisonment. *See* CPL 410.91(2). Judgment affirmed. (County Ct, Franklin Co [Main, Jr., JJ])

Guilty Pleas (Errors Waived By) (General) (Withdrawal) GYP; 181(15) (25) (65)

Plea Bargaining (General) PLE; 284(10)

People v Morton, No. 11631, 3rd Dept, 9/28/00

The defendant pled guilty to first-degree reckless endangerment with the understanding that he would be sentenced to five years probation. Before accepting the defendant’s plea, the court advised him that if he were arrested prior to sentencing he could be sentenced to up to seven years. The defendant was arrested prior to sentencing and was sentenced to two to six years.

Holding: The court did not err in failing to inquire before enhancing the defendant’s sentence as to whether the defendant wanted to withdraw his plea. The court clearly advised the defendant that his plea was conditioned upon not being re-arrested before sentencing. The defendant’s claim of innocence as to the later arrest raises no due process violation as there was a preliminary hearing finding of reasonable cause to believe he committed the acts for which he was arrested. The no-arrest condition was valid and enforceable, and there is no reason to disturb the enhanced sentence. *See People v Outley*, 80 NY2d 702. Order affirmed. (County Ct, Albany Co [Breslin, JJ])

Speedy Trial (Cause for Delay) (Prosecutor’s Readiness for Trial) SPX; 355(12) (32)

People v Mitchell, No. 10539, 3rd Dept, 10/19/00

Holding: The defendant sought dismissal based on violation of his statutory right to a speedy trial. The court did not charge to the prosecution the 63 days of postreadiness delay that elapsed between the defendant’s motion to inspect the grand jury minutes and the granting of that motion. The prosecution had objected to the motion. “Mere ‘opposition’ to a motion to inspect pursuant to CPL 210.30 will not toll the time imposed upon the People for speedy trial purposes.” The statute imposes a burden on the prosecutor to show good cause why such a motion should not be granted. The only basis for the prosecutor’s opposition to the instant motion to inspect was the failure of the defense to meet a predicate (sworn allegations of fact) that was eliminated two decades ago. *People v Harris*, 82 NY2d 409, 413. It was clear from the prosecution’s affirmation that no basis in law or fact supported the opposition. Therefore, the time chargeable to them for postreadiness delay ran from the interposition of the defendant’s omnibus motion, not the granting of the motion to inspect. The delay exceeded that permitted by statute. *See* CPL 30.30(1)(a). Judgment reversed, motion granted, indictment dismissed. (County Ct, Rensselaer Co McGrath, JJ)

Third Department *continued*

Sentencing (Enhancement) SEN; 345(32)

People v Covell, No. 10794, 3rd Dept, 10/19/00

Holding: The court erred by imposing an enhanced sentence based in part upon the defendant’s alleged violations of plea conditions never imposed or agreed to at the plea proceedings. While the defense made representations at the plea about where the defendant would reside during his brief release, his residency there was not clearly made a condition of the plea, and the defendant was not told that failure to stay there could result in an enhanced sentence. Nor was he told that failure to maintain contact with his attorney could result in enhanced punishment. The defendant’s waiver of appeal did not encompass a challenge to an enhanced sentence based on improper factors, so the waiver did not preclude consideration of this sentencing issue. *Cf People v Caines*, 268 AD2d 790, __ *lv den* 95 NY2d 833. He cannot be said to have knowingly waived the right to challenge imposition of enhanced punishment premised on violations of terms never agreed to or included in the plea bargain. *See People v Seaberg*, 74 NY2d 1, 11-12. The terms of the plea bargain did require the defendant to surrender himself on a designated date before sentencing. He surrendered a day later than directed, in violation of the plea agreement. Had the court relied solely on this violation of the agreement, the court would have had authority to enhance the plea and defendant’s waiver of appeal would have been given effect. Judgment modified, matter remitted for resentencing, and as modified affirmed. (County Ct, Saratoga Co [Scarano, Jr., J])

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

Evidence (Burden of Proof) EVI; 155(10) (60) (130)
(General) (Sufficiency)

People v Whipple, No. 11054, 3rd Dept, 10/19/00

Holding: During a precharge conference before the prosecution concluded its case, the court told the parties that the jury would be charged as to the meaning of “parking lot” under Vehicle and Traffic Law 1192(7), which includes a requirement that the lot have a capacity of four or more vehicles. The prosecutor said that was fine. The prosecution failed to tender evidence during the case-in-chief that the parking lot in which the defendant operated his vehicle met the statutory definition. *Cf People v Hollis*, 255 AD2d 615 *lv den* 92 NY2d 1033. Defense counsel moved for dismissal. The court erred by denying the motion and permitting the prosecution to reopen its case to elicit testimony from the arresting deputy about the

parking lot’s capacity. The failure of the prosecution to submit any proof on a necessary element was fatal to the case. *See People v Coles*, 47 AD2d 905. The court’s discretion to allow witnesses to testify out of order (CPL 260.30) does not permit reopening of a case following a meritorious motion to dismiss for legal insufficiency at the close of all proof. The need for proof of this element was not unexpected, given the precharge conference discussion. The motion to reopen was not made to allow a previously unavailable witness to testify or just to admit a stipulation into evidence. Without deciding that the assistant prosecutor’s experience is relevant, it appears the prosecutor here had seven or eight years experience. Judgment reversed, indictment dismissed. (County Ct, Sullivan Co [La Buda, J])

Accomplices (Corroboration) ACC; 10(20)

Alibi (General) ALI; 20(22)

People v Mensche, No. 11943, 3rd Dept, 10/19/00

Holding: After statements from two accomplices focused a police investigation on the defendant, search warrants were executed at his residence. The accomplices’ testimony (including how residences were surveilled and raided) was corroborated by items found in the search, including portable radios, body wires and transmitters, as well as property identified as having been taken. This evidence independent of the accomplice testimony incriminated the defendant. *See People v Glasper*, 52 NY2d 970, 971-972. The record amply demonstrated a common scheme or plan; evidence corroborating an accomplice as to one offense was sufficient as corroboration for similar crimes. *See People v Spencer*, 272 AD2d 862, __ *lv den* 95 NY2d 858. The refusal to allow the defense to present alibi witnesses because notice of alibi was served late was not error. Late entry of counsel into a case may provide a reasonable excuse for delay (*People v Davis*, 193 AD2d 885, 886-887 *lv den* 82 NY2d 716), but the tardiness here prejudiced the prosecution, and was not cured when the defense renewed the application based on the prosecution’s having interviewed the witnesses in question. The notice failed to advise the prosecution where the defendant claimed to have been. The denial of a mistrial when the defendant’s father and co-defendant became too ill to participate in the trial was not error. The assertion that his father would explain the items found in their house was purely speculative, and the defendant failed to ask for a conditional examination. *See CPL 660.20*. Judgment affirmed. (County Ct, Ulster Co [Bruhn, J])

Double Jeopardy (General) DBJ; 125(7)

Trial (Joinder/Severance of Counts and/or Parties) TRI; 375(20)

Third Department *continued***People v Lanahan, Nos. 10758; 11253,
3rd Dept, 10/26/00**

When arrested in Rensselaer for parole violation, the defendant was carrying a knapsack containing items found to have been stolen earlier in East Greenbush. He was charged by information in Rensselaer City Court with fifth-degree possession of stolen property. He was then arrested by East Greenbush police and charged with second-degree burglary and other counts, which were superceded by a grand jury indictment. He pled guilty to the stolen property charge, then sought dismissal of two counts of the indictment on double jeopardy and mandatory joinder grounds. He pled guilty to two other counts, retaining his right to appeal this issue, and unsuccessfully sought to withdraw or vacate his plea.

Holding: Second-degree burglary and fifth-degree possession of stolen property do not constitute the same offense under the test found in *People v Prescott* (66 NY2d 216, 221 *cert den* 475 US 1150). Nor was continued prosecution prohibited by statute. Multiple prosecutions for the same transaction are not barred where, as here, the offenses involve substantially different elements and the statutes defining the offenses are designed to prevent very different harms or evils. CPL 40.20(2); *People v Skinner*, 200 AD2d 783, 783 *lv den* 83 NY2d 858. Burglary is primarily aimed at protecting the integrity of a residence, while the stolen property statute is in a separate title of the Penal Law, covering theft. The mandatory joinder statute (CPL 40.40) was not violated, as there was no failure to pursue all transactions simultaneously, and the defendant never sought consolidation. Judgment and order affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Grand Jury (Procedure) GRJ; 180(5)

**Impeachment (Of Defendant
[Including Sandoval])** IMP; 192(35)

Misconduct (Prosecution) MIS; 250(15)

People v Alicea, No. 11094, 3rd Dept, 10/26/00

Holding: The defendant alleged prosecutorial misconduct during cross-examination of him before the grand jury, but failed to claim an overall pattern of prosecutorial bias and misconduct. Isolated instances of misconduct do not necessarily impair the grand jury's integrity or lead to the possibility of prejudice. *People v Huston*, 88 NY2d 400, 409. The defendant had a meaningful opportunity to provide his own version of events before being cross-examined. *Compare People v Smith*, 215 AD2d 940, 941 *lv den* 86 NY2d 802 with *People v Miller*, 144 AD2d 94, 97. The court did not err in modifying its ruling under

People v Sandoval (34 NY2d 371) after the defendant testified on direct. The prosecutor was allowed to cross-examine the defendant about a disorderly conduct conviction arising on the same day as the instant charges. The defendant had testified that he normally did not carry a knife and never assaulted anyone with a weapon or intentionally injured them with his fists. This opened the door to cross-examination revealing he had threatened his wife and possessed a knife when he was arrested. *See People v Fardan*, 82 NY2d 638, 646. The defendant failed to preserve for review the court's error in discharging alternate jurors without his consent. *See CPL 270.30(1)*. The narrow exception to the preservation requirement was not met. *See People v Patterson*, 39 NY2d 288, 295 *affd* 432 US 197. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Arrest (Resistance)

ARR; 35(45)

Assault (Evidence) (General)

ASS; 45(25) (27)

People v William EE, No. 11326, 3rd Dept, 10/26/00

Holding: There was insufficient evidence on the second-degree assault element of intending to prevent a police officer from performing a lawful duty. *See Penal Law 15.05(1) and 120.05(3); CPL 70.10(1); see also People v Campbell*, 72 NY2d 602, 604. The deputies testified that the defendant had no duty to give a statement, get into the police car, or remain in their presence, but when he attempted to leave they physically detained him and arrested him for disorderly conduct following a struggle. His refusal to get into the car did not give rise to reasonable suspicion to detain him or constitute interference with the investigation. There was no evidence that he interfered with police efforts to interview potential witnesses or to do their job concerning the domestic dispute call they had responded to. *Compare People v Townsend*, 248 AD2d 811 *lv den* 92 NY2d 862. Nor was there evidence that the defendant injured the deputies in an effort to avoid being arrested "such that an intent to interfere can be inferred." *Compare People v Pierce*, 201 AD2d 677 *lv den* 83 NY2d 914. He did not know he was being arrested until after the struggle, in which he had not attacked either deputy nor instigated physical contact, and he was acquitted of resisting arrest. Judgment reversed, indictment dismissed. (County Ct, Schuyler Co [Buckley, JJ])

Appeals and Writs (Record)

APP; 25(80)

People v LaMotte, No. 11921, 3rd Dept, 10/26/00

Holding: While the defendant's appeal from his convictions and denial of his postjudgment 440 motion was pending, he moved to settle the transcript of the proceeding, proposing amendments to alleged errors. The prosecution consented to some amendments and objected to

others. When the defendant failed to submit an explanation of how remaining alleged inaccuracies or omissions were relevant to potential issues to be raised on appeal, the court accepted the agreed-upon amendments and deemed the transcript settled. The trial court is the final arbiter of the record. *See People v Alomar*, 93 NY2d 239, 247. The defendant's contention that the remaining identified omissions in the transcript render it so inaccurate or unreliable so as to preclude adequate review of his appeal is rejected. There was no abuse of discretion in the court's ruling. *See CPLR 5525(c); People v Hoppe*, 239 AD2d 777. Order affirmed. (County Ct, Clinton Co [McGill, JJ])

Fourth Department

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)

Grand Jury (Procedure) GRJ; 180(5)

People v Kirk, No. KA 97-05340, 4th Dept, 9/29/00

Holding: The defendant's right to counsel at a critical stage of the criminal proceedings was violated. *See NY Const, art I, § 6; People v Chapman*, 69 NY2d 497, 500. His indelible right to counsel attached when the felony complaint was filed. *See People v Samuels*, 49 NY2d 218, 221. In the absence of counsel the defendant could not waive his right to counsel when he appeared before the grand jury. There was no assurance by the attorney that the defendant's decision to waive counsel had been made in consultation with the attorney, so counsel's physical absence was not excused. *See People v Beam*, 57 NY2d 241, 254. The attorney's telephone call to the prosecutor saying that the defendant would appear at the grand jury alone was insufficient to waive the defendant's right to counsel; counsel cannot unilaterally waive a client's right to counsel. *People v Thomas*, 155 AD2d 706 *aff'd* 76 NY2d 902. The grand jury waiver of immunity was therefore ineffective and transactional immunity was conferred on the defendant. Judgment reversed, indictment dismissed. (County Ct, Livingston Co [Alonzo, JJ])

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

Witnesses (Defendant as Witness) WIT; 390(12)

People v DiFondi, No. KA 98-05004, 4th Dept, 9/29/00

Holding: By failing to move to dismiss the indictment within five days of his arraignment, the defendant waived the contention that the indictment should be dismissed because he was denied his right to timely testify before the grand jury. *See CPL 190.50 [5][c]; People v Webb*, 236 AD2d 872, 873 *lv den* 90 NY2d 865. While it was improper for the prosecutor to compel the defendant to wear his jail clothing when testifying before the grand jury, the curative instructions given by the prosecutor dispelled any prejudice. *See People v Walker*, 259 AD2d 1026, 1027 *lv den* 93 NY2d 1029. Order affirmed. (County Ct, Niagara Co [Hannigan, JJ])

Admissions (Miranda Advice) ADM; 15(25)

Continuances (General) CTN; 90(14)

People v Spina, No. KA 98-05658, 4th Dept, 9/29/00

Holding: The defendant's statements, made while standing near the brink of Niagara Falls threatening suicide before any *Miranda* warnings were given by the police officers at the scene (*see gen People v Yukl*, 25 NY2d 585, 589 *rearg den* 26 NY2d 883 *cert den* 400 US 851), were not made while in custody and need not have been suppressed. There was no error in admitting the testimony of two jail inmates concerning statements they said were made to them by the defendant, because the prosecution did not elicit the aid of the inmates. *See People v Seymour*, 255 AD2d 866 *lv den* 93 NY2d 902. The court did err in denying the defense request for a continuance where the results and analysis of scientific tests performed on about 70 items were provided to the defense only a week before trial. However, the error was harmless given the overwhelming evidence of the defendant's guilt. Judgment affirmed. (County Ct, Niagara Co [Hannigan, JJ])



Under the banner "Justice Isn't Free," Katherine Kase (far left), Vincent E. Doyle, III (left), Tom Terrizzi (right), and others spoke at a Gideon Day press conference in Albany on March 20, 2001 (see page 3).



the Amadou Diallo trial. He was censured by the Commission on Judicial Conduct for several reasons unrelated to that ruling:

"In two cases, Judge Teresi held the parties in contempt and sentenced them to jail without following lawful procedures. In two other matters, the judge was 'injudicious, impatient and discourteous' during discussions in which he attempted to force a settlement. The Commission concluded that, by such conduct, the judge 'failed to respect and comply with the law' and violated the ethical rules requiring a judge to be 'patient, dignified and courteous' towards litigants and their attorneys."

SCJC News Release (2/15/01).

The Commission also found that "after pointedly excluding a female attorney from a conference in chambers, respondent used 'colorful' language and exerted pressure in an 'injudicious and indiscriminate manner' in order to force a settlement." *In Re Teresi* (2/8/01).

NYSBA Acts on Death Penalty Moratorium

The Death Penalty Moratorium signal first broadcast by Governor Ryan in Illinois has reached New York. The fear of wrongful conviction and lingering injustices from inadequate safeguards has prompted action throughout the state. On Mar. 31, 2001, the New York State Bar Association (NYSBA) passed a resolution offered by its Criminal Justice Section. It calls upon "the executive and legislative branches of the New York State government to enact and adopt legislation imposing a moratorium on executions until such time as the State can undertake an appropriate study and deliberation in order to implement policies and procedures to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process and, (2) minimize the risk that innocent persons may be executed." The American Bar Association passed a similar resolution in 1997.

The Moratorium has also become a focal point for New York City's mayoral candidates. Fernando Ferrer, Bronx Borough President, was quoted as saying that "he now supports a moratorium on executions, citing evidence that innocent people were being sent to death row." Other candidates also spoke out in favor of the moratorium. (*New York Times*, 3/12/01.) City and county legislatures and local bar associations are also considering similar resolutions in support of legislative action. (*Syracuse Online*, 3/12/01; *Newsday*, 3/22/01.) The cities of Rochester and Buffalo have already passed resolutions along with a significant number of groups and organizations. (*Syracuse Online*, 3/4/01.) For more information on the Death Penalty Moratorium movement, visit New Yorkers Against the Death Penalty at <http://www.nyadp.org>. Information about the death penalty is also available on

NYSBA's web site (www.nysda.org) on the NY Capital Defense page.

Cameras Consent Condition Loses in NYSBA

In addition to passing the Moratorium resolution, the NYSBA House of Delegates also passed, by a 73-69 vote, a resolution supporting legislation giving judges discretion over whether cameras are allowed in courtrooms. The resolution involved a change from NYSBA's 1994 position, which included a requirement that all lawyers involved consent to cameras.

Lindenauer Lauded

During the Annual Meeting, the Criminal Justice Section of NYSBA presented Susan B. Lindenauer, Counsel to the President and Attorney-in-Chief of The Legal Aid Society of New York City (LAS) with a special recognition award for outstanding service to the Bar and the community. She served as Chair of the Section for a term ending in 1999.

Federal Defender Feted

Thomas J. Concannon, Attorney-in-Charge of the Eastern District Office of the Federal Defender Division of LAS, received the Norman Ostrow Award for excellence on Mar. 28, 2001. Awarded by the New York Council of Defense Lawyers, membership in which is by invitation only, the tribute was presented before approximately 700 people, including about 20 federal judges, at the Grand Hyatt Hotel. Asked about the occasion, Concannon modestly observed that if he was as uncomfortable in a courtroom as he was in this spotlight, he would have taken up painting houses.

Former Court of Appeals Judge Dies

Judge Hugh R. Jones, who sat on the Court of Appeals from 1972 to 1984, passed away at his home in Utica on Mar. 3, 2001, at the age of 86. During his career on the bench, he earned a reputation as a fair-minded intellectual and played a key role in many important decisions. He has been described as being "very much in step with the court's tendency to protect individual liberties, sometimes interpreting the State Constitution as more protective than the federal Constitution." He served on the State Board of Social Welfare and "led the committee that reviewed the state's prison system after the 1971 uprising at Attica." In one of his most notable decisions, declaring New York's consensual sodomy law unconstitutional, Judge Jones wrote: "[I]t is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values." *People v Onofre*, 51 NY2d 476 (1980). (*New York Times*, 3/6/01.) ☞

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