NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Supreme Court Highlights

As the final months of the US Supreme Court's 2000 term approached, several adverse decisions came down of which defense counsel need to be aware. Included were decisions making it easier to interrogate suspects and more difficult to cross-examine witnesses. (Watch for case digests in a future issue of the *REPORT*).

The Court ruled that police could interrogate represented defendants about related crimes. The appointment of counsel for a suspect charged with one offense did not prohibit police questions about "factually related" crimes. According to the majority, the 6th Amendment right to counsel is "offense specific." Four justices dissented. *Texas v Cobb*, No. 99-1702 (4/2/01). (*New York Law Journal*, 5/1/01.)

Witnesses fared better than suspects. A witness "claiming innocence" may still assert the privilege against self-incrimination. The Court held that the privilege was intended to apply to any witness who has "reasonable cause to apprehend danger from a direct answer." *Ohio v Reiner*, No. 00—1028 (3/19/01).

Sentencing Considerations Considered

In the post-trial arena, the Court curtailed the right to challenge prior convictions used for sentence enhancement; gave deference to federal trial judges' consolidating prior offenses for sentencing; and clarified due process requirements for sentencing in capital cases. In two separate decisions, the Court decided that prior convictions included in sentence enhancement could not be challenged through habeas corpus. *In Daniels v US* (No. 99—9136 [4/25/01]), the Court ruled that if "a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse." The only exception is when those convictions were obtained in violation of the right to counsel and the issue was raised at sentencing. The *Daniels* holding was extended to state convictions in *Lackawanna County District Attorney v Coss* (No. 99—1884 [4/25/01]). Also regarding prior convictions, the Court said a federal court's decision to consolidate priors for sentencing purposes under the United States Sentencing Guidelines is entitled to "due deference" on appeal. *Buford v US*, No. 99-9073 (3/20/01).

In death penalty sentencing proceedings where future dangerousness was at issue, the Court ruled that due process requires the trial court to inform the jury that a life sentence carries no possibility of parole." *Shafer v South Carolina*, No. 00—5250 (3/20/01).

Search and Seizure See-Saw

During this term, the Court widened the exigent circumstances exception to the warrant requirement, pulled in the reins on hospital drug testing programs connected to law enforce-

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ment, and enlarged the scope of custodial arrests for traffic offenses. In *Illinois v McArthur,* No. 99-1132 (2/20/01) (see p. 16), the police were told by the defendant's spouse that the defendant had marijuana in his trailer home. While waiting for a search warrant to arrive, police prevented him from entering the premises alone for two hours. This was held a valid application of the exigent circumstances exception to the warrant requirement as the police had probable cause to believe that the defendant had illegal drugs inside the trailer and good reason to believe that he might destroy the evidence if unrestrained.

A South Carolina state hospital's program for conducting suspicionless, warrantless, nonconsensual drug tests on pregnant women to coerce them into drug treatment was found to be in violation of the 4th Amendment. *Ferguson v City of Charleston,* No. 99—936 (3/21/01). The hospital's policy was a "substantial" invasion of privacy. "The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent." The Court's balancing test weighed "the intrusion on the individual's interest in privacy against the 'special needs' that supported the program." The involvement of law enforcement and the ultimate aim of coercing patients into treatment excluded this program from the "special needs" category making it unconstitutional.

Buckle up or go directly to jail was what Gail Atwater learned from the Supreme Court. In *Atwater v Lago Vista* (No. 99—1408 [4/24/01]), a Texas police officer had pulled Atwater over and took her into custody for driving without a seatbelt, among other traffic offenses. The seatbelt offense, a misdemeanor, carried a fine-only penalty. Atwater sued the city and the police department for violating her civil rights, claiming that the 4th Amendment did not permit warrantless custodial arrests for minor traffic violations. After an analysis of the history and implementation of warrantless arrest procedures in the states, the Court concluded that a warrantless custodial arrest for a traffic offense did not require a threat of violence or breach of the peace. The Court refused to fashion a rule prohibiting custodial arrests for "fine-only" offenses that did not show a compelling need for detention claiming that it would have been too difficult to administer in the field. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*New York Times*, 4/25/01); (*Newsday*, 4/26/01); (*National Law Journal*, 3/20/01.)

Search and Seizure A Hot Issue at State Level

As the US Supreme Court was deciding search and seizure cases, New York courts were grappling with the 4th Amendment as well. A Court of Appeals decision about looking for a stolen tractor turned into a disquisition on search and seizure law. The search warrant in *People v Brown,* No. 23 (3/27/01) "authorized police to search for four particularized items and 'any other property the possession of which would be considered contraband.'" In the course of executing the warrant, the police found several weapons in plain view. Determining the admissibility of the weapons followed a long and circuitous path. First, the "any other property" provision of the warrant was held to be overbroad, as it granted the officers "unfettered discretion to look anywhere and seize anything that they thought 'would be considered contraband.'" However, the portion of the warrant that described with particularity four items related to the stolen tracker was sufficient. The court decided to sever "the invalid directive and apply the plain view doctrine to the valid remainder." Since the valid portion of the warrant authorized the police to be in the defendant's home, and the seized items were accessible and apparently contraband, the plain view doctrine applied.

In another case, Brooklyn police observed a man jogging down a city street late one night "holding the right side of his waistband with his right hand on top of his outer jacket." The officers from the street crimes unit in their unmarked car called him over and asked if he had any weapons. Then he was told to lift up his jacket and his shirt, which revealed the butt of a gun. No bulge or other telltale signs of a weapon had been noted. The officers were not afraid for their safety. The trial court concluded that "the unadorned observation of someone holding their hand to their waistband, without more, is insufficient to create a founded suspicion that criminal activity is afoot. . . . However, even if such conduct is sufficient to justify a level two common law right to inquire, such

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inquiry does not allow the police to ask the defendant to lift up his clothing (or open a bag or empty his pockets)." Under the circumstances, the defendant's compliance did not constitute consent. Since the police officers' actions were "the product of overreaching," the gun and its fruits, the defendant's confession, were suppressed and the indictment dismissed. *People v Hills*, 9765/00 (Sup Ct, Kings Co 4/5/01); (*New York Law Journal*, 4/18/01.)

Strip-Searching Proves Costly

A Brooklyn resident who was strip-searched after being arrested for driving with a suspended license is among the latest to join a lawsuit against local police and jail officials. He was quoted as saying, "I am involved in this because this was a total and complete indignity, and I was treated in a way that no human being should be treated." Just four months ago New York City reached a $50 million settlement in a class action lawsuit brought on behalf of 63,000 people illegally strip-searched in Manhattan and Queens detention centers. Blanket policies to strip-search arrestees regardless of the charge is an illegal practice that has recently been brought to light in several counties, including Nassau and Schenectady. (*Newsday*, 5/4/01.) Even in jurisdictions with a unified prison system, where no local jails exist, broad-based strip-search policies for minor offenses have been rejected. "Standing alone, the security concerns of the Intake facility cannot support the search policy here as it applies to minor offenses." *Roberts v Rhode Island*, No. 00-1752 (1st Cir 2/13/01.) More resources concerning strip-searches can be found in the Prisoners' Rights page on the NYSDA web site: www.nysda.org.

Schenectady Police Investigated by DOJ

A federal judge has declared Schenectady's strip-search policy unconstitutional. *Gonzalez v City of Schenectady,* No. 00-CV-0824 (NDNY 4/5/01); (*New York Law Journal*, 4/11/01.) Allegations of corruption and misconduct in the Schenectady Police Department have prompted calls for federal intervention. "The civil rights complaints have ranged from officers allegedly roughing up citizens to strip searching those charged with minor crimes at the police station jail block." Local groups welcomed the decision by the US Justice Department to investigate these complaints. "This is a recognition, in effect, by the US Attorney's Office that real reform is needed in the police department," stated the NYCLU Capital Region Director Louise Roback. "What's happening in Schenectady is not a recent phenomenon, it's more of an entrenched problem." The outcome of the investigation may result in federal oversight of the department. (Albany *Times Union*, 4/27/01.)

NYSDA Training Update

MCLE Accreditation Renewed

The New York State Continuing Legal Education Board has renewed NYSDA's "Accredited Provider" status through Feb. 27, 2004. NYSDA will continue to provide affordable, relevant Continuing Legal Education trainings around the state, helping defense lawyers sharpen their skills and obtain their Mandatory CLE credits. A regional trainer was just held in Rochester, and planning is underway for the CLE to be presented at the Annual Meeting and Conference in Lake George July 26-29, 2001 (see box, p. 1).

Rochester Trainer A Success

NYSDA held a successful trainer, Criminal Defense Tactics and Techniques III, in Rochester on May 19, 2001. Approximately 90 people heard the presentations: Bennett Gershman of Pace Law School on "Prosecutorial Misconduct," Peter Gerstenzang of the Albany firm Gerstenzang, O'Hern, Hickey & Gerstenzang on "Breath Testing: The Big Blow Out of the Prosecution's Case," Jacqueline Corey Smith of the NYS Division of Criminal Justice Services on "Criminal Histories and Their Mysteries," and Andrew C. Fine of The Legal Aid Society of New York City, Criminal Appeals Bureau, on "*Apprendi*" (see below). Materials from the trainer are available from the Backup Center for $20.

Court of Appeals Rejects Apprendi

Last year in *Apprendi v New Jersey*, No. 99-478 (6/26/00), the US Supreme Court decided that: "The Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." Appeals nationwide have been filed in federal and state courts armed with this new insight. One such case was heard in the Court of Appeals, *People v Harry Rosen*, No. 28, (4/3/01). The defendant, who had two prior felony convictions, was convicted after trial of 1st degree Sexual Abuse. The court sentenced him to 25 years to life as a persistent felony offender. On appeal, he raised for the first time an *Apprendi* challenge to New York's discretionary persistent felony offender statute. The Court of Appeals rejected it concluding: "Defendant had no constitutional right to a jury trial to establish the facts of his prior felony convictions." (*New York Law Journal,* 4/4/01.) It is expected that the matter will ultimately be resolved in the federal courts. More information about *Apprendi* can be found in the *Apprendi* page of the Hot Topics section of the NYSDA web site: www.nysda.org. Digests of this and other decisions reported in Defender News will appear in a future issue of the *REPORT*.

FOIL Limited in Sex Crime Cases

Three convicted sex offenders sought copies of police reports related to their cases under New York's Freedom of Information Law (FOIL). They intended to use the information as part of their motions for collateral review of their convictions. The police departments refused to comply, claiming that the documents were exempt from disclosure under Civil Rights Law 50-b, which shields records containing information that can identify the victim of a sex crime. However, the Civil Rights Law exempts persons "charged" with a crime from its general prohibition against disclosure. The Court of Appeals interpreted this language to mean pre-conviction defendants only. "Because the constitutionally guaranteed right of confrontation was the sole reason given by the Legislature for access under section 50-b (2)(a), we may not now read that provision to provide identical rights in the context of CPL 440 motions and federal habeas corpus review, which are not of constitutional dimension." Nevertheless, the police departments were required to show that the records contained the protected identifying information before refusing disclosure. "In those cases where there is a legitimate dispute as to whether the information contained in any given document tends to identify the victim, the police still bear the burden of making a particularized showing as to why it should not be disclosed." *Fappiano v New York City Police Department*, Nos. 30, 31, 32 (3/27/01); (New York Law Journal, 3/27/01.)

The 1st Department also decided that subpoenas are "court records" and exempt from disclosure under FOIL. *Newsday* attempted to obtain copies of subpoenas served by the New York County District Attorney's office on the Empire Development Corporation. They argued that subpoenas were issued by individual parties and did not constitute official court records. The 1st Department rejected that argument. "While by statute it is the District Attorney who issues a subpoena duces tecum (CPL 610.25[1]), the subpoena is nevertheless a mandate of the court issued for the court." The court concluded that "subpoenas are judicial records, and the judiciary is exempt from the reach of FOIL. . . . Even if, as here, court records are in the possession of agencies other than the District Attorney's office, that circumstance does not alter their exempt status." *Newsday v Empire State Development Corporation*, (No. 3700, 1st Dept 5/3/01); (*New York Law Journal*, 5/4/01.)

Amtrak Assists DEA

In a unique arrangement, a local Amtrak office in New Mexico has been working with DEA agents to intercept drug traffickers. Amtrak provides details about suspected passengers to the DEA and they receive 10 percent of any cash seized from drug couriers. According to one agent, "Tips are passed 'all over the country.'" (Albany *Times Union*, 4/12/01.)

AC Fee Pressure Continues

Across the state, events continue to highlight the crisis in public defense, a crisis most graphically demonstrated by the decline in numbers of lawyers able to accept court assignments due to unrealistically low fees.

Bar Associations and Others Push for Rate Increase

As the *REPORT* went to press, the New York County Lawyers Association (NYCLA), though its counsel, Davis Polk and Wardwell, had filed a motion seeking declaratory relief and a temporary injunction in its suit regarding the inadequate compensation provided for assigned counsel under County Law article 18-B. The motion is supported "by a staggering amount of evidence that the current assigned counsel system in New York City is in a severe crisis and already has begun its collapse." Supporting the motion are affidavits from over 40 persons with first-hand knowledge of the current state of the assigned counsel system, including current and former judges, current and former assigned counsel lawyers, and family and criminal court experts. A May 31 press release, an executive summary of the motion, and related documents are on the NYCLA web site at http://nycla.org/main.htm.

On May 1, the Association of the Bar of the City of New York (www.abcny.org) sponsored a Law Day Rally in support of an increase in the rates paid to assigned counsel under article 18-B of the County Law. Chief Judge Judith Kaye also marked Law Day by reiterating her call for increased rates. Attorney General Eliot Spitzer, while defending the constitutionality of the current statutory rates, agreed that as a matter of policy, the rates should be raised. Another official seeking to protect competing interests while supporting a rate hike was Albany County Executive Michael Breslin. He agreed that the rates had to go up, but did not want his county, which spent $218,830 on 18-B attorneys last year, to foot the bill. (Albany *Times Union*, 5/2/01.)

Members of the Nassau County Criminal Courts Bar Association, along with practitioners from the Family Court 18-B/Law Guardian Panel, demonstrated outside Family Court on May 2, 2001. The action followed a similar demonstration at the County Bar Association building in Mineola, on Law Day. Meanwhile, county legislatures in Genesee and Wyoming counties have passed resolutions asking the State to raise fees, index them to the cost of living, reject in-court/out-of-court and other differentials, provide a subsidy for the increase that would not harm institutional providers, and in fact take over funding of public defense services. The resolutions also call for an independent statewide commission to oversee distribution of state public defense funds and the provision of public defense services (see p. 14). A similar resolution was offered at the 18-county InterCounty Association of

Western New York on May 11; it was tabled to allow time to strengthen certain portions and then be reconsidered. Other counties are considering resolutions as well. Copies of these resolutions are available from the Backup Center.

CURE-NY passed a similar resolution at their annual meeting on May 29, 2001. The group (Citizens United for Rehabilitation of Errants, New York chapter) is dedicated to anti-crime measures that will save human resources and taxpayer money by combining measured justice with healing for victims and offenders.

"Extraordinary" Fees Examined

Local judicial efforts to address the assigned counsel fee problem by finding the crisis constitutes "extraordinary circumstances" allowing the statutory limits to be exceeded have suffered a major setback. Judges in several cases were found to have improperly awarded assigned counsel fees above the statutory rate, according to Administrative Judge Micki A. Scherer of the Criminal Term of State Supreme Court in Manhattan. Notably, Scherer held that Justice Marcy Kahn, the only judge in New York City who has found the present assigned counsel rates so inadequate as to constitute extraordinary circumstances, failed to properly consider individual facts relating to two felony cases for which compensation was due: "[T]he failure of the Legislature to act with regard to increased fees does not convert the statutory 'extraordinary circumstances' test to the 'unacceptable circumstances' test." Kahn had ordered payment of $75 per hour due to the crisis in provision of assigned counsel brought on by the 15-year-old fee schedule ($25/hour for in-court work, $40/hour for out-of-court in most types of cases). Scherer ruled that judges in 12 other cases had also awarded fees without setting forth facts demonstrating "the requisite extraordinary circumstances."

Scherer's May 23, 2001 rulings were issued under the questionable authority of a revised rule promulgated by Chief Administrative Judge Jonathan Lippman, effective April 16. Prior to its amendment, Chief Administrative Judge Rule 127.2 had permitted "consultation" between a trial judge and administrative judge about an ordered fee. The amended rule allows administrative judges to modify a trial court judge's fee award if it reflects "an abuse of discretion." Administrative judges may now review a trial judge's compensation order "with or without application." The 25 orders reported here were reviewed by Judge Scherer on an application from Isabelle Alicia, Director of the Assigned Counsel Plan for the City of New York.

In 11 cases, Scherer upheld extraordinary fees, including fees in one case of $100/hour. (*New York Law Journal*, 5/24/01.) For more news about assigned counsel fees, check the Hot Topics section of NYSDA's web site at www.nysda.org.

Far to the north of the 1st Department, a Clinton County Family Court Judge who earlier announced he would consider ordering fees to $75 per hour told the press that the increase has improved court operations. Since the announcement, fewer lawyers have requested to be relieved of assignments, indicating that litigants have counsel who is acting voluntarily, not under the threat of a court order. (*New York Law Journal*, 5/10/01.)

Chief Defenders Convene on Defense Crisis

Thirty chief defenders—the heads of public defense offices across the state—came to Albany on May 4, 2001 to discuss options for resolving the public defense crisis. The lack of any uniformity in how public defense services are provided in the state was fully displayed. Chiefs from counties relying entirely on assigned counsel compared notes with those from counties using public defender offices, legal aid offices, and various combinations of any or all methods. Among repeated themes were: acknowledgment by county officials and judges that assigned counsel rates need to be increased and a desire on the part of localities that the State fund what is after all a state mandate. The need for standards, suggestions about how to achieve the independence that is necessary for provision of quality defense services, and how public defense programs can best respond to the current crisis were discussed at length.

Death Penalty Defense Notes

Revelation of the FBI's failure to turn over evidence to the defense in the trial of Timothy McVeigh, which delayed the execution of McVeigh scheduled for mid-May, has riveted the nation's attention on the biggest capital case in the country. However, in New York and other states, less famous cases are proceeding through the courts, raising their own issues about the fairness and propriety of the death penalty.

Prosecutors Seek Death with Varying Frequency

Since 1995, many New York prosecutors have had to decide whether to seek the death penalty in eligible cases. The results have run the gamut. Manhattan District Attorney Robert Morgenthau rejected the death penalty in 44 first-degree murder cases. (*New York Daily News*, 4/18/01.) Westchester County District Attorney Jeanine Pirro is bringing her first death penalty case out of seven potential cases, while Monroe County District Attorney Howard Relin has asked for the death penalty in five out of nine eligible cases. According to Suffolk County District Attorney James M. Catterson, who is responsible for putting three men on death row, "When you make that decision to seek capital punishment, you're buying into a long, protracted legal struggle. You have to be morally certain in your decision, so if the jury returns a verdict in your favor, it can withstand appellate review. Each case takes a lot of soul

searching and a lot of analysis." (*Journal News,* May 4, 2001; Rochester Democrat and Chronicle, 5/2/01.) A disparity in approaches to the death penalty exists in prosecutors' offices nationwide. (*ABA Journal,* 5/01.)

According to the Capital Defender Office, as of May 22, 2001, there had been 330 first-degree murder indictments since capital punishment was reinstated in New York. Prosecutors have sought the death penalty 43 times, though three notices were later withdrawn. Three cases are pending and one defendant committed suicide, while 20 others entered pleas (13 in exchange for sentence of life without parole (LWOP) and 7 for sentences less than LWOP). Of the 16 cases that have proceeded to a capital trial, six defendants received death sentences (all of which are currently on appeal), seven received LWOP, two others entered pleas resulting in LWOP sentences before the penalty phase began, and one defendant was found guilty of an offense less than Murder I.

Capital Cases Pose Challenges for Court of Appeals

The first death penalty appeal has not been decided yet, but the administrative burden of hearing capital cases has begun to weigh on the Court of Appeals. The appeal in Darrel Harris's case, which will be the first to be argued, includes a nearly 800-page appellant's brief and a record on appeal of approximately 21,000 pages. Five more capital appeals are pending. The judges have had to hire additional law clerks to stay ahead of the paper work. (*New York Law Journal,* 5/3/01.) Among the many related issues that the court will have to decide is the procedure for performing executions, which lawyers for Harris claim could result in an "'enormously painful, prolonged and torturous' execution." (Albany *Times Union*, 4/23/01.)

John J. Marshall, Jr., President of the Nassau County Criminal Courts Bar Association, Manuel D. Vargas, Director of NYSDA's Criminal Defense Immigration Project, Keynote Speaker Deputy Chief Administrative Judge Juanita Bing Newton and Monroe County Public Defender and NYSDA President Edward J. Nowak mingle following the Awards Dinner at the NYSDA Annual Meeting and Conference 2000. *DON'T MISS THIS YEAR'S ANNUAL MEETING & CONFERENCE IN LAKE GEORGE, JULY 26-29!*

AG Puts County Cellphone Ban on Hold

Suffolk County was the first county in the nation to ban the use of cellular phones while driving. (*NY Times,* 10/05/00.) Despite the momentum to curb cellphone use on roadways, New York counties may have acted prematurely. In response to a question about Rockland County's proposed cellphone ban, a recent Attorney General's Opinion stated: "There is a substantial possibility that a municipality lacks the authority to pass a local law prohibiting a driver from holding and using a hand-held mobile phone while operating a motor vehicle on roads within the County." NYAG Op 2001-1 (1/16/01). After an exhaustive analysis of the home rule and VTL provisions, the Attorney General concluded that "while there is an argument to be made that the proposed local law is valid, our reading of the relevant precedents, in conjunction with the Vehicle and Traffic Law as a whole, supports the contrary conclusion that the County is preempted by State law from enacting such a local law."

The state legislature will be considering a statewide ban. The State Senate Majority Leader introduced a bill in April. (Albany *Times Union,* 4/7/01.) The Governor recently joined the call to curb mobile phone use, issuing an executive order banning state workers from talking and driving in state vehicles and proposing his own bill. (Albany *Times Union,* 5/15/01.)

Congress is also investigating a proposal to ban cellphones while driving, as are legislatures in more than two dozen states. Some legislators have expressed doubts. Rep. Eddie Bernice Johnson (D-Texas) stated, "I'm not certain we can legislate this behavior." (*Newsday*, 5/10/01.) The federal Department of Transportation has told Congress that use of cellphones while driving creates a "significant" safety threat, but has not recommended federal action pending the results of driver distraction studies. (Albany *Times Union*, 5/10/01)

2nd Circuit Says AA in State Facilities OK

State funding of a treatment facility that rents space to Alcoholics Anonymous (AA) does not necessarily violate the Establishment Clause of the federal constitution, the 2nd Circuit Court of Appeals has ruled. As long as clients are not coerced into attending AA sessions nor inculcated in AA doctrine, a program that receives almost 95% of its funding from the State may encourage people receiving treatment for substance abuse to enroll in AA, whose 12 "steps" to sobriety include references to God. However, a state-funded program would run afoul of the constitutional ban on government establishment of religion if its own staff directly participated in inculcation of AA views through nightly readings, discussion of AA tenets at program events, supervision of AA meetings, and holding screenings of AA videotapes for its participants. The case was remanded due to conflicting testimony about activi-

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Place: Boulder, CO
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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; website http://www.nysda.org**

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Contact: NACDL: 1025 Connecticut Ave. NW, Ste. 901, Washington, DC 20036; tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; websites http://www.criminaljustice.org or http://www.nacdl.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; website http://www.scu.edu/law/dpc ⚖

ties in which the state-funded program was actually engaged. *DeStefano v Emergency Housing Group Inc.,* No. 99-9146 (*New York Law Journal,* 4/24/01.)

NYSDA Research Associate Honored

Thomas Brewer, Research Associate at NYSDA's Backup Center, was recently honored with the Frank J. Remington Prize for Interdisciplinary Legal Studies at the SUNY Albany School of Criminal Justice. The Remington Prize, established by Professor Emeritus Fred Cohen, is given to a graduate student who shows unusual ability in, and commitment to, combining legal studies with social science in an interdisciplinary way. The recipient of the Prize is determined by vote of the School's faculty. Making the presentation to Brewer was James R. Acker, Interim Dean and Professor at the School. Everyone at the Backup Center congratulates Tom and thanks him for putting his talents and commitment to work for public defense! ⚖

Susan Horn, Executive Director, Frank H. Hiscock Legal Aid Society, Alan Rosenthal, Center for Community Alternatives, and David C. Schopp, Executive Attorney, The Legal Aid Bureau of Buffalo, Inc. find a moment to exchange thoughts at the Chief Defender Convening at last year's Annual Meeting & Conference.

An Introduction to Ineffective Assistance of Counsel in New York

By Kathryn M. Kase*

[***Ed. note:*** *Our thanks to Board Member Kathryn Kase for providing this outline. We believe it can serve as, among other things: a warning list for inexperienced attorneys of pitfalls they might not yet know about, such as "Failure to Advise of Deportation Consequences;" an appellate and 440 "checklist" of possible issues; and a quick reference for when a defense attorney needs, fast, authority on a conflict of interest issue such as "Prior Representation of Government Witness." Like all legal reference material, it serves as a starting point, not the final word on any particular IAC issue.*]

Contents

Introduction

This outline is intended as a guide to the law governing ineffective assistance of counsel in New York. Every effort has been made to cite cases in which the ineffective assistance claim was successful. Cases from the federal Second Circuit Court of Appeals are cited when New York courts appeared to be silent on the topic or to have levied an adverse decision.

Many of the state court decisions cited found ineffective assistance based on the application of the "totality of the circumstances" test. Thus, the particular failing cited—*e.g.*, failure to investigate a possible defense—usually is but one of the reasons why ineffective assistance was found. The cases are cited in this manner to alert counsel to the broad outlines of ineffective assistance law in New York and also to assist those doing post-conviction work.

* © 2001 Kathryn M. Kase. ***Kathryn M. Kase*** *is a criminal defense lawyer with Crane, Greene & Parente in Albany. She is on the Board of Directors of the New York State Defenders Association and of the National Association of Criminal Defense Lawyers.*

I. STANDARDS FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL

A. Federal Standard: *Strickland v Washington*, 466 US 668, 686 (1984) *rehear den* 467 US 1267; also US Const. amend. VI.

1. Elements:

a. Counsel's performance must be deficient and fall below the objective standard of reasonableness. *Strickland*, 466 US at 689-91.

(1) Counsel's performance is examined "as of the time of counsel's conduct," *Id*, at 690.

(2) Hindsight may not be used to second-guess counsel's strategic choices. *Mayo v Henderson*, 13 F3d 528, 533 (2d Cir. 1994); *see also McKee v US*, 167 F3d 103, 106 (2d Cir. 1999).

b. The deficient performance must be prejudicial, thus depriving the accused of both a fair trial and a reliable result. *Strickland*, 466 US at 694.

(1) Prejudice is established if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*, *quoted in Bunkley v Meachum*, 68 F3d 1518, 1521 (2d Cir. 1995).

B. New York Standard: *People v Baldi*, 54 NY2d 137, 147 (1981); NY Const art. I § 6.

1. Elements:

a. The finding of ineffective assistance a review of the "totality" of the evidence, law and circumstances in a particular case. *Baldi*, 54 NY2d at 147.

b. The review must show that representation was "meaningful." *Id*.

2. Exception to "Totality" Requirement—Single Substantial Error. A single substantial error by counsel which seriously compromises a defendant's right to a fair trial can constitute ineffective representation. *People v Hobot*, 84 NY2d 1021, 1022 (1995).

II. *PER SE* INEFFECTIVE ASSISTANCE

A. "Attorney" Not Duly Licensed in Any Jurisdiction

1. *People v Felder*, 47 NY2d 287, 293-97 (1979) (layman masqueraded as lawyer). *But see People v Kieser,* 79 NY2d 936, 937-38 (1992) (no ineffective assistance where counsel was out-of-state lawyer who had been suspended in home state for failing to pay bar dues and who had not sought admission in New York *pro hac vice*).

2. *Solina v US*, 709 F2d 160, 167 (2d Cir. 1983) (counsel never admitted to bar).

B. Counsel Fraudulently Obtained Law License—*US v Novak*, 903 F2d 883 (2d Cir. 1990).

C. Counsel Implicated in Client's Crimes—*US v Fulton*, 5 F3d 605, 609-12 (2d Cir. 1993); *US v Cancilla*, 725 F2d 867, 871 (2d Cir. 1984).

D. Counsel Asleep During Trial—*Tippins v Walker,* 77 F3d 682, 687 (2d Cir. 1996) (accused "suffered prejudice, by presumption or otherwise, if his counsel was repeatedly unconscious at trial for periods of time in which defendant's interests were at stake"). *But see People v Tippins*, 173 AD2d 512, 513 (2d Dept. 1991) *lv den* 78 NY2d 1015 (1991) (New York standards for effective assistance not violated by sleeping lawyer).

III. CONFLICTS OF INTEREST

A. Defense Counsel's Prior Representation of Government Witness—*Ciak v US*, 59 F3d 296, 304-5 (2d Cir. 1995).

B. Plea Induced by Counsel's Threats and Misinformation—*Lopez v Scully*, 58 F3d 38, 41-43 (2d Cir. 1995).

C. Criminal Activity by Counsel—*US v Fulton*, 5 F3d 605, 609-12 (2d Cir. 1993) (prosecution witness's allegation of criminal activity by counsel created a *per se* prejudicial conflict of interest).

D. Representation of Co-Defendants with Conflicting Defenses—*People v Jones*, 184 AD2d 405, 406 (1st Dept. 1992).

E. Representation of Two Co-Defendants, One of Whom is Offered Plea in Exchange for Testimony Against the Other Co-Defendant—*People v Dell,* 60 AD2d 18, 22-23 (4th Dept. 1977).

F. Representation of Two Clients with Conflicting Interests—*People v Carillo,* 218 AD2d 505, 506 (1st Dept. 1995); *People v Ortiz*, 76 NY2d 652, 656 (1990); *People v Davis,* 72 AD2d 69, 71 (4th Dept. 1979).

G. Representation by Co-Defendant's Attorney During Jury Deliberations Because Counsel Absent—*People v Allah,* 80 NY2d 396, 400 (1992).

IV. GUILTY PLEAS

A. Counsel's Ignorance of Applicable Law—*People v Butler,* 94 AD2d 726, 726 (2d Dept. 1983).

B. Failure to Investigate Prior to Advising Client to Accept Plea—*People v Van Wie*, 238 AD2d 876, 876-77 (4th Dept. 1997) (counsel ineffective in advising defendant to plead guilty when investigation would have shown the prosecution had no case).

C. Failure to Communicate Information Regarding Viable Defense Prior to Advising Client to Plead Guilty—*People v Thomson,* 719 NYS2d 171 (3d Dept. 2001) (attorney failed to advise client that criminal intent was necessary element of second-degree attempted murder and element could have been negated by fact client was intoxicated).

D. Failure to Communicate Accurate Information About Plea Negotiations—*People v Reed*, 152 AD2d 481, 481 (1st Dept. 1981).

E. Failure to Place Understanding of Plea on the Record—*People v Roy,* 122 AD2d 482, 483-84 (3d Dept. 1986).

F. Failure to Advise Client that Client Was Not Entitled to Specific Performance of the Plea Agreement, but Could Withdraw Plea—*People v Roy,* 122 AD2d 482, 283-84 (3d Dept. 1986).

G. False Representations and Promises as Inducements to Plead Guilty—*Mosher v Lavallee*, 351 FSupp 1101, 1107 (SDNY 1972).

H. Failure to Advise of Deportation Consequences—*Janvier v US*, 659 FSupp 827, 829 (EDNY 1987). *But see Campbell v US,* 1992 WL 1001 74; 1992 US Dist. LEXIS 5975 (EDNY 1992) and *People v Ford*, 86 NY2d 397, 403-4 (1995).

I. Failure to Advise Client that Prosecution Did Not Intend to Enforce Promise of Reduced Sentence—*US ex rel Wissenfeld v Wilkins,* 281 F2d 707, 712 (2d Cir. 1960).

J. Failure to Counsel Client to Accept Plea Resulting in Shorter Sentence—*Boria v Keene,* 99 F3d 492, 496-99 (2d Cir. 1996) *cert den* 521 US 1118, 117 S Ct 2508; *see also US v Gordon*, 156 F3d 376, 379-80 (2d Cir. 1998).

K. Failure by Counsel to Familiarize Self with Charges Client Pleaded Guilty To—*People v Droz,* 39 NY2d 457, 462-63 (1976).

V. FAILURE TO MAKE VARIOUS MOTIONS

A. Failure to File Any Pre-Trial Motions—*People v Trait,* 139 AD2d 937, 938-39 (4th Dept. 1988) *app den* 72 NY2d 867 (1988); *People v Ramos,* 53 AD2d 703, 703 (2d Dept. 1976).

B. Speedy Trial

1. Failure to Demand a Speedy Trial—*People v Pickens,* 216 AD2d 631, 632 (3d Dept. 1995); *People v O'Connell,* 133 AD2d 970 (3d Dept. 1987).

2. Failure to Pursue Defendant's *Pro Se* Speedy Trial Motion—*People v Sanford,* 148 AD2d 999 (4th Dept. 1989).

C. Failure to Demand a Hearing (*Dunaway*) on Probable Cause to Arrest—*People v Detling*, 73 AD2d 937, 937-38 (2d Dept. 1980).

D. Failure to Demand a Suppression Hearing (*Mapp*) on Physical Evidence Seized from Accused—*People v Donovan*, 184 AD2d 654, 655 (2d Dept. 1992); *People v Gugino*, 132 AD2d 989, 989-90 (4th Dept. 1987); *People v Sanin*, 84 AD2d 681, 682-83 (4th Dept. 1981).

E. Failure to Demand a Suppression Hearing (*Huntley*) on Voluntariness of Statement—*People v Morgan,* 141 AD2d 928, 929-30 (3d Dept. 1988); *People v Detling*, 73 AD2d 937, 937-38 (2d Dept. 1980); *People v Gugino*, 132 AD2d 989, 989-90 (4th Dept. 1987); *People v Sanin*, 84 AD2d 681, 682-83 (4th Dept. 1981).

F. Failure to Demand a Hearing (*Sandoval*) on Accused's Prior Crime or Misconduct—*People v Wiggins,* 213 AD2d 965, 965 (4th Dept. 1995); *People v Peterson,* 97 AD2d 967, 967-68 (4th Dept. 1983).

G. Identification (*Wade*) Hearing

1. Failure to Demand a Hearing (*Wade*) regarding Identification of the Accused—*People v Sullivan,* 209 AD2d 558, 558-59 (2d Dept. 1994); *People v Donovan,* 184 AD2d 654, 655 (2d Dept. 1992); *People v Peterson*, 97 AD2d 967, 967-68 (4th Dept. 1983); *People v Sinatra*, 89 AD2d 913, 914-15 (2d Dept.) *lv den*, 28 NY2d 695 (1982).

2. Failure to Properly Move for a *Wade* Hearing—*People v Hale*, 142 AD2d 172, 174-75 (1st Dept. 1998) (accused denied *Wade* hearing because counsel erroneously asserted that accused was identified in line-ups not in show up).

H. Failure to Move for Dismissal of the Indictment—*People v Kilstein*, 174 AD2d 756, 757 (2d Dept. 1991) (vague allegations); *People v Sanford,* 148 AD2d 999, 1000 (4th Dept. 1989) (improper questioning of defendant by prosecutor before grand jury).

I. Failing to Seek Competency Hearing—*People v Sinatra,* 89 AD2d 913, 915 (2d Dept.) *lv den* 28 NY2d 695 (1982) (ineffective assistance found where accused appeared incompetent and court suggested that counsel seek hearing, but counsel did not). *But see People v Tortorici*, 249 AD2d 588, 592-93 (3d Dept. 1998) *affd other gnds* 92 NY2d 757 (1999) *cert den* 528 US 834; 120 S Ct 94 (counsel not ineffective for failing to seek competency hearing after prosecution's psychiatrist opined mid-trial that accused was unfit to proceed).

VI. INADEQUATE TRIAL PREPARATION

A. The Client

1. Failure to Meet Client Until the Day of Trial—*People v Droz*, 39 NY2d 457, 462-63 (1976).

2. Failure to Conduct More than a Single Interview With Client Before Trial—*People v Simmons*, 110 AD2d 666, 666-67 (2d Dept. 1985).

B. Witnesses

1. Failure to Prepare Witnesses Adequately—*People v Donovan,* 184 AD2d 654, 655 (2d Dept. 1992).

2. Failure to Locate and Call Significant Witnesses—*People v Droz,* 39 NY2d 457, 462-63 (1976); *People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994) (failure to subpoena alibi witnesses); *People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994) (failure to interview available witnesses).

3. Failure to Secure Independent Medical Testimony—*People v Baba-Ali*, 179 AD2d 725, 729 (2d Dept. 1992).

C. Discovery

1. Failure to Follow Up on Demanded Discovery—*People v Ali-Baba*, 179 AD2d 725, 729 (2d Dept. 1992) (counsel failed to follow up on demand for medical records which resulted in his receipt of them on the day of trial).

2. Failure to Subpoena Documents—*People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994).

D. Investigation

1. Generally—*People v Droz*, 39 NY2d 457, 462 (1976); *People v La Bree*, 34 NY2d 257, 259 (1974); *People v Van Wie*, 238 AD2d 876, 877 (4th Dept. 1997); *People v AliBaba*, 179 AD2d 725, 728-29 (2d Dept. 1992); *see also People v Bennett*, 29 NY2d 462, 466 (1972) (right to counsel includes right to have counsel conduct appropriate investigations), and *Deluca v Lord*, 77 F3d 578, 584 (2d Cir.) *cert den* 519 US 824, 117 SCt 83 (1996) (counsel failed to conduct adequate investigation of possible defense of extreme emotional disturbance which could have reduced murder charge to first-degree manslaughter).

2. Failure to Read Hospital Records and Speak to Doctors—*People v Bennett*, 29 NY2d 462, 466 (1972).

3. Delay in Investigating Possible Mental Defense—*People v Wilson*, 133 AD2d 179, 180-81 (2d Dept. 1987).

E. Unfamiliarity With Earlier Proceedings—*People v Riley*, 101 AD2d 710, 711 (4th Dept. 1984).

F. Specific Defense

1. Failure to Prepare Alibi Defense—*People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994).

2. Failure to Prepare Insanity Defense—*People v Angellilo*, 91 AD2d 666, 666-67 (2d Dept. 1982).

G. The Law

1. Failure to Prepare on the Law Essential to the Defense—*People v Bennett*, 29 NY2d 462, 464-66 (1972) (insanity case where counsel failed to read the law regarding the insanity defense); *People v Van Wie*, 238 AD2d 876, 877 (4th Dept. 1997).

2. Failure to Conduct Any Legal Research—*People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994).

VI. FAILURE TO OBJECT AT TRIAL

A. In General—*People v Hollins*, 221 AD2d 863, 864 (3d Dept. 1995) (counsel made only two objections at trial).

B. Direct and Cross Examination

1. To Improper Direct or Cross-Examination—*People v Wiggins*, 213 AD2d 965, 966 (4th Dept. 1995).

2. To Prosecution's Improper Implications Made on Cross-Examination—*People v Peterson*, 97 AD2d 967, 967-68 (4th Dept. 1983).

C. Evidence

1. To Inadmissible Tangible Evidence—*People v Hollins*, 221 AD2d 863, 864 (3d Dept. 1995); *People v Donovan*, 184 AD2d 654, 654 (2d Dept. 1992); *People v Ellsworth*, 131 AD2d 109, 112 (3d Dept. 1987); *People v Ferguson*, 114 AD2d 226, 229-31 (1st Dept. 1986); *see also Quartararo v Fogg*, 679 FSupp 212, 240 (EDNY 1988) *affd without op* 849 F2d 1467 (2d Cir. 1988) (counsel failed to object to evidence that defendant's parents believed him to be guilty).

2. To Hearsay Evidence—*Mason v Scully*, 16 F3d 38, 42 (2d Cir. 1994) (counsel ineffective in failing to object, on hearsay and Confrontation Clause grounds, to critical testimony by police detective about inculpatory statement by nontestifying codefendant).

3. To Inadmissible Confession—*People v Vauss*, 149 AD2d 924, 924 (4th Dept. 1989) (confession by accused); *People v Morgan*, 141 AD2d 928, 929 (3d Dept. 1988) (confession by accused); *People v Barbot*, 133 AD2d 274, 275-76 (2d Dept. 1987); *Henry v Scully*, 918 FSupp 693, 713-15 (SDNY 1995) *affd* 78 F3d 51 (2d Cir. 1996) (confession of co-defendant).

4. The Accused

a. To Evidence of Accused's Criminal Record—*People v Wiggins*, 213 AD2d 965,

966 (4th Dept. 1995); *People v Morgan*, 141 AD2d 928, 929-30 (3d Dept. 1988).

b. To Prejudicial Collateral Matters Elicited from Accused by Prosecution—*People v Gugino*, 132 AD2d 989, 990 (4th Dept. 1987).

c. To Incriminating Information Extracted from Accused on Cross by Prosecution—*People v Sanin*, 84 AD2d 681, 682-83 (4th Dept. 1981).

5. To Improper Identification Evidence—*People v Wallace*, 187 AD2d 998, 998 (4th Dept. 1982); *People v Winston*, 134 AD2d 546, 547 (2d Dept. 1987).

D. To Prosecutorial Misconduct—*People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994).

E. To Jury Instructions—*People v Sullivan*, 209 AD2d 558, 558-59 (2d Dept. 1994).

VIII. OTHER INEPT TRIAL PERFORMANCE

A. Jury Selection—*People v Wagner*, 104 AD2d 457, 458-59 (2d Dept. 1984) (counsel failed to challenge jurors at all, resulting in nine jurors with friends or relatives on police forces).

B. Opening Statement

1. Failure to Make Any Opening Statement—*People v Angellilo*, 91 AD2d 666, 667 (2d Dept. 1982).

2. Poor Opening Statement—*People v Trait*, 139 AD2d 937, 938-39 (4th Dept. 1988) *lv den* 72 NY2d 867 (1988) (rambling and disconnected opening sustained 21 objections); *see also People v Barbot*, 133 AD2d 274, 275 (2d Dept. 1987) (counsel suggested client attempted to commit charged crime even though attempt was A-1 felony, too).

C. Counsel Sleeping At Trial—*Tippins v Walker*, 77 F3d 682, 684 (2d Cir. 1996).

D. Failure to Develop the Record—*People v Van Wie*, 238 AD2d 876, 877 (4th Dept. 1997).

E. Failure to Pursue Identifiable Defense Strategy—*People v Norfleet*, 267 AD2d 881, 882 (3d Dept. 1999) *lv den* 95 NY2d 801 (2000) (defense should have pursued intoxication defense).

F. Failure to Raise Issue of Whether Chief Prosecution Witness was Accomplice and, Therefore, Whether His Testimony Required Corroboration—*People v Gugino*, 132 AD2d 989, 990 (4th Dept. 1987).

G. Waiver of *Ranghelle* Violation—*Flores v Demskie*, 215 F3d 293, 304-6 (2d Cir.) *cert den sub nom Keane v Flores*, 121 SCt 606 (2000).

H. Waiver of Cross-Examination of Certain Prosecution Witnesses through Unwise Concession—*People v Morales*, 118 AD2d 814, 814-15 (2d Dept. 1986).

I. Inadequate Cross Examination

1. Generally—*People v LaBree*, 34 NY2d 257, 259 (1974); *People v Tillman*, 179 AD2d 886, 887-88 (3d Dept. 1992); *People v Kilstein*, 174 AD2d 756 (2d Dept. 1991) *app den* 78 NY2d 1012 (1991); *People v Trait*, 139 AD2d 937, 938-39 (4th Dept. 1988) *app den* 72 NY2d 867 (1988); *People v Morales*, 118 AD2d 814 (2d Dept. 1986).

2. Failure to Cross-Examine the Complainant—*People v Morales*, 118 AD2d 814, 814-15 (2d Dept. 1986).

3. Failure to Use Evidence of Prior Misidentifications By Sole Prosecution Witness—*People v Jenkins*, 68 NY2d 896, 898 (1986).

4. "Opening The Door"—*People v Wiggins*, 213 AD2d 965, 966 (2d Dept. 1994) (counsel opened door to prejudicial information about accused).

5. Eliciting Uncharged Crimes on Cross-Examination—*People v Hollins*, 221 AD2d 863, 864 (3d Dept. 1995).

6. Eliciting Damaging Testimony about the Accused on Cross—*People v Barbot*, 133 AD2d 274, 275-76 (2d Dept. 1987); *People v Riley*, 101 AD2d 710, 711 (4th Dept. 1984).

J. Failure to Call Witnesses

1. Failure to Call Accused as Witness—*Deluca v Lord*, 858 FSupp 1330, 1353-57 (SDNY 1994) *affd* 77 F3d 578 (2d Cir.) *cert den* 519 US 824, 117 SCt 83 (1996).

2. Failure to Call A Promised Witness—*People v Shawn Brown*, 8/21/98 NYLJ, at 21 (Sup. Ct., Queens Co.) (Eng, J.).

3. Failure to Call Alibi Witness—*People v Detling*, 73 AD2d 937, 937-38 (2d Dept. 1980).

4. Failure to Call Any Witnesses—*People v Angellilo*, 91 AD2d 666, 666-67 (2d Dept. 1982).

5. Failure to Call Expert Witnesses—*People v Saunders*, 54 AD2d 938, 939 (2d Dept. 1976).

K. Inadequate Direct Examination

1. Inadequate Direct Examination of Defense Expert—*People v Trait*, 139 AD2d 937, 938-39 (4th Dept. 1988) *app den* 72 NY2d 867 (1988) (inadequate examination of psychiatric expert in insanity case).

2. Permitting Client to Offer Inculpatory Testimony at Prior Trial—*People v Wilson*, 133 AD2d 179, 180-81 (2d Dept. 1987).

L. Use of the Mental Defense

1. Failure to Raise Insanity Defense—*People v Angellilo*, 91 AD2d 666, 666-67 (2d Dept. 1982).

2. Inadequate Presentation of Insanity Defense—*People v Saunders*, 54 AD2d 938, 938-39 (2d Dept. 1976).

M. Closing Argument

1. Introduction of Damaging Evidence During Defense Summation—*People v Tillman*, 179 AD2d 886, 887-88 (3d Dept. 1992).

2. "Incompetent" Closing Argument by Defense—*Quartararo v Fogg*, 679 FSupp 212, 250-51 (EDNY 1988) *affd without op* 849 F2d 1467 (2d Cir. 1988); *see also People v Worthy*, 112 AD2d 445, 456 (2d Dept. 1985) (failure to review evidence or focus jury on critical identification issue).

N. Jury Charge

1. Request for Lesser Included Offense that Doubled Number of A-1 Felonies—*People v Barbot*, 133 AD2d 274, 275-76 (2d Dept. 1987).

2. Failing to Seek Charge

a. On Voluntariness of Confession—*People v Barbot*, 133 AD2d 274, 275-76 (2d Dept. 1987).

b. Regarding Missing Witness—*Henry v Scully*, 78 F3d 51, 53 (2d Cir. 1996); *People v Wiley*, 120 AD2d 66, 70 (4th Dept. 1986).

c. Regarding Alibi—*People v Wiley*, 120 AD2d 66, 70 (4th Dept. 1986) (counsel also failed to preserve issue for appeal).

d. On Circumstantial Evidence—*People v Butterfield*, 108 AD2d 958, 960 (3d Dept. 1985).

IX. SENTENCING

A. Failure to Appear at Sentencing—*People v LaBree*, 34 NY2d 257, 259 (1974).

X. INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL

A. Failure to Advise Client of Right to Appeal—*US ex rel Thurmond v Mancusi*, 275 FSupp 508, 523 (EDNY 1967).

B. Failure to Perfect Appeal in Timely Manner—*Harris v Kuhlman*, 601 FSupp 987, 993-95 (EDNY 1987).

C. Filing of *Anders* Brief When Review of Record Showed Colorable Appellate Issues—*People v Stokes*, 2001 NY LEXIS 102 (Ct. App. 2001).

D. Advocacy on Appeal

1. Failure to Present Significant and Obvious Issues—*Mayo v Henderson*, 13 F3d 528, 532 (2d Cir. 1994) (ignored issues must be stronger than those presented).

2. Failure to Present Particular Issues

a. *Rosario* Violation—*Mayo v Henderson*, 13 F3d 528, 535 (2d Cir. 1994).

b. Violation of State Constitutional Right to Counsel—*Claudio v Scully*, 982 F2d 798, 805 (2d Cir. 1992) *cert den* 508 US 912 (1993).

c. *Batson* Violation—*People v Reyes*, 151 AD2d 262, 263 (1st Dept. 1989).

d. Duplicitious Nature of Indictment—*Grady v Artuz*, 931 FSupp 1048, 1053-54 (SDNY 1996).

3. Choosing to Argue Particularly Weak Appellate Issues that Had Little Chance of Success—*Mayo v Henderson*, 13 F3d 528, 536 (2d Cir. 1994).

4. Disparaging Defendant's *Pro Se* Arguments—*People v Wallace*, 137 AD2d 639, 639-40 (2d Dept. 1988). ⚖

*From My Vantage Point**

by Jonathan E. Gradess

Wanted: An Independent Commission to Oversee Public Defense Services

We have received positive feedback on the recommendations in our position paper to the Task Force to Study Compensation Rates for Law Guardians and Assigned Counsel (discussed in the last issue of the *REPORT*). There has been widespread acceptance of our first four recommendations—that the Legislature should: raise assigned counsel fees; index the fees to the cost of living; reject existing and proposed differentials for different types of work, along with per-case caps; and provide State funding for the fee increase without harming other public defense providers.

There has also been substantial agreement with our fifth recommendation, echoing the report of the First Department Committee on Representation of the Poor, for an independent statewide Public Defense Commission. Creating an independent Commission will protect constitutionally and statutorily required legal services from control by those with conflicting interests and provide a single, accountable entity to whom any and all concerned groups can turn when quality representation is not being met. How and when to implement this recommendation is the subject of many ongoing discussions, and the venue for some disagreement.

As a matter of immediate need, some lawyers and judges are saying simply, "Show me the money." They would have public defense reform via creation of a Commission wait for another day. But the signals from Albany indicate that a state-funded increase with no strings attached is unlikely.

Why Push for an Independent Public Defense Commission Now?

As one public defense lawyer observed, "Horrible things are already happening to public defense. Maybe this is the time to get something better." For many clients, things cannot get worse. For many others, things are so bad that a risk to improve them is worth taking. The depths to which public defense has sunk is detailed in the transcripts of the hearings the League of Women Voters of New York State and others have held with us across the state (available on our web site). It is set out in the papers accompanying the recent motion filed in the NYCLA lawsuit (see p. 4). We see it every day in the files and on the desks of the Backup Center where our small staff struggles to staunch a flood of requests for help from dedicated public defense lawyers overwhelmed by too many cases, too little time, and too few resources.

Some say that by our call for an independent public defense commission, we may help create a governing entity we will all rue. But we are convinced that state funding will result in the creation of some type of oversight entity—which we must work to ensure is independent.

This Moment Occasioned By Crisis Will Not Soon Return

The Backup Center opened its doors in 1978, became State funded in 1981, and has been working to improve the quality of public defense services ever since. We have studied local systems and made recommendations. We have identified statewide problems and made recommendations. We have analyzed every budget, advocated for reforms, proposed new formulae for improvement. We have helped more than 20,000 lawyers prepare their cases. We have trained lawyers, implemented computerized case management systems and other technological aids for public defense providers, and tried to fix this ever-breaking, fiscally-bankrupt, politicized system. Things are worse now than when we began.

The moment for change is now, not because government has finally reached out to comprehensively fix these things but because a broken cog has temporarily slowed the wheel that ordinarily rolls over our clients. The assigned counsel fee crisis has reduced the number of lawyers needed to move cases through the system, and the Legislature is looking in our direction.

State officials are poised to act, because they must act on assigned counsel fees. And so we are letting them know that that they must do more than reluctantly spend money, they must act to ensure quality.

This moment for reform, occasioned by crisis, will not easily return. The timing could be better for us, but I believe the opportunity for systemic reform will be lost if we merely acquiesce in whatever is proposed by the Task Force. I also believe that if we do not pursue our vision of oversight we will invite oversight that will be adverse to the interests of clients and the defense community.

Oversight Is Promised, and It Threatens to be Harmful if We Don't Demand and Achieve Independence

I believe that when state officials say they want to "monitor services," "provide oversight," and establish

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

"mechanisms to insure accountability and efficiency," they are focused on cost containment, not assurance of quality. When they refer to a fiscal "watchdog," I fear that they mean one that slashes costs, not barks at malpractice. Despite the millions of dollars drained from the State treasury for the prosecution function, fiscal "accountability" has never been required for prosecutorial expenditures. Such plans are reserved for the belated, proportionately small amount being discussed for defense services.

Obviously, nothing is inherently wrong with fiscal accountability; no one endorses waste. Our fear, however, is that political control of state public defense will undermine quality. Voucher cutting, county attorney standing to appeal extraordinary fee claims, limiting appointed lawyers' use of experts to those experts employed by the government are all within the sphere of current legislative consideration. As desperate as is the need for more money, more money tied to that kind of oversight will bring no genuine relief.

When we call for oversight, we mean something quite different than undifferentiated cost containment. We support the cost containment of reducing genuine waste, inefficiency, and fraud. We oppose the "cost containment" of lowering eligibility standards so fewer clients need be served. We call for oversight that will require localities to provide high quality services, that will re-form impoverished structures that fail to provide such representation, and that will fiscally support those systems that do provide such representation. We call for oversight that will establish standards designed to support all counties in moving toward higher levels of individual, efficient representation.

Efficiencies will come from systematically requiring local programs to apply uniform standards to their work and funding jurisdictions that meet those standards. Such standards will support systems where there are healthy attorney client relationships, thoroughly investigated and legally researched cases, utilization and financing of experts needed to achieve adversarial testing of the prosecution's case, lawyers ably equipped by training and experience matched to the complexity and severity of the matters to which they are assigned, and a political environment at the local and state levels that will protect the integrity and importance of the client attorney relationship.

Who Should Be On the Commission?

The Public Defense Commission that is to take on this quality oversight should be run by people who understand the nature of public defense work and can contribute to making the system better. Seasoned and distinguished trial and appellate criminal defense practitioners with demonstrated and deep-rooted sensitivity to the complex issues affecting people in poverty should be included on such a commission. Public defense lawyers with a proven commitment to enhancing the constitutional and statutory rights of clients and the client community should be included. People with confirmed expertise in solving the problems of poor people in the justice system or who demonstrate a long-established commitment to positively addressing the need for adequate legal representation should be included, along with former consumers of defense services. Those who administer or have administered public defense systems and lawyers from private law firms with an established and demonstrated commitment to resolving problems associated with the representation of low-income people should all be considered.

Obviously, no judge, prosecutor or others whose positions create a conflict of interest or place them in an adversarial relationship to the defense, and no law enforcement official should sit on the Commission. And the Commissions' membership should reflect the geographic, racial, ethnic, gender and cultural diversity of the state's public defense clients.

How Can This be Accomplished?

We propose a Commission accountable fiscally to the State, housed in a public benefit corporation, and appointed by the Governor, Legislative leaders and the Courts from a pool of candidates selected by an independent nominating committee based on statutory criteria reflecting the qualifications and restrictions set forth above. The nominating process would be designed to assure experience, competence and integrity. On the nominating committee would sit representatives from statutorily-designated entities such as bar groups and civic and legal organizations, whose competence regarding defense representation, public defense services, poverty, and the criminal justice system would be evident. The nominating committee would consult as needed with others.

The road to an independent public defense commission is strewn with danger. Bringing the right kind of commission into existence will be hard. We know that the fears of our friends are genuine and legitimate. But in our judgment we have to try—now. We invite your help, your comments, even your loyal opposition to any aspect of our plan that threatens whatever positive there is in New York public defense today. Write me, call me, or e-mail me (jeg@nysda.org).

Ending with good news, I report that a survey conducted April 22-25, 2001, by the Albany-based research firm, Strategic Moves, LLC, publishers of the *New York Report*, reveals that nearly 70% of New York's registered voters support an independent Public Defense Commission. With them and with your help, we are going to try to bring it into being. ⚖

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

Evidence (Preservation) **EVI; 155(107)**

Narcotics (Marijuana) **NAR; 265(40)**

Illinois v McArthur, No. 99-1132, 2/20/01, 531 US 326; 121 SCt 946; 148 LEd2d 838

Two police officers came to the trailer home of the defendant and his wife at her request. After she had cleared out her belongings, she told the officers that the defendant had "dope" inside. The defendant came out on the porch and denied a police request to search the trailer. One officer left to get a search warrant and the other prohibited the defendant from reentering the trailer alone. The second officer returned two hours later with the warrant. They arrested the defendant for the misdemeanor (but jailable) offenses of possession of marijuana and paraphernalia found in the resulting search. The defendant's suppression motion was granted and affirmed on appeal. The state supreme court denied the prosecutor's motion for leave to appeal.

Holding: Preventing the defendant from entering the trailer alone was a valid application of the exigent circumstances exception to the warrant requirement. The police had probable cause to believe that the defendant had illegal drugs inside the trailer and good reason to believe that the defendant might have destroyed the evidence if unrestrained. *See Segura v US*, 468 US 796 (1984). The Court distinguished *Welsh v Wisconsin* (466 US 740 [1984]) in which warrantless entry by police into a defendant's home to preserve evidence of intoxication for a traffic offense was held to be unconstitutional. The nonjailable offense in Welsh made it inapplicable to the present case. Judgment reversed.

Concurrence: [Souter, J] The police could have followed the defendant back into his trailer to conduct a warrantless search based on fear that evidence would be destroyed. The actions taken were legitimate due to the law's preference for warrants.

Dissent: [Stevens, J] The low status of the charges make this is a poor vehicle for probing the boundaries of governmental power to limit a possessory interest in one's home pending a warrant. On the merits, the state court's ruling that the sanctity of a home overrode the state's interest in prosecution should have been affirmed.

New York State Court of Appeals

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

People ex rel Matthews v NYS Division of Parole, No. 13, 2/8/01

The defendant, on parole for a New York offense, was sentenced to prison for a federal crime. The NYS Division of Parole lodged a detainer with a federal prison outside New York, where the defendant was serving time. Unknown to Parole, the defendant spent almost two years in New York jails pending federal resentencing. Upon completion of the federal sentence he was released to the state warrant. Before returning to New York, the defendant had filed a New York state habeas corpus petition asserting that Parole failed to provide a preliminary revocation hearing when he was in New York. The court found that defendant was not 'detained in another state' under Executive Law § 259-i(3)(a)(iv) for almost two years. Still, the petition was dismissed because the defendant was beyond the 'convenience and practical control' of Parole during that time. The Appellate Division reversed.

Holding: "[W]hen the Division lodges a detainer against an alleged parole violator in an out-of-state facility, the 15 day period is not triggered until the individual has completed the out-of-state sentence and is available for extradition." See Executive Law § 259-i (3)(a)(iv). The defendant's contention that he was in New York jails for two years and not "detained in another state" is rejected. "A parolee who has been temporarily brought into New York while serving a sentence in another jurisdiction is still not a New York prisoner." Order reversed.

Evidence (Hearsay) **EVI; 155(75)**

Harmless and Reversible Error (Harmless Error) **HRE; 183.5(10)**

People v Kello, No. 16, 2/8/01

At the defendant's trial for shooting the decedent, the prosecutor introduced two eyewitnesses, who knew the defendant, and the audiotapes of several anonymous 911 telephone calls. The calls were made several hours after the shooting by someone who claimed to have witnessed the event. The 911 calls contained the caller's contemporaneous description of the defendant in the street below. The defendant made a hearsay objection to the tapes. The court found that the testimony met the present sense impression exception. The Appellate Division affirmed the conviction. The defendant asserted a Confrontation Clause violation.

Holding: The taped 911 hearsay statements about events that occurred hours before did not fall within the present sense impression exception. However, admission was harmless error. The defendant objected based only on a state common-law hearsay rule. The Confrontation

NY Court of Appeals *continued*

Clause issue was not preserved, so a non-constitutional harmless error analysis applies. *See People v Crimmins*, 36 NY2d 230. The credible testimony of two eyewitnesses familiar with the defendant and the latter's announced intention of leaving the area, evincing consciousness of guilt, established overwhelming proof of guilt. Exclusion of the tapes would not have created a "significant probability that the jury would have acquitted." Order affirmed.

Civil Rights Actions (General) **CRA; 68(20)**

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

Juveniles (Delinquency) **JUV; 230(15)**

Green v Montgomery, No. 6, 2/13/01

The 15-year-old defendant drove a stolen jeep directly toward an officer pursuing him on foot. The officer fired, wounding the defendant in the head. The defendant claimed that the police fired at him without cause as he was slowing down to stop. He was indicted for reckless endangerment, grand larceny, possession of stolen property, and attempted murder, the latter charge requiring the case to be heard in supreme court. The defendant was convicted of two of the lesser charges. The court adjudicated the defendant a juvenile delinquent. Later, the defendant filed a civil rights action in federal court claiming that the police used excessive force. The case was dismissed on summary judgment finding the defendant's claim collaterally estopped by the juvenile delinquency adjudication. On appeal, the 2nd Circuit certified to the Court of Appeals the issues of whether the delinquency adjudication was privileged under the Family Court Act and whether the defendant had waived all rights regarding the collateral estoppel.

Holding: Supreme court adjudicated the defendant a delinquent only as to offenses for which he could not be held criminally responsible. The case must be treated as if it were a Family Court proceeding. *See* Family Court Act §§ 380.1 and 381.2 apply. The defendant waived the statutory privilege by filing a civil suit placing at issue the same conduct underlying the delinquency adjudication. *See Dillenbeck v Hess*, 73 NY2d 278, 287; *see also People v Johnson*, 90 Misc2d 777, 780 *revd other gnds* 78 AD2d 298. The adjudication was available to estop re-litigation of the issue. Certified questions answered in the affirmative.

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

Prisoners (Access to Courts and Counsel) **PRS I; 300(2)**

Statute of Limitations (Tolling of) **SOL; 360(20)**

Matter of Grant v Senkowski, No. 10, 2/13/01

The petitioner, a *pro se* inmate, sought to commence a CPLR article 78 proceeding. He delivered a proposed order to show cause to prison officials for mailing to the court five days before the four-month Statute of Limitations would expire. Due to prison administrative delays, his papers did not arrive in the clerk's office until two days past the deadline, and were not signed by a judge until later. He argued that under the "mailbox rule" for pro se inmate pleadings, *Houston v Lack* (487 US 266 [1988]), his papers should have been deemed timely filed when he delivered them to prison officials for mailing. The trial court held the petition time-barred. The Appellate Division affirmed.

Holding: The petition was time-barred because CPLR 304's filing requirement contemplates actual receipt of legal papers by the clerk of the court, and these papers were received too late. While pro se prisoners may face greater impediments to timely filing than most litigants, the statutorily mandated filing requirements do not allow incorporation of a pro se prisoner mailbox exception.

Unlike filings by non-incarcerated litigants, *pro se* inmate pleadings initiated by order to show cause are properly "filed" the moment legal papers are received in the clerk's office, not when a judge signs them. A 1999 legislative amendment (CPLR 1101[f]) that replaced traditional poor person relief with a system of reduced filing fees for pro se inmate legal filings changed the general rule; actions and special proceedings by pro se inmates are "commenced" upon receipt of an unsigned order to show cause and accompanying papers in the clerk's office. Here, the commencement date was still untimely. Order affirmed.

Attempt (General) **ATT; 50 (7)**

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

People v Prescott, No. 17, 2/13/01

The defendant was charged with attempted driving while intoxicated and attempted aggravated unlicensed operation of a motor vehicle for allegedly trying to start a truck in a neighbor's driveway while intoxicated. The trial court, relying on *People v Campbell* (72 NY2d 602), dismissed the charges on the ground of legal impossibility, reasoning that one could not attempt commission of the "strict liability" element of intoxication. The Appellate Division reversed based on *People v Saunders* (85 NY2d 339), holding that driving while intoxicated does not proscribe a result (intoxication), but specific conduct (operating a motor vehicle in an intoxicated condition), and therefore attempts are legally cognizable.

Holding: "Driving while intoxicated appears to fit within the confines of *Saunders*, since it is aimed principally at conduct: operating a motor vehicle while 'intoxi-

NY Court of Appeals *continued*

cated'." However, the comprehensive nature of the Vehicle and Traffic Law with respect to drinking and driving offenses, including carefully prescribed penal sanctions, fines, and license suspensions and revocations, makes clear that the legislature "did not contemplate criminal liability for attempted drunk driving." The offense of attempted driving while intoxicated is unnecessary because the legal definition of "operation" is broad enough to encompass most unsuccessful attempts to engage the "motive power of the vehicle." Order reversed.

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

Matter of Going, No. 46, 2/13/01

Holding: "On the Court's own motion, it is determined that Hon. Robert N. Going is suspended, with pay, effective immediately, from his office of Judge of the Family Court, Montgomery County, pending disposition of his request for review of a determination by the State Commission on Judicial Conduct."

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

Gold v United Health Services Hospitals & NYS Office of Mental Retardation and Developmental Disabilities, Nos. 7 & 19, 2/15/01

Holding: Social Services Law 104 (2) does not limit recoupment of funds by Medicaid agencies for services provided to infant Medicaid recipients. The rights of Medicaid agencies to repayment are expressly governed by other sections of the Social Services Law, which grant such agencies broad authority to satisfy a lien from the entire amount of an infant's personal injury judgment or settlement. Here, the lower courts properly applied full value liens against settlements awarded to infants who were injured by lead paint poisoning and obstetrical malpractice, respectively. The Appellate Division found the recoupments valid. Orders affirmed (one as modified on another issue).

Constitutional Law (United States generally) **CON; 82(55)**

Defenses (Affirmative Defenses generally) (Mistake of Fact or Law) **DEF; 105(2) (40)**

Sex Offenses (General) (Juveniles) **SEX; 350(4) (12)**

People v Fraser, No. 9, 2/20/01

The defendant downloaded computer images of young children engaging in sexual activity with adults. He sought to assert an affirmative defense based on scientific use, having downloaded the images as research to develop treatment for persons transmitting child pornography on the Internet. The Appellate Division affirmed the denial of his requests for jury instructions and resulting conviction.

Holding: The defense of scientific or similar justification for possessing pornography (Penal Law 235.15[1]) is not applicable to the child pornography statute. A state's compelling interest in protecting children allows it to prohibit possession of child pornography without violating the 1st Amendment. *New York v Ferber,* 458 US 747 (1982). The US Supreme Court has not indicated that scientific and other exceptions are required. *See Osborne v Ohio,* 495 US 103 (1990). There was no violation of equal protection, as the defendant failed to show that the statutory scheme is irrational or contrary to public policy. Nor was the defendant entitled to a mistake of law defense. *See* Penal Law 15.20(2)(a). There was no "official statement of the law" on which to base his assumption that Penal Law article 235 allowed him to possess child pornography for research purposes. That the material was digital images not displayed to others is no defense. Nothing in Penal Law 263.00(4) permits possession of the prohibited material. The graphic computer images were found to be scanned photographs or pictures taken with a digital camera, falling within the statute. Order affirmed.

Harassment (Elements) **HRS; 184 (10)**

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

Menacing (Elements) **MEN; 247 (10)**

People v Bartkow, No. 14, 2/20/01

Appellate Term affirmed the district court conviction.

Holding: Second-degree harassment under Penal Law 240.26(1) is not a lesser-included offense of second-degree menacing under Penal Law 120.14(1). Persons commit second-degree menacing when they intentionally place or attempt to "place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm." The focus of second-degree harassment is physical contact: actual, attempted or threatened. The offense is committed when a person "with intent to harass, annoy or alarm another person . . . strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same." Since menacing does not require actual, attempted or threatened physical contact, but merely requires that a person intend to place another in "reasonable fear of physical injury" by "displaying" a weapon or dangerous instrument," second-degree harassment is not a lesser included offense. Order affirmed.

NY Court of Appeals *continued*

Dissent: [Rosenblatt, J] It is impossible to commit second-degree menacing without committing second-degree harassment.

Evidence (Hearsay) **EVI; 155(75)**

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

People v Rivera, No. 18, 2/20/01

A police officer arrived at a fight scene between the defendant and a taxi driver. At first, both were handcuffed. After speaking with bystanders, the police officer released the cab driver. The defendant was charged with assault and criminal mischief. Defense counsel advised the court of a plan to elicit trial testimony from the arresting officer about handcuffing both combatants, and requested that no reference be made to the police talking to the bystanders, who were not available for cross examination. The court permitted the testimony as background evidence and gave a limiting instruction. The officer included testimony about speaking to bystanders, without revealing what they said. The defendant claimed that reference to the bystanders was hearsay and inferential bolstering of the prosecutor's case. The Appellate Division affirmed.

Holding: The inference created by reference to a conversation with unavailable witnesses may be improper in some cases, but not when the defense creates a material gap in the narrative that the prosecution is entitled to explain. *See People v Brown*, 160 AD2d 440, 441- 442 *affd* 78 NY2d 874. The court's limiting instruction counterbalanced the prejudicial effect of the testimony. *See People v Santiago*, 52 NY2d 865, 866. Order affirmed.

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

Witnesses (Credibility) **WIT; 390(10)**

Matter of Shaw, No. 21, 2/20/01

Justice James H. Shaw of the Supreme Court of Kings County was charged with misconduct and found to have made many comments of a sexual nature to his secretary, to have repeatedly touched her without invitation or consent and once pulling her onto his lap and kissing her mouth without invitation or consent. The State Commission on Judicial Conduct concluded that the judge violated several sections of the Rules Governing Judicial Conduct, and censured him. He claimed that the complaints were based on fabricated evidence and moved to "renew/reconsider." An affidavit from a witness purportedly challenged the complainant's credibility. The Commission's deputy counsel found the new evidence unpersuasive; the Commission decided that the evidence did not create a reasonable possibility or probability that the determination would be altered.

Holding: There is no jurisdiction to review the Commission's determination based on newly discovered evidence. "The New York State Constitution, Judiciary Law, and our precedents lead to the inescapable conclusion that this Court is limited to reviewing the Commission's determination of censure on the record as it was before the Commission at the time of the original determination." *See Matter of Lenney*, 70 NY2d 863; NY Const, art VI § 22(a) and (d); Judiciary Law 44 (1). Determined sanction sustained.

Concurrence: [Rosenblatt, J] A process in which newly discovered allegations of perjury were never heard firsthand by a neutral arbiter is troubling. The Commission formulated an impracticable standard for dealing with newly discovered evidence.

Dissent: [Smith, J] The Commission apparently reviewed the evidence on the merits. These events are part of the Commission's determination. There are due process claims concerning the fairness of those proceedings.

First Department

[*Ed. note: The five cases below from July 2000 were inadvertently omitted from the appropriate past issue of the REPORT*.]

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

Traffic Infractions (Procedure) **TFI; 372(30)**

People v Robinson, No. 868, 1st Dept, 7/6/00, 271 AD2d 17, 711 NYS2d 384

The defendant was a passenger in a livery cab stopped by a motor patrol unit officer after it sped through a red light. One police officer shined a light into the cab and noticed "'a puffy area around [defendant's] chest . . . [that] was bulging out.'" The officer confirmed that the defendant was wearing a bulletproof vest, and later discovered a revolver and ammunition on the floor in front of the defendant's seat. The defendant claimed that the police had no basis to stop the cab or conduct a search.

Holding: The Court of Appeals has not expressly held pretextual search and seizure conduct to violate the state constitution. Under the objective test in *Whren v United States*, 517 US 806 (1996), the stop here was lawful. Formerly, the 1st Department applied a subjective test to determine if a stop was pretextual. However, there is no reason to vary from federal precedent interpreting consti-

First Department *continued*

tutional law analogous to the NY Constitution. *Whren* held that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Accordingly, "the subjective reason of the police for stopping an automobile is irrelevant in ascertaining probable cause as long as the stop is reasonable." The *Whren* test has been adopted by the 2nd Department in *People v Henry* (258 AD2d 473 *lv den* 93 NY2d 874), but not in the other Departments. Judgment affirmed. (Supreme Ct, Bronx Co [Tonetti, J; Boyle, J])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

Witnesses (Credibility) **WIT; 390(10)**

People v Mickel, No. 984, 1st Dept, 7/13/00, 274 AD2d 325, 710 NYS2d 70

Before defendant's trial for assault, falsifying business records and offering a false instrument for filing, a specific request was made to the prosecutor for "all *Brady* material bearing on the credibility of their witnesses." The prosecutors turned over information concerning their key witness, a former Corrections officer, including a cooperation agreement in exchange for not being prosecuted for various crimes. However, the prosecutor did not disclose that the witness had violated the cooperation agreement by fleeing the jurisdiction and upon his return had made a new cooperation agreement.

Holding: Non-disclosure of *Brady* material about a key witness who fled to avoid complying with a cooperation agreement and was given a second chance warranted reversal and a new trial. *People v Vilardi,* 76 NY2d 67. Acquittal of the two co-defendant's, along with gaps and inconsistencies in the testimony of other witnesses, showed the need for the jury to be able to fully evaluate the credibility of the key witness, whose testimony had to have been believed at least in part to convict the defendant. Judgment reversed. (Supreme Ct, Bronx Co [Hayes, J])

Due Process (Prisoners) **DUP; 135(25)**

Prisoners (Disciplinary Infractions and Proceedings) **PRS; 300(13)**

Application of Henderson v NYC Dept of Corrections, No. 1382, 1st Dept, 7/13/00, 274 AD2d 328, 711 NYS2d 180

The petitioner, a prisoner in a New York City jail, was charged with assaulting a corrections officer. At the disciplinary hearing, the petitioner requested witnesses, but the hearing officer denied the application without a written response. The petitioner was sentenced to 90 days punitive segregation. The court dismissed the petitioner's claim that the denial of requested witnesses violated due process.

Holding: "The motion court's dismissal of the petition was improper because petitioner's due process rights were violated at the disciplinary hearing. Pursuant to respondents' own regulations, an inmate has the right to call witnesses at a disciplinary hearing unless the presiding officer determines that their testimony is immaterial, redundant or would jeopardize safety or institutional goals." 9 NYCRR 7006.8 [d]; 39 RCNY 1-03[a][10][iii]; 7 NYCRR 253.5[a]; 254.5[a]; *Matter of Barnes v LeFevre,* 69 NY2d 649. There is no showing here of the hearing officer's reasons for denying the request or of efforts to obtain the requested testimony. Judgment reversed. (Supreme Ct, Bronx Co [Boyle, J])

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

Juveniles (Detention) **JUV; 230(35)**

Jamie B v Hernandez, No. 1287, 1st Dept, 7/20/00, 274 AD2d 335, 712 NYS2d 91

The plaintiff brought a class action contesting New York City's placement of juveniles in secure detention facilities, alleging that the shortage of Non-Secure Detention Facilities (NSD) was "a longstanding and continuing problem, a result of poor planning for contingencies." The court granted preliminary injunctive relief and class certification; as well as declaratory relief—finding a violation of statutory and regulatory duties—that was not requested in the complaint.

Holding: The issue of placing of juvenile detainees in secure detention facilities as an interim alternative to NSDs is justiciable. New York City is obliged to "guarantee the availability of 'conveniently accessible and adequate . . . (NSD[s]), certified by the State Division for Youth, as juvenile housing resources for the Family Court.'" [footnote omitted.] *See* County Law 218-a(B); NY City Charter 677[c]; *see also,* 9 NYCRR 180.5[a][3][iv]. However, granting complete relief without a trial or evidentiary hearing was an abuse of discretion. The matter was not moot because it involves a substantial and novel issue likely to recur, but class action certification was inappropriate. The governmental operations rule presumes that under principles of *stare decisis,* the government will abide by court rulings in future cases involving similarly situated petitioners. *Matter of Jones v Berman*, 37 NY2d 42. Family Court can address the issue in individual cases. Judgment reversed. (Supreme Ct, New York Co [York, J])

Arrest (General) **ARR; 35(12)**

Possession of Stolen Property (General) **PSP; 288.5(17)**

First Department *continued*

Bonar v City of New York, No. 1273, 1st Dept, 7/27/00, 274 AD2d 354, 711 NYS2d 12

A vehicle insured by Allstate was stolen and abandoned in plaintiff's parking lot. The plaintiff attempted to negotiate a settlement with Allstate, which assumed title, for storage costs. Reaching an impasse, the plaintiff advised Allstate that the vehicle would be put on the street and the storage costs waived. Allstate objected, contacted the police and had the plaintiff arrested for possession of a stolen vehicle. The prosecutor declined to pursue it. The plaintiff filed a malicious prosecution suit against Allstate. The insurance company moved to dismiss for failure to state a cause of action, which was granted.

Holding: Viewing the allegations as true, "it cannot be stated, as a matter of law, that Allstate reasonably believed there was probable cause justifying the initiation of police intervention." *See Heller v Ingber,* 134 AD2d 733, 734. If the plaintiff retained the vehicle at Allstate's importuning, it can be reasonably inferred that such possession was, at that point, with the apparent consent of the vehicle's owner, and was not criminal. Allstate was not justified in seeking police intervention, particularly in that Allstate waited over five months to issue a report to the police while the parties conducted their negotiations. Order reversed. (Supreme Ct, Bronx Co [McKeon, J])

Sentencing (Modification) **SEN; 345(55)**

People v Primack, No. 1754, 1st Dept, 10/3/00, 276 AD2d 268, 716 NYS2d 282

Holding: The defendant was sentenced to concurrent terms of 1 to 3 years and 6 months, and $36,000 in restitution payments, upon being convicted of a scheme to defraud and conspiracy. "Solely in light of defendant's extraordinary medical circumstances and the lack of opposition by the People . . . the sentence should be reduced in the interest of justice to the extent indicated." Judgment modified by reducing the prisoner term to time served, and otherwise affirmed. (Supreme Ct, New York Co [Crane, J])

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

People v Brown, No. 1780, 1st Dept, 10/5/00, 276 AD2d 269, 713 NYS2d 872

Holding: On May 15, 1997 the defendant pled guilty to attempted robbery and was sentenced as a second violent felony offender to 5 years in prison with a final order of protection in favor of a witness. "As conceded by the People, under the version of CPL 530.13(4) in effect at the time in question, the court had no authority to issue a final order of protection in favor of a witness rather than a victim. While the witness was also the complainant in a separate case against defendant, that case had been dismissed." Order of protection vacated, judgment otherwise affirmed. (Supreme Ct, New York Co [Atlas, J])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

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

People v Jaafar, No. 1789, 1st Dept, 10/5/00, 276 AD2d 272, 714 NYS2d 17

At the defendant's trial for bribing a police officer, the prosecutor responded orally to a request for *Brady* material (see *Brady v Maryland*, 373 US 83 [1963]) made when information that a police witness was under departmental investigation came to light. The file on the witness's misconduct was not immediately available and defense counsel agreed to cross-examine the witness based on the prosecutor's representations, with the option to reopen cross when the file arrived. The only discrepancy between the written file and the prosecutor's oral statements concerned the witness's modified duties.

Holding: "There is no reasonable possibility that defendant's inability to cross-examine the officer about the details of his modified assignment affected the verdict." *See People v Vilardi,* 76 NY2d 67, 77. The minor disparity between the oral and written material did not affect the witness's credibility. When the defense made the point that the defendant was ignorant of arrest processing and mistakenly thought that bail could be posted with the arresting officer, the door was opened to the defendant's statement that he had been "through the system." *See People v Hudson*, 273 AD2d 83, 709 NYS2d 541. Judgment affirmed. (Supreme Ct, New York Co [Silverman, J])

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

People v Baity, No. 1811, 1st Dept, 10/5/00, 276 AD2d 282, 713 NYS2d 862

During the defendant's trial for criminal sale and possession of a controlled substance, the court discharged one of the jurors. The juror expressed fear of retribution by the defendant, who lived in the same neighborhood. The defendant claimed that releasing the juror was improper.

Holding: The defendant's attorney failed to preserve the issue of improperly discharging a sitting juror by rejecting the court's offer of additional inquiry and consenting to the court's decision. "This was a tactical decision to be made by counsel rather than defendant." *See People v Ferguson*, 67 NY2d 383, 390. The defendant's ambiguous expression of dissatisfaction did not withdraw

First Department *continued*

that consent. Considering the issues without reviewing them, the court found that the juror's fear of retribution by defendant made her grossly unqualified to continue. *See People v Carrasco,* 262 AD2d 50 *lv den* 93 NY2d 1015. Judgment affirmed. (Supreme Ct, New York Co [Obus, J])

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

People v Samuels, No. 1834, 1st Dept, 10/10/00, 276 AD2d 302, 714 NYS2d 29

After the defendant's pre-trial attorney withdrew from the case, that attorney then represented the prosecution's eyewitness as a defendant in two unconnected cases. The court appointed a different attorney to represent the witness when she testified at the defendant's trial.

Holding: The defendant's pre-trial attorney's representation of a prosecution witness in an unrelated case did not create a conflict of interest. The defendant's trial attorney was conflict-free and presented a vigorous defense. *See People v Lombardo,* 61 NY2d 97, 103. There was no evidence to show that the pre-trial attorney's actions had any impact on the conduct of the trial. *See People v Pepe*, 259 AD2d 949, 950 *lv den* 93 NY2d 1024. The pre-trial attorney represented the witness after withdrawing from the defendant's case and that representation was adversarial to the prosecution, and not a "defection to the prosecution's camp." *Compare People v English*, 88 NY2d 30 *with People v Shinkle,* 51 NY2d 417. There was no appearance of impropriety or opportunity for abuse of confidences. Judgment affirmed. (Supreme Ct, Bronx Co [Torres, J])

Burglary (Instructions) **BUR; 65;(25)**

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

People v Thompson, No. 1879, 1st Dept, 10/12/00, 276 AD2d 318, 714 NYS2d 264

In the defendant's burglary trial, the court instructed the jury "in regard to the statutory definition of 'building' (Penal Law § 140.00[2]), that no use-based qualification applies to the question of what constitutes an 'inclosed motor truck.'" The court refused to grant a mistrial for deviating from instruction discussions held during the pre-charge conference.

Holding: The court's jury instruction was correct, since the statutory phrase "used by persons for carrying on business therein" applied to the term "vehicle" and did not apply to "inclosed motor truck" later in the statutory subdivision. *See McKinney's Cons Laws of NY*, Book 1, Statutes 231, 235, 253. The denial of the mistrial motion was within the court's discretion. There was no prejudice to the defendant given overwhelming proof that the complainant's van was used for business purposes. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, J])

Equal Protection (Discriminatory Enforcement) **EQP; 140(5)**

Motor Vehicles (General) **MVH; 260(17)**

Application of Gold Key Lease Inc. v City of NY Dept of Finance Parking Violations Bureau, Nos. 1894, 1894a, 1st Dept, 10/12/00, 276 AD2d 322, 714 NYS2d 261

The New York City Parking Violations Bureau (PVB) upheld summonses for challenged parking violations.

Holding: PVB's interpretation of Vehicle and Traffic Law 238(2-a), permitting "not available" as a description of a condition preventing an issuing officer from listing the vehicle registration expiration date on a parking summons, was valid. There was a rational basis for presuming that vehicles with New York State registration have the full registration date on display, based on the format of DMV windshield stickers, which did not apply to vehicles registered out-of-state. The presumption was for a legitimate governmental purpose. Therefore, PVB policy did not violate equal protection principles. *See D'Amico v Crosson,* 93 NY2d 29, 31-32. "No fundamental privilege is at stake and residents and nonresidents are put on substantially equal footing, satisfying the requirements of the Privileges & Immunities Clause." S*ee City of New York v State of New York*, 94 NY2d 577, 593. Judgment affirmed. (Supreme Ct, New York Co [Freedman, J])

Contempt (General) (Procedure) **CNT; 85(8) (10)**

People v Keno, No. 1904, 1st Dept, 10/12/00, 276 AD2d 325, 714 NYS2d 455

During the defendant's sentencing for attempted robbery, he told the court to "drop dead." The court held the defendant in criminal contempt and added 30 days to the sentence.

Holding: The court's criminal contempt citation was proper since it was done in response to the defendant's remarks made during sentencing, while the court was in session. *See Judiciary Law* 750(A) (1), 755; 22 NYCRR 604.2[a]; *Matter of Roajas v Recant*, 249 AD2d 95. The remedy for any denial of an opportunity for the defendant to make a statement in mitigation would be a remand for further proceedings, which the defendant expressly declined to pursue on appeal. Judgment affirmed. (Supreme Ct, New York Co [Berkman, J])

Dismissal (General) **DSM; 113(17)**

Narcotics (Cocaine) (Sale) **NAR; 265(5) (59)**

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People v Susanol, No. 1667, 1st Dept, 10/17/00, 276 AD2d 345, 714 NYS2d 464

The defendant was arrested in the lobby of a building not his residence for criminal possession of a controlled substance. After the defendant had disappeared into an alcove area, and a mailbox was heard to close, the police recovered a key that the defendant dropped, which opened a mailbox containing a glassine bag with 1/8 ounce and 38.3 grains of cocaine and a tin foil packet with 8.5 grains of cocaine. The defendant had $188 on his person. At trial the court dismissed one count of the indictment as not legally sufficient to establish the defendant's intent to sell cocaine as required for third-degree possession. Penal Law 220.16[1].

Holding: The court erred in dismissing the count since there was sufficient circumstantial evidence of intent for the issue to go to the jury. The use of a mailbox to stash drugs, throwing the mailbox key away upon seeing the police, carrying a large sum of money and standing in the lobby of a building where the defendant did not live was sufficient to support a rational inference of an intent to sell. *People v Marte,* 207 AD2d 314, 316 *lv den* 84 NY2d 937. Order reversed. (Supreme Ct, New York Co [Altman, J])

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

Search and Seizure (Plain View Doctrine) **SEA; 335(53)**

People v Vega, No. 2071, 1st Dept, 10/26/00, 276 AD2d 414, 714 NYS2d 291

Holding: During the defendant's suppression hearing on a charge of criminal possession of a controlled substance, defense counsel conceded that that the police were entitled to seize contraband found on a bed in the defendant's room because they were in plain view from the hallway. Counsel's concession was based on a mistaken interpretation of the law and not a strategic decision, thereby denying the defendant effective assistance of counsel. *See People v Benevento,* 91 NY2d 708, 713-714. The defendant's lawyer overlooked the necessity of establishing that the police had lawful access to the premises as part of the plain view doctrine. *Horton v California*, 496 US 128, 136-137 (1990); *People v Diaz,* 81 NY2d 106, 110. Despite defense counsel's suppression of other items and obtaining a good plea bargain, a new suppression hearing was warranted. Judgment modified. (Supreme Ct, New York Co [Tejada, J at hearing, Tallmer, J at plea and sentence])

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

Judgement (Vacating) **JGT; 220(20)**

Police (Misconduct) **POL; 287(32)**

People v Roberson, No. 2119, 1st Dept, 10/31/00, 276 AD2d 446, 716 NYS2d 43

The defendant was convicted of criminal sale of a controlled substance and criminal possession of a controlled substance. The grounds for his motion to vacate the judgment under CPL 440.10 included newly discovered evidence about the arresting officer's perjury in unrelated matters and a *Brady* violation by the prosecutor for failing to reveal the officer's misconduct in other cases. The motion was denied without a hearing.

Holding: The defendant did not show that the officer's alleged perjury in unrelated matters would have probably affected the result of defendant's trial. *See People v Salemi,* 309 NY 208. At best, the evidence would have served to impeach the officer's general credibility. Combined with the arresting officer's limited role in the case—an undercover officer purchased the drugs from the defendant—the evidence was not sufficient to vacate the judgment. The *Brady* (*Brady v Maryland*, 373 US 83 [1963]) violation claim was properly rejected because the defendant failed to prove that at the time of trial the prosecutor knew of the officer's alleged misconduct in other cases. *People v Vasquez,* 214 AD2d 93, 99-102 *lv den* 88 NY2d 943. Newspaper articles alone were insufficient to impute knowledge of the police misconduct to the prosecution. *See People v Major,* 243 AD2d 310 *lv den* 91 NY2d 928. Order affirmed. (Supreme Ct, New York Co [Wetzel, J]

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

Narcotics (Sale) **NAR; 265(59)**

People v Perez, No. 1788, 1st Dept, 11/2/00, 277 AD2d 1, 715 NYS2d 398

The defendant was tried and convicted of four counts of criminal sale of a controlled substance in or near school grounds, among other charges. On appeal, the defendant raised for the first time the claim that the prosecution failed to prove that the drug transactions occurred on "school grounds."

Holding: Two of the drug sales meet the statutory requirements since they occurred on a stoop and in a public lobby of buildings within the 1000-foot radius defining "school grounds." Penal Law 220.00 [14]. The evidence was sufficient for proving a sale "in or near" school grounds. See Penal Law 220.44[5]. Two other transactions started in the same way, but were "consummated in the privacy of a second-floor apartment." However, the defendant failed to preserve the issue of location as an element of the crime. *People v Permant*, 268 AD2d 230 *lv den* 94 NY2d 905. There is no reason to exercise "interest of

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justice" discretion to reach the issue under CPL 470.15 [3][c].

Concurrence: [Saxe, J] A private stoop or lobby does not fall outside "areas accessible to the public;" to so hold would create an absurd result. *See People v Davis*, 195 AD2d 1, 4 *lv den* 83 NY2d 871. There was sufficient evidence of non-verbal communication to establish that two sales occurred before the parties entered a private apartment. *See Aetna Cas. & Sur. Co. v Berry*, 350 F2d 49, 54. Judgment affirmed. (Supreme Ct, New York Co [Obus, J])

Confession (Duress) **CNF; 70(25)**

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

People v Skinner, No. 1928, 1st Dept, 11/9/00, 277 AD2d 27, 715 NYS2d 412

Holding: During an interrogation session with the police, the defendant made inculpatory statements about homicides in New York City and Utica. In the Utica trial, the defendant denied making statements concerning the Utica homicide but said nothing about physical coercion. At the New York trial, the defendant claimed that he had been coerced into the inculpatory statements regarding that offense. The prosecutor impeached the defendant by omission with the statement from the Utica trial. It was "unnatural" for the defendant to omit mentioning coercion at the Utica trial, so the prosecutor had the right to use that omission for impeachment. *See People v Savage*, 50 NY2d 673 *cert den* 449 US 1016. Judgment affirmed. (Supreme Ct, New York Co [Fried, J])

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

People v Braxton, No. 1736, 1st Dept, 11/9/00, 277 AD2d 39, 716 NYS2d 44

A potential juror at the defendant's trial for criminal possession of stolen property, said she had been the victim of a mugging and felt that the "criminal justice system was too lenient." In response to the court's inquiries, the prospective juror stated, "I'm not saying I couldn't follow the Law, but I would be influenced by certain feelings that I have. I know I would be in the end, as much as I would want to be uninfluenced, I do feel that I would be." The court denied the defendant's challenge for cause.

Holding: An objection is warranted when a prospective juror's state of mind is likely to preclude the juror from rendering an impartial verdict. CPL 270.20[1][b] Here, the prospective juror's equivocal statements showed an increased likelihood of bias. She did not offer an unequivocal assurance of impartiality. *People v Johnson*, 94 NY2d 600, 614. The juror's repeated expressions of doubts about her impartiality and fear that her feelings would interfere with her judgment made her unfit for service. *See People v Sharper*, 255 AD2d 139, 141 *affd sub nom People v Johnson*, 94 NY2d 600. Since the defendant used his last peremptory challenge before jury selection was complete, after using one challenge on this prospective juror, the court's improper denial of the challenge for cause was reversible error. CPL 270.20[2]. Judgment reversed. (Supreme Ct, New York Co [White, J])

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

People v Rollock, No. 1935, 1st Dept, 11/14/00, 277 AD2d 51, 715 NYS2d 64

An unidentified man approached two police officers at a jazz festival and informed them that the defendant was the person identified by a newspaper article as a suspect in a homicide. One of the officers recalled seeing the article. When the police approached the defendant, they called out and he ran. The police caught the defendant and forced him to the ground, when a gun fell from his waistband. They charged him with criminal possession of a weapon. The defendant unsuccessfully moved to suppress the gun.

Holding: As the prosecution concedes, the police did not have probable cause or exigent circumstances to seize the defendant based on an unidentified informant and a newspaper article of unknown accuracy. *See People v Griminger*, 71 NY2d 635, 639. There was no separate basis supporting reliability of the unidentified informant. The defendant's flight alone did not supply a basis for probable cause. *People v Holmes*, 81 NY2d 1056, 1058. Judgment reversed. (Supreme Ct, New York Co [Rettinger, J])

Appeals and Writs (Mandamus) **APP; 25(55)**

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

Mantell v NYS Commission on Judicial Conduct, No. 2291, 1st Dept, 11/16/00, 277 AD2d 96, 715 NYS2d 316

The petitioner, an attorney, filed a motion pursuant to CPLR article 78 to compel the NYS Commission on Judicial Conduct to investigate his complaint of judicial misconduct. The motion was dismissed.

Holding: The petitioner lacked standing to compel the Commission, under Judiciary Law 44(1), to "investigate all facially meritorious complaints of judicial misconduct." The Commission's decision of whether a complaint was meritorious was discretionary and not subject to mandamus. *Cf Matter of Dyno v Rose*, 260 AD2d 694, 698, *app dismissed* 93 NY2d 998 *lv den* 94 NY2d 753. Judgment affirmed. (Supreme Ct, New York Co [Lehner, J])

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

Weapons (Possession) **WEA; 385(30)**

People v Garcia, No. 2330, 1st Dept, 11/21/00, 716 NYS2d 298

The police found a weapon under the hood of a car, which along with other evidence connected the defendant to a robbery. The defendant moved to suppress the weapon, which was denied.

Holding: The defendant's claim that since he was only a passenger in the car, the police lacked probable cause to search under the hood was not raised at the suppression hearing and therefore not preserved for review. *See People v Vasquez,* 66 NY2d 968 *cert den* 475 US 1109. The defendant's arrest for criminal possession of a weapon was supported by the statutory presumption of possession. *See Penal Law* 265.13[3]. No exception existed for a weapon found under the hood of a vehicle. The arrest was also supported by other evidence connecting the defendant to the crime. Judgment affirmed. (Supreme Ct, New York Co [Carruthers, J]

Confessions (Notice of Use at Trial) **CNF; 70(46)**

Witnesses (Police) **WIT; 390(40)**

People v Batista, No. 1882, 1st Dept, 11/28/00, 277 AD2d 141, 717 NYS2d 113

At the defendant's trial for rape and endangering the welfare of a child, the prosecution introduced a statement by the defendant to an employee of the Administration for Children's Services. The defendant moved for a mistrial claiming that the prosecution failed to give notice of the statement.

Holding: The statutory notice requirement for statements made by the defendant to a "public servant" under CPL 710.30(1)(a) is intended to provide notice of statements to law enforcement, to facilitate motions for suppression. *See Matter of Luis M.*, 83 NY2d 226. The Court of Appeals has said that the statute's predecessor did not require notification of admissions made to private parties who are not police agents. *People v Mirenda*, 23 NY2d 439.The Administration for Children's Services employee was acting as an interpreter and investigating a child's claims of sexual abuse, not acting as an agent of the police. Judgment affirmed. (Supreme Ct, Bronx Co [Newman, J]

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

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

People v Ali, No. 1405, 1st Dept, 11/28/00, 277 AD2d 138, 717 NYS2d 114

The defendant was charged with assault and other offenses for striking a pedestrian with his car while fleeing from the police. At a bench conference, the court noted that his own daughter had been injured in a similar incident and that he would remember the facts here by designating this "Julia's case" for future reference. The court expressed an intention to keep the case on his own calendar rather than allowing it to be reassigned, and to sentence the defendant to the maximum if it went to trial, despite the absence of criminal history or a prosecution recommendation.

Holding: "The trial Judge's stated intent to impose the maximum sentence after trial, coupled with his biased remarks about the merits of the case, created a coercive environment that rendered the plea involuntary." *See People v Wilson,* 245 AD2d 161 *lv den* 91 NY2d 946. Although the defendant did not move to withdraw his guilty plea, his statement at sentencing that he felt the court was unfair, leaving him no choice, was sufficient to preserve the issue. His failed recusal motion underscored the objection. The court's remarks about his daughter's accident suggested prejudgment of the facts. *See People v Glendenning,* 127 Misc2d 880, 884. The court ignored mitigating sentencing factors and wrongly viewed the defendant as a repeat offender. *See People v Hernandez*, 248 AD2d 160. The plea was involuntary, so the defendant had the right to withdraw it. Judgment reversed. (Supreme Ct, New York Co [Rothwax, J]

Dissent: [Andrias, J] The issue is unpreserved, and the defendant failed to establish actual bias or prejudice from the judge's comments.

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

People v Logan, No. 1909, 1st Dept, 11/28/00, 277 AD2d 145, 717 NYS2d 549

During jury selection in the defendant's trial for criminal possession of a weapon, one of the prospective jurors revealed seeing a friend robbed at knifepoint 15 years ago and having his car stolen on another occasion. In response to defense questioning, the juror stated, "I think when you are a victim of a crime and you see a best friend or loved one with a knife to their throat and their hand is cut, you kind of—it sort of stays with you. I think I could intellectually detach myself. I think I can do that, but emotionally—it is not recent." The court denied the defendant's challenge for cause. The defendant used his last peremptory challenge after using one challenge on this juror.

Holding: Since the challenged juror stated that he could not promise that his experiences with crime would not compromise his ability to be fair, the court erred by not removing him for cause. CPL 270.20[1][b]; *People v*

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Johnson, 94 NY2d 600, 614. The defense having exhausted its peremptory challenges before jury selection was finished, the court's improper denial of defendant's challenge for cause was reversible error. CPL 270.20[2]. Judgment reversed. (Supreme Ct, New York Co [Cropper, J])

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

Application of Sanders v Bratton, No. 1714, 1st Dept, 12/05/00, 278 AD2d 10, 718 NYS2d 19

After conviction of sale of a controlled substance, the petitioner submitted a Freedom of Information Law (FOIL) request to the police department for 13 items relating to the buy-and-bust operation, such as police reports and laboratory records. The Records Access Officer responded that most items could not be located and that the others were exempt. The court refused to compel disclosure.

Holding: Conclusory allegations by an employee with second-hand knowledge did not meet the statutory requirements for a response under FOIL. *Cf Key v Hynes,* 205 AD2d 779, 781. Someone in the Police Department with direct knowledge of the search made had an obligation to certify either that they did not possess the requested items or after a diligent search the requested items could not be found. Public Officers Law 89(3). *See Matter of Rattley v New York City Police Department,* 270 AD2d 170 *lv grntd* 272 AD2d 120. The respondents must conduct a diligent search for certain items and provide a detailed certification of the outcome based on direct knowledge. The response that certain items "were not prepared in this manner" is belied by trial testimony and those items must be disclosed or their existence status certified. Items concerning non-routine criminal investigative techniques or procedures ("tactical plans") or the identity of an undercover officer ("undercover expense reports, files or records") may be exempt from disclosure if not already publicly disclosed, but a justification of such exemption must be made with specific particularity. *See Matter of Gould,* 89 NY2d 275. Judgment modified. (Supreme Ct, New York Co [Lippmann, J])

Evidence (Hearsay) EVI; 155(75)

Impeachment (General) IMP; 192(15)

People v Lewin, No. 2543, 1st Dept, 12/07/00, 278 AD2d 35, 717 NYS2d 161

In the defendant's manslaughter trial, the prosecution called a witness who, since the incident, had pled guilty to an unrelated drug offense and was sentenced to probation due to a medical condition and cooperation in this case. The prosecutor stated during jury selection that a witness had received leniency, and provided the defense a copy of the drug case plea minutes. During trial, the witness admitted receiving leniency on a later arrest, but not the drug case. The prosecutor did not correct the witness, but later introduced a stipulation about the agreement. The defendant objected to the prosecution's use of prior consistent statements to rebut recent fabrication evidence, saying the defense had been set up to raise the defense by the delay in correcting the witness's testimony.

Holding: While the delayed disclosure of leniency towards the witness was error, the defense had enough information for impeachment. The recent fabrication rule was triggered by the favorable treatment on the other arrest, admitted by the witness. *See People v McDaniel,* 81 NY2d 10, 18. Correcting the witness sooner would not have altered the defendant's strategy. The prior consistent statements were admissible. There was no evidence of bad faith. The stipulation and the evidence from another eyewitness made the error harmless. C*ompare People v Steadman,* 82 NY2d 1. Judgment affirmed. (Supreme Ct, Bronx Co [FitzGerald, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Furtive Conduct) (Observations and State of Mind)]) SEA; 335(10[g(i) (iv)])

People v Randolph, No. 2576, 1st Dept, 12/12/00, 278 AD2d 52, 717 NYS2d 561

Holding: Several police officers in an unmarked car observed the defendant nervously stopping to look back at the car several times. The police surmised that the defendant identified them as law enforcement. They approached the defendant and discovered he had a gun in his waistband. The court denied the defendant's motion to suppress the weapon. The defendant's suspicious glances at an unmarked police car supplied the officers with an objective credible reason to approach him and inquire. *See People v De Bour,* 40 NY2d 210, 220. This led to the observation of the gun. Judgment affirmed. (Supreme Ct, Bronx Co [Boyle, J])

Homicide (Murder [Evidence]) HMC; 185(40[j])

Police (Misconduct) POL; 287(32)

Robbery (Elements) ROB; 330(15)

People v Gray, Nos. 2729, 2730, 1st Dept, 12/21/00, 278 AD2d 151, 717 NYS2d 596

After a bank robbery, one of the defendants grabbed a bystander a few blocks away in the hopes of escaping. The hostage was shot and killed by the police during an exchange of gunfire. The defendants argued that since the police surrounded them, there was no escape and there-

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fore the hostage was not killed in flight. The court did not permit the defendants to cross-examine the police officers about their guidelines for using deadly force. The defendants were convicted of robbery and murder.

Holding: Taking a hostage evinced a refusal to surrender, and supported the conclusion that the defendant was fleeing the scene. *Compare People v Hernandez*, 82 NY2d 309, 319 *with People v Ruiz,* 136 AD2d 493. The hostage's death from an errant police bullet during an exchange of gunfire was foreseeable, so the police action did not break the chain of causation. *See People v Griffin,* 80 NY2d 723 *cert den* 510 US 821. By acquiescing in a compromise ruling, the defendants failed to preserve their objection to the limitation of cross-examination of the police about internal policies. *See People v Santiago,* 52 NY2d 865. A mini-trial on police conduct was unnecessary, since the trial court gave the defendants "wide latitude" to explore the issue. The defendant's own refusal to remove his tie when no lineup fillers wore one led to any suggestiveness that resulted. Judgment affirmed. (Supreme Ct, New York Co [Andrias, J])

Discrimination (Race) **DCM; 110.5(50)**

People v Woods, No. 2791, 1st Dept, 12/28/00, 278 AD2d 176, 718 NYS2d 177

Holding: The prosecutor's irrelevant elicitation of the police backup team's racial composition "did not have the effect of interjecting improper racial considerations or promoting racial prejudice against defendant." *See People v Dominguez*, 275 AD2d 129, 713 NYS2d 129. The prosecutor was proscribed from referring to the evidence in summation. Judgment affirmed. (Supreme Ct, Bronx Co [Boyle, J])

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

People v Sin, No. 2805, 1st Dept, 12/28/00, 278 AD2d 181, 718 NYS2d 333

During the defendant's trial for burglary and robbery, he requested that defense counsel's Mandarin-speaking assistant sit at the defense table to act as an interpreter. Since a court interpreter was available throughout the trial, the court denied the application.

Holding: The presence of a court interpreter was sufficient to provide effective communication with counsel. The defendant failed to make any showing that a second interpreter was required. *See People v Colon,* 213 AD2d 490 *lv den* 86 NY2d 733. Attorney-client communications translated by a court appointed interpreter are privileged. *Cf People v Osorio,* 75 NY2d 80, 84. Judgment affirmed. (Supreme Ct, New York Co [Schlesinger, J])

Burglary (Possession of Tools) **BUR; 65(30)**

Instructions to the Jury (Missing Witnesses) **ISJ; 205(46)**

People v Smith, No. 2816, 1st Dept, 1/04/01, 719 NYS2d 33

The defendant was charged with auto stripping and possession of burglar's tools. The owner of the car, who was from Texas, and his companion saw the defendant in the car. The car owner filled out a deposition for the police and returned to Texas. At trial, the car owner was not called and the court denied the defendant's request for a missing witness charge.

Holding: These facts did not require a missing witness charge. The victim of a crime is not under the prosecution's "control" by virtue of their status. *Compare People v Robertson,* 205 AD2d 243, 246 *lv den* 85 NY2d 913. Reasonable efforts were made to obtain the witness's presence for trial. The criteria for compelling the witness to appear through the Uniform Act to Secure Attendance of Witnesses from Without the State in Criminal Cases—materiality, necessity, and absence of undue hardship—may not have been met in this case. CPL 640.10. *See People v Walker,* 105 AD2d 720 *app den* 64 NY2d 787. The evidence was cumulative, as another witness was available to give the same testimony. Judgment affirmed. (Supreme Ct, New York Co [Stackhouse, J])

Search and Seizure (Arrest/Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (Consent [Third Persons, by]) (Search Warrants [Affidavits, Sufficiency of]) **SEA; 335(10[(i)]) (20[p]) (65[a])**

People v Crawford, No. 2837, 1st Dept, 1/04/01, 719 NYS2d 18

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

Holding: The owner of a "drug-prone" apartment building gave the police a "trespass affidavit" and asked for help to remove intruders. The defendant left a ground floor apartment and, having seen the police officer, started to walk up the stairs then abruptly reversed direction. The police officer had an "objective credible reason" to ask the defendant if he lived in the building based on the "trespass affidavit" and the defendant's sudden changes of direction after seeing the officer. *People v Greene*, 271 AD2d 235 *lv den* 95 NY2d 853. When the defendant was unable to show that he had been visiting a friend's apartment as he claimed, there was probable cause to make an arrest for trespassing and conduct a search incident to an arrest. Judgment affirmed. (Supreme Ct, New York Co [Wittner, J at hearing, Leo, J at trial and sentence])

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

Weapons (Firearms) **WEA; 385(21)**

Witnesses (Experts) **WIT; 390(20)**

People v Jennings, No. 2878, 1st Dept, 1/09/01, 720 NYS2d 4

The defendant was tried for attempted robbery and criminal possession of a weapon. The prosecution's ballistic expert was vague concerning the length of the barrel or details about the sawed-off shotgun used. No other testimony on this point was offered. The court denied the defendant's request for a jury instruction on the definition of a firearm.

Holding: The charge of criminal possession of a weapon required the prosecution to prove that the defendant possessed a loaded firearm. Since the evidence presented an issue of fact concerning the description of the weapon, the trial court should have instructed the jury on the definition of the term "firearm." Penal Law 265.00[3]. *See People v Brigante,* 186 AD2d 360 *lv den* 81 NY2d 761. A new trial was required for the weapons charge. The attempted robbery charge was unaffected by this error, since the trial court properly instructed the jury that the defendant had "displayed what appeared to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm." Penal Law 160.15[4]. *See People v Saez*, 69 NY2d 802. There was no need for an instruction regarding the length of the barrel as this statute lists shotguns without regard to length. Judgment modified. (Supreme Ct, Bronx Co [Cerbone, J])

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

People v Foster, No. 1719, 1st Dept, 1/16/01, 720 NYS2d 98

The defendant faced assault charges stemming from an altercation with a corrections officer while in transport from the jail to the court.

Holding: The grand jury, upon being charged by the prosecution, indicated that they did not have enough votes to dismiss or indict, but more than enough votes to request additional evidence. After hearing additional evidence and being charged again, the grand jury returned a true bill. The trial court held a hearing and wrongly concluded that the failure to vote a true bill the first time and the request for more evidence, a tacit acknowledgement that the evidence was insufficient, equaled a "no true bill" requiring court permission before resubmission. The grand jury's non-voting a true bill was not the same as a dismissal; indictment or dismissal requires a minimum of 12 votes. CPL 190.25(1). The only valid action the grand jury took was to request more evidence. CPL 190.50(3). Resubmission to the court was not required. The grand jury foreperson said that he called the prosecutor to a partition by the door and explained the need for further evidence and of the failure to obtain 12 votes to indict or dismiss. The prosecutor made no facial gestures and did not demand another vote. There was no evidence of prosecutorial overreaching. *See People v Montanez*, 90 NY2d 690. Judgment reversed. (Supreme Ct, Bronx Co [Fisch, J])

Grand Jury (Witnesses) **GRJ; 180(15)**

Speedy Trial (Cause for Delay) **SPX; 355(12)**

People v Roebuck, No. 2698, 1st Dept, 1/18/01, 719 NYS2d 82

The defendant, facing several felony counts, moved to dismiss the charges on statutory speedy trial grounds. Before trial, he had been denied a chance to testify before the grand jury and the original indictment was dismissed pursuant to CPL 190.50. The defendant sought to charge the time between the old and new indictments to the prosecution along with other significant delays. The speedy trial motion was denied.

Holding: The total number of days attributable to the prosecution was 139, less than the 184 days or six-months required by statute. The period between the dismissal of the old indictment and the arraignment on the new indictment was properly charged to the prosecution. *See People v Cortes*, 80 NY2d 201, 211, 212. The prosecution failed to allow the defendant to testify in the grand jury creating the delay and the need for re-presentment. The prosecution's argument that if the defendant ultimately decided not to appear before the grand jury it showed "bad faith" making the delay excludable is rejected. Judgment affirmed. (Supreme Ct, New York Co [Rettinger, J])

Parole (Revocation Hearing [General] [Warrant]) **PRL; 276(45[d] [g])**

People ex rel Washington v NYS Division of Parole, No. 2685, 1st Dept, 1/23/01, 720 NYS2d 22

The defendant was released on parole; a violation of parole was filed within three months. Three years later, the court arraigned the defendant on misdemeanor charges and noted that a parole warrant had been issued. Five days after arraignment, the parole warrant and a notice of a preliminary hearing were served on the defendant. The defendant filed a habeas corpus petition seeking to dismiss the parole warrant for untimely service of notice of a hearing.

Holding: The habeas petition was properly dismissed since "failure to comply with the three-day rule of notice as to one's rights with regard to an alleged parole violator's hearing does not directly affect the right to be

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restored to parole, especially in the absence of a showing of prejudice." *See People ex rel Williams v Walsh*, 241 AD2d 979 *lv den* 90 NY2d 809. Whether the arraignment court referred to the three year old warrant or the new one, the two-day delay in serving the required notice (Exec Law 259-i[3][c][iii]) did not support dismissal of the parole violation warrant or necessitate the defendant's restoration to parole. Judgment affirmed. (Supreme Ct, Bronx Co [Byrne, J])

Evidence (Other Crimes) (Uncharged Crimes) **EVI; 155(95) (132)**

People v McLeod, No. 3054, 1st Dept, 1/23/01, 719 NYS2d 557

In the defendant's trial for attempted assault, the prosecution introduced evidence of uncharged crimes without advance notice. The defendant objected, claiming that a prior ruling by another judge prohibited it and that the lack of notice was prejudicial.

Holding: The evidence of uncharged crimes was admissible under *People v Molineux* (168 NY 264), despite the prosecution's failure to follow the better practice of seeking an advance ruling. *See People v Ventimiglia*, 52 NY2d 350, 356, 361-362. The defendant did not show prejudice from the lack of advance notice. *See People v Sibadan*, 240 AD2d 30, 37 *lv den* 92 NY2d 861. "Unlike uncharged crimes offered to impeach a defendant's credibility, neither CPL 240.43 nor any other statute provides for discovery of uncharged crimes offered under a *Molineux* theory." *See People v Travis*, 273 AD2d 544, 545-546. Despite the ruling of a prior justice, the trial court had the power to determine the admissibility of the uncharged crimes anew. *See People v Evans*, 94 NY2d 499. Judgment affirmed. (Supreme Ct, Bronx Co [Williams, J on preclusion order, Tonetti, J at trial and sentence])

Search and Seizure (Consent [Third Persons, by]) (Plain View Doctrine) **SEA; 335(20[p]) (53)**

People v Abad, No. 2725, 1st Dept, 1/25/01, 720 NYS2d 61

Holding: The defendant was riding in a cab whose owner/driver participated "in a program wherein he registered with the Police Department, giving his consent to have the police stop the cab for limited visual inspections and safety inquiries." Notice of the consent was displayed on the cab. The cab driver's consent was a valid basis for the stop and binding on the defendant as the passenger. *See People v Lane*, 10 NY2d 347, 353. The defendant's movements provided reasonable suspicion to believe he had a weapon. *See People v Worthy*, 261 AD2d 277 *lv den* 93 NY2d 1029. This justified opening the cab door, which lead to the discovery of packaged drugs in plain view. The defendant's motion to suppress was properly denied. Judgment affirmed. (Supreme Ct, New York Co [Zweibel, J])

Discovery (General) **DSC; 110(12)**

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

People v Bagley, No. 2616N, 1st Dept, 1/30/01, 720 NYS2d 454

Holding: The defendant in a criminal action sought a subpoena duces tecum for the police department. The police, not a party to the criminal case, moved to quash the subpoena. The court denied their motion. As a non-party, the police had the right to appeal the denial. *See Matter of Cunningham v Nadjari*, 39 NY2d 314. Denying the motion to quash was error, since the defendant failed to state a factual predicate sufficient to establish that evidence sought would be relevant and exculpatory. *See Matter of Constantine v Leto*, 157 AD2d 376 *affd* 77 NY2d 975; *People v Gissendanner*, 48 NY2d 543. Lacking a factual predicate, the subpoena became an unauthorized discovery request to a non-party. CPL article 240. Order reversed. (Supreme Ct, New York Co [Yates, J])

Counsel (Anders Brief) **COU; 95(7)**

Defense Systems (Assigned Counsel Systems) **DFS; 104(5)**

People v Foster, No. 3121, 1st Dept, 1/30/01, 719 NYS2d 850

Holding: The defendant's assigned counsel moved to withdraw on the ground that the appeal was wholly frivolous. *People v Saunders*, 52 AD2d 833. Counsel did not show that a "conscientious examination of the record and the applicable law has been performed." *See People v Reyes*, 231 AD2d 478. There were no references to facts brought out at the suppression hearing or to the speedy trial motion that was filed. "Since our own review cannot substitute for the single-minded advocacy of appellate counsel (*People v Casiano*, 67 NY2d 906) . . ." counsel is relieved without compensation and new counsel assigned. *See People v Moore*, 208 AD2d 357. Order granted. (Supreme Ct, New York Co [Figueroa, J])

Evidence (Preservation) **EVI; 155(107)**

Forensics (General) **FRN; 173(10)**

People v Mendez, No. 3132, 1st Dept, 1/30/01, 720 NYS2d 65

Holding: The defendant was tried on charges of rape and sodomy. The prosecution inadvertently failed to store

First Department *continued*

condoms found at the crime scene in a way that would have allowed for allegedly more effective DNA testing. The defendant did not make a request for testing of the condoms until learning during trial of the allegedly degraded state of the DNA contained therein. Denial of the defendant's request for an adverse inference charge regarding the improper storage of the condoms was not error. Since the defendant's request for DNA analysis was made belatedly, "he forfeited any right that he may have had to demand an analysis or to claim that he was prejudiced by the storage methods." *See People v Allgood*, 70 NY2d 812. Nothing suggested that better DNA analysis would have yielded exculpatory evidence. The other assertions raised by the defendant are without merit. Judgment affirmed. (Supreme Ct, New York Co [Wittner, J])

Second Department

Instructions to Jury (Burden of Proof) **ISJ; 205(20)**

Juries and Jury Trials (Deliberation) (Hung Jury) **JRY; 225(25) (40)**

People v Moye, No. 98-09907, 2nd Dept, 12/4/00, 717 NYS2d 265

During jury deliberations in the defendant's trial for possession and sale of a controlled substance, the jury sent a note to the court indicating that the vote was "'guilty, eleven. One not guilty, state did not prove case beyond a reasonable doubt.'" The court responded that "'it appears to me that one of the jurors is not following my instruction on the law and I'll tell you why; because after I explained the elements of each of the counts, I said that if you find that the People have proven each of those elements beyond a reasonable doubt, then you must find the defendant guilty.'" Upon conviction, the defendant challenged the court's instruction as directing a guilty verdict.

Holding: The court's comments were coercive and did not stress the importance of reaching a verdict without jurors' compromising their conscientious beliefs. *See People v Nunez,* 256 AD2d 192. "The dissenting juror could only have interpreted the instructions as a directive to reach a verdict of guilty." *See People v Diaz,* 66 NY2d 744. Judgment reversed. (Supreme Ct, Suffolk Co [Mullen, J])

Evidence (Character and Reputation) **EVI; 155(20)**

Prior Convictions (General) **PRC; 295(7)**

People v Jones, 98-10873, 2nd Dept, 12/4/00, 717 NYS2d 270

The defendant was tried for a gunpoint robbery. The court issued a pretrial Sandoval ruling prohibiting the prosecution from questioning the defendant about three prior robbery convictions or the underlying facts. At trial, the defense called the defendant's fiancée. On cross-examination by the prosecutor, she responded to a question about how she knew in her heart that he did not commit the crime, "He doesn't do things like that." Viewing this as character evidence, the court gave the prosecutor permission to question her about the defendant's prior convictions, which involved gunpoint robberies.

Holding: The defendant did not open the door to evidence of past conviction since the witness' testimony was not character evidence. "A defense witness who has not testified as a character witness on direct examination may not be cross-examined about the defendant's criminal record." *See People v Cruz,* 47 NY2d 838. At most, the witness' statement was a private opinion and not evidence of the defendant's reputation in the community. The prosecutor's cross-examination questions were not limited to whether the fiancée had heard of the defendant's previous convictions, and so were improper. *See People v Kennedy,* 47 NY2d 196, 206. The prosecutor did not have the right to circumvent the *Sandoval* ruling by opening a door that the defense had kept closed. *See People v West,* 62 NY2d 708. The error was not harmless in light of the close identification issue. Judgment reversed. (Supreme Ct, Queens Co [Rosenzweig, J])

Evidence (Missing Witnesses) **EVI; 155(86)**

Witnesses (Confrontation of Witnesses) **WIT; 390(7)**

People v Diaz, No. 97-05483, 2nd Dept, 12/26/00, 718 NYS2d 369

The defendant had been tried for robbery three times, each ending in a mistrial. The complainant, a Mexican national, returned home after the third trial. At the fourth trial, the prosecutor wanted to read the complainant's previous testimony. In a hearing pursuant to CPL 670.20, the court concluded that the prosecution was unable to secure the complainant's attendance despite good faith efforts. A telephone conversation with the complainant in Mexico revealed the he would not voluntarily return to New York, despite an offer to pay expenses.

Holding: The prosecution met the due diligence requirement of CPL article 670, the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings) and thereby satisfied the federal Confrontation Clause requirements. *See People v Arroyo,* 54 NY2d 567 *cert den* 456 US 979. The defendant did not challenge the adequacy of the previous cross-examination of

Second Department *continued*

the complainant. Judgment affirmed. (Supreme Ct, Queens Co [Eng, J])

Dissent: [McGinity, J] The prosecutor's case turned on the complainant's credibility and reliability. Attempts to compel his attendance "were too cursory to meet the constitutional requirements." There was no effort to contact Mexican or American authorities to obtain his appearance through official channels. *Cf United States v Curbello*, 940 F2d 1503.

Impeachment (General) **IMP; 192(15)**

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

Trial (Summations) **TRI; 375(55)**

People v Washington, Nos. 97-06173; 97-6179, 2nd Dept, 12/26/00, 718 NYS2d 385

Holding: The defendant was tried for rape, sexual abuse and unlawful imprisonment. During closing arguments the prosecutor disparaged the defendant's claims. While the evidence was legally sufficient to support the conviction and not against the weight of the evidence, the interests of justice required a new trial. Since there were close questions of credibility, the trial court committed error by precluding the testimony of a defense witness who had heard the complainant describe the sexual encounter with the defendant as consensual. *See People v Duncan,* 46 NY2d 74. Other defense evidence was also wrongly precluded. The defendant should have been permitted to explain the circumstances surrounding an alleged incriminatory statement to the police. *See People v Boyd,* 256 AD2d 350. Prosecution comments in summation were improper, such as saying that the defendant's testimony was "'a lie,'" "'a pile of crock'" [sic], and was 'fabricated' after having had 'the benefit of counsel', and that the jury should not be "'fooled'" by the defense theory of the case which was "'patently absurd.'" These remarks should not be repeated. *See People v Walters,* 251 AD2d 433. Judgment reversed. (Supreme Ct, Queens Co [Dunlop, J])

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

People v Maldonado, No. 98-05580, 2nd Dept, 12/26/00, 718 NYS2d 387

Holding: The defendant was tried twice, due to a deadlocked jury at the first trial, for robbing the complainant at the latter's school. While the evidence at the second trial was legally sufficient to support the conviction and not against the weight of the evidence, the defendant was denied effective assistance of counsel. The complainant had identified the defendant at the school two months after the fact. Evidence at the first trial included testimony by a robbery participant that the defendant was not involved. The defendant's relatives had testified that defendant went to the school on the day of his arrest on behalf of his nephew. At the second trial, new defense counsel did not call the participant in the robbery or the defendant's relatives as witnesses or interview or call any alibi witnesses. Defense counsel's failure to investigate or call exculpatory defense witnesses left the defendant without meaningful representation. *See People v Rivera,* 71 NY2d 705. No perceptible trial strategy justified counsel's actions. *See People v Rojas*, 213 AD2d 56. The trial court also erred when it denied defendant's challenge for cause to a juror who worked with two of the detectives in the case. *See People v Hoffstetter*, 256 AD2d 1171. Judgment reversed. (Supreme Ct, Queens Co [Naro, J])

Third Department

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

Evidence (Hearsay) **EVI; 155(75)**

People v Carrion, No. 10304, 3rd Dept, 11/2/00, 715 NYS2d 257

Holding: At a suppression hearing, a police officer testified that the defendant voluntarily came to the station where he was given *Miranda* warnings, which he indicated that he understood. Later, *Miranda* warnings were again given. The defendant refused to sign a *Miranda* waiver form "but purportedly agreed to speak to an investigator." The defendant responded to questions about the robberies at issue by nodding his head. The court correctly denied the defendant's motion to suppress the admissions. When he agreed to speak with the police, refusing to sign a waiver form did not imply an invocation of *Miranda* rights and the court could find they had been waived. *See People v Setless*, 213 AD2d 900, 900-901 *lv den* 86 NY2d 740. The prosecutor's use of a witness's prior statement to refresh his recollection, after the witness failed to testify to an incriminating statement made by the defendant, was not the equivalent of impeaching their own witness. The statement, which implicated the defendant, was not shown to the jury nor did the witness read from it, but only testified about what the defendant had said and what the witness had previously told an officer. *See People v Lake,* 235 AD2d 921, 922 *lvs den* 89 NY2d 1091, 1096. Judgment affirmed. (County Ct, Montgomery Co [Sise, J])

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

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

Third Department *continued*

People v Bass, No. 10737, 3rd Dept, 11/2/00, 715 NYS2d 466

The defendant was charged with intentional murder, felony murder, robbery and criminal use of a firearm.

Holding: The defense did not object to admission of a gun never linked to the defendant or the crime, but used it to attack the prosecution's failure to establish guilt. Strategy by experienced trial counsel will not be second-guessed. The testimony of a second pathologist for the prosecution as to the distance from which the decedent was shot did not impeach the medical examiner, even though their testimonies differed. *See People v Reed,* 40 NY2d 204, 207. The medical examiner's failure to preserve biological evidence was not *Rosario* error. *People v Washington*, 86 NY2d 189, 192. Reversal was not required for other *Rosario* error in light of the trial court's sanction of permitting the defense to listen to the undisclosed tape and recall the witness heard on it. *See People v Martinez,* 71 NY2d 937, 940. There was insufficient evidence of forcible stealing, so that the robbery and related felony murder and firearm charges must be dismissed. *See People v Johnson,* 250 AD2d 1026, 1028 *lv den* 92 NY2d 899.

The defendant's contention that defense counsel's failure to engage a pathologist or ballistics expert and the "disparity of resources between the offices of the prosecution and the public defender" deprived him of effective assistance of counsel is belied by the meaningful representation provided despite the lack of expert testimony. *See People v Benevento,* 91 NY2d 708, 712. Judgment modified, and as modified, affirmed. (County Ct, Schenectady Co [Giardino, J])

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

Grand Jury (Witnesses) **GRJ; 180(15)**

People v Colantonio, No. 10788, 3rd Dept, 11/2/00, 715 NYS2d 764

Parole officers pursued the defendant to execute a parole warrant. He eluded them and when cornered attacked them with a long steel rod. One parole officer "received a 'very substantial' blow to the chest which 'hurt a lot' and caused him to lose his balance." The defendant was charged with second-degree assault and related offenses. He initially advised his attorney that he did not want to testify before the grand jury, but changed his mind on the day of the presentment. His attorney contacted the prosecutor, but the grand jury was already voting. The court denied defendant's motion to dismiss the indictment.

Holding: The defendant did not preserve his right to testify before the grand jury. CPL 190.50 (5)(a). *See People v Green,* 187 AD2d 528 *lv den* 81 NY2d 840. The prosecution did not waive the statutory written notice requirement. *See People v Young,* 138 AD2d 764, 765 *lv den* 72 NY2d 868. There was insufficient evidence of "substantial" physical injury under Penal Law 10.00 [9] to sustain one count of second-degree assault. Penal Law 120.05(3); it is reduced to attempted second-degree assault. However, as to the second count, the evidence concerning the results of the defendant's use of the steel rod against the other office provided legally sufficient evidence of physical injury. *Compare People v Guidice,* 83 NY2d 630 *with Matter of Philip A.,* 49 NY2d 198, 200. Judgment modified, remitted for resentencing, and as modified, affirmed. (County Ct, Albany Co [Breslin, J])

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

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

People v Williams, No. 11574, 3rd Dept, 11/2/00, 715 NYS2d 511

The defendant shared a bottle of alcohol with three minors. They went into an abandoned building and played drinking games during which the female minor became partially unclothed and unconscious. The defendant denied an accusation of rape before the grand jury. An indictment was returned with one count of burglary, two counts of endangering the welfare of a child, and three counts of unlawfully dealing with a child. The defendant was convicted of criminal trespass, not burglary, and all the remaining counts. The court imposed a one-year sentence for each count, with three of the counts to be consecutive. The court assumed Penal Law 70.30 (2)(d) would limit the aggregate term of the sentences to two consecutive one-year terms.

Holding: Imposing consecutive sentences for the trespass and providing alcohol to minors charges was error. The aggregate term of the sentences was limited to one year under Penal Law 70.25 (3); all counts were closely related in criminal purpose and objective so as to constitute parts of a single criminal transaction. *See People v Frazier,* 212 AD2d 976, 977-978. The defendant's right against self-incrimination was not violated. He spoke with counsel for 10 or 15 minutes before testifying to the grand jury, and twice left the grand jury room to consult with counsel for a few minutes. *See People v Caruso,* 125 AD2d 403. Order modified and as modified, affirmed. (County Ct, Schenectady Co [Tomlinson, J])

Probation and Conditional Discharge (Conditions and Terms) **PRO; 305(5)**

Sentencing (Modification) **SEN; 345(55)**

Third Department *continued*

People v Wood, No. 11920, 3rd Dept, 11/2/00, 715 NYS2d 106

The defendant pled guilty to third-degree criminal sale of marihuana based on the prosecutor's recommendation of four months in jail; and agreed to pay restitution and waive appeal. The court sentenced the defendant to probation, with conditions of 120 days jail time, restitution, and 50 hours community service.

Holding: The waiver of the right to appeal did not prevent appellate review, but the lack of a motion to withdraw the guilty plea or vacate the judgment left unpreserved the defendant's claims that his plea and waiver of appeal were coerced by ineffective counsel. *See People v Seaberg,* 74 NY2d 1. The record showed that the defendant knowingly, voluntarily and intelligently pled guilty and waived his right to appeal with the meaningful assistance of counsel. *See People v Ireland,* ___ AD2d ___, 711 NYS2d 560. The community service sentence was illegal, as the prosecution conceded. The defendant did not consent nor could consent be inferred from the plea allocution. *See* Penal Law 65.10 (2)(h). Resentencing is required. *See People v Tice,* 267 AD2d 504, 505. Judgment modified, matter remitted for resentencing, and as modified, affirmed. (County Ct, St. Lawrence Co [Nicandri, J])

Admissions (*Miranda* Advice) (Spontaneous Declaration) **ADM; 15(25) (37)**

Grand Jury (Witnesses) **GRJ; 180(15)**

People v Johnson, No. 11110, 3rd Dept, 11/22/00, 717 NYS2d 668

The defendant was tried for killing his cousin after an argument over a leather jacket. After being shot, the decedent named the defendant as the shooter. Again at the hospital, the decedent repeated this statement before going into surgery. The grand jury declined to hear several witnesses that the defendant wanted to testify that he was intoxicated at the time of the shooting.

Holding: The grand jury had no obligation to hear mitigating evidence of intoxication that did not establish a complete defense to murder. *See People v Lancaster*, 69 NY2d 20. Intoxication, a defense that may be offered to negate an element of a charged crime (Penal Law 15.25) is not a defense to a reckless mental state, an element of second-degree murder and therefore not a complete defense here. *See* Penal Law 15.05(3), 125.25(2). The defendant's right to testify in the grand jury regarding mitigation did not extend to a right to have particular witnesses called. *See* CPL 190.50 [5] (a), (b); [6]. The decedent's statements after being shot qualified as excited utterances. *People v Cotto*, 92 NY2d 68, 79. Two of the defendant's statements to police, made after he had requested counsel while being transported to jail, were initiated by the defendant, were not in response to studied police efforts to elicit information, and in any event were harmless in light of the overwhelming evidence. Judgment affirmed. (County Ct, Columbia Co [Leaman, J])

Harmless and Reversible Error (Reversible Error) **HRE; 183.5(30)**

Juries and Jury Trials (Challenges) (Deliberation) **JRY; 225(10) (25)**

People v King, No. 11112, 3rd Dept, 11/22/00, 716 NYS2d 141

Holding: The prosecution's peremptory removal of a prospective African-American juror did not support a *Batson* claim. *See Batson v Kentucky,* 476 US 79, 98 (1986). Defense counsel's generalized assertions did not establish a *prima facie* case of discrimination. *People v Childress,* 81 NY2d 263, 268. Assuming a prima facie case was made, the prosecution provided a "specific nonpretextual, race-neutral explanation," *ie*, a scheduling conflict. *See People v Allen,* 86 NY2d 101, 110-111.

The court's failure to respond to one jury note during deliberation, though responding to others, was not reversible error. The note read, "Does a [juror] have to put up with being degraded [and] belittled [and] laughed at?" The court was required to "give defendant and defense counsel meaningful notice of the precise contents of the jury's note and an advance opportunity to suggest appropriate responses." *See* CPL 310.30; *People v O'Rama*, 78 NY2d 270, 276-279. Since the question did not involve any key issue in the case, the error was not prejudicial. *See People v Agosto,* 73 NY2d 963, 966. The better practice would have been to disclose the request in full to the parties and discuss it with them, then fashion a response reminding all jurors of their duty to act with civility in deliberations. *See eg People v Scott,* 213 AD2d 501 *lv den* 85 NY2d 980. Judgment affirmed. (County Ct, Saratoga Co [Scarano, Jr., J])

Accusatory Instruments (General) **ACI; 11(10)**

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

People v Vandebogart, No. 11118, 3rd Dept, 11/22/00, 717 NYS2d 675

A plea bargain was made in which the defendant would plead guilty to attempted robbery as set out in a Superior Court Information (SCI), after waiving prosecution by indictment and the right to appeal. On the scheduled date, counsel had not read the waiver of indictment document and the matter was adjourned. A week later, the defendant pled guilty and executed a written waiver of appeal and, then, a waiver of indictment.

Third Department *continued*

Holding: The defendant's contention that the court lacked power to accept a guilty plea because the SCI was never filed is rejected. It appears that the court had the SCI before it during both court proceedings, and the defendant waived any objection since he did not assert his right to a copy beforehand. *See People v Moylan*, 4 Misc2d 747. The court informed the defendant of his rights involving the waiver of prosecution by indictment before entering the plea and confirmed that understanding after the waiver was signed. No uniform catechism or order is required. *People v Allen*, 79 AD2d 1004. The record showed the defendant's plea and waiver of appeal to have been voluntary, knowing and intelligent. *See People v Johnson*, 243 AD2d 997 *lv den* 91 NY2d 927. Judgment affirmed. (County Ct, Schenectady Co [Eidens, J])

Narcotics (Sale) **NAR; 265(59)**

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

People v Nichols, No. 11276, 3rd Dept, 11/22/00, 715 NYS2d 783

Police officers with the Community Narcotics Enforcement Team (CNET) observed the defendant working with the co-defendant, who conducted what appeared to be a drug transaction. When a police car approached, the defendant ran into one of the police officers in the street. The officer pushed him to the ground and the defendant spit out several glassine bags containing a white substance. The defendant's motion to suppress the evidence was denied.

Holding: The arresting officer, an experienced member of CNET, had probable cause to arrest the defendant based on his observation of glassine envelopes being exchanged by the codefendant for money in an area known for narcotics trafficking. *See People v McRay*, 51 NY2d 594, 604. The codefendant was seen to gesture to the defendant. Even without probable cause, the defendant's attempted flight established reasonable suspicion to stop him. *See People v Martinez,* 80 NY2d 444. "Once the authorities observed defendant spitting bags of narcotics onto the sidewalk in the course of that detention, the evidence linking defendant to illegal activity was more than sufficient to provide probable cause to effect an arrest." *See People v Belo,* 240 AD2d 964, 965 *lv den* 91 NY2d 869. Judgment affirmed. (County Ct, Columbia Co [Leaman, J])

Accusatory Instruments (General) **ACI; 11(10)**

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

People v Beverly, No. 11369, 3rd Dept, 11/22/00, 716 NYS2d 730

The defendant was indicted for charges stemming from a violation of an order of protection in April 1998. The defendant did not testify before the grand jury and moved to dismiss the indictment. The defense counsel and the prosecution agreed that the defendant would be given the opportunity to testify before a second grand jury, whose result would control, and any indictment returned would supersede the April indictment. If he did not testify, the defendant's motion would be withdrawn and the April indictment stand. The defendant chose to testify and a superseding indictment was handed up.

Holding: The stipulation concerning the agreement about the second grand jury was entered in open court in the presence of the defendant. Therefore, the defendant waived any statutory right to outright dismissal of the April indictment. *See* CPL 190.50 [5] [c]; *see gen People v Redcross,* 246 AD2d 838 *lv den* 92 NY2d 859. Consolidation of the superceding indictment and a later one for additional violations of the order of protection was not an abuse of discretion. *See* CPL 200.20. Judgment affirmed. (Supreme Ct, Albany Co [Lamont, J])

Prisoners (Crimes) **PRS I; 300(10)**

Speedy Trial (Due Process) **SPX; 355(25)**

People v Diaz, No. 11633, 3rd Dept, 11/22/00, 715 NYS2d 786

The defendant, a state prisoner, was charged with promoting prison contraband. At his plea, the defendant objected to a pre-indictment delay of six months.

Holding: The delay issue survived the guilty plea (*See People v Gallup,* 224 AD2d 838) and was preserved for appeal. However, the comparatively short time between the event and the indictment did not violate due process. The time, split between investigation and seeking an indictment, were reasonable in this prison case and within the statute of limitations. CPL 30.10 [2] [b]. Due process was not compromised. *See People v Singer*, 44 NY2d 241, 253-255. The defendant did not show that the delay was protracted or unjustified, or that his defense was impaired. *See People v Taranovich,* 37 NY2d 442, 446-447. The underlying charge is serious. Judgment affirmed. (County Ct, Chemung Co [Buckley, J])

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

Speedy Trial (Due Process) **SPX; 355(25)**

People v Denis, No. 12245, 3rd Dept, 11/22/00, 276 AD2d 237, 716 NYS2d 718

The defendant was charged with the intentional murder of his wife. The prosecution's evidence showed that the decedent, who drowned, fell off a cliff into a pool of

Third Department *continued*

water and the defendant held her under. According to the defense, the decedent drowned before he reached her.

Holding: The evidence viewed in the light most favorable to the prosecution supported a valid conclusion that the defendant intentionally and directly caused the decedent's death. *See* Penal Law 125.00, 125.25 [1]; *People v Williams,* 84 NY2d 925, 926. The defendant's actions need not be the sole cause of death, but a link in the chain of causes. *See People v Stewart,* 40 NY2d 692, 697.

Denial of the post-trial CPL 330.30 motion to dismiss based on pre-indictment delay was proper because it was untimely. *See* CPL 30.20, 210.20 [1] [g], [h], [i]; [2]; *People v Ramirez,* 243 AD2d 734 *lvs den* 91 NY2d 878, 929. Further, the six-year delay was not unreasonable or a violation of due process. *See People v Singer,* 44 NY2d 241, 253-255. That a newly elected prosecutor pursued the case on evidence largely available years earlier is not controlling. There is no showing the delay was meant to hamper the defense. Lengthy delays in obtaining indictments charging homicide have been held not to violate due process principles where good cause or justification is shown. *See People v Vernace,* __ AD2d __, 711 NYS2d 492. Judgment affirmed. (County Ct, Delaware Co [Estes, J])

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

Identification (Sufficiency of Evidence) **IDE; 190(45)**

People v Tunstall, No. 11131, 3rd Dept, 12/14/00, 717 NYS2d 685

The police responded to a burglar alarm and followed a trail of broken glass into the woods where they found the defendant. His disheveled appearance and implausible explanation for being a short distance from the burglarized home led to his arrest. A tracking dog also proceeded from the home to the vicinity of the defendant's arrest. The defendant represented himself at trial. On appeal, the defendant challenged the mostly circumstantial evidence as insufficient.

Holding: The "moral certainty" standard did not apply because appellate courts do not distinguish between direct and circumstantial evidence in assessing sufficiency. *See People v Davis,* 260 AD2d 726, 729 *lv den* 93 NY2d 968. The evidence here met the proper test: "whether a rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt" when viewed in the light most favorable to the prosecution." *People v Harper,* 75 NY2d 313, 316. The defendant did not preserve an objection to the dog tracking evidence; this evidence was not bolstering, but "independent relevant evidence, analogous to a blood test or breath analysis" confirming the defendant's identification as the intruder. *See People v Harris,* 249 AD2d 775, 776. The trial court permitted the defendant to proceed *pro se* with hybrid representation that was not constitutionally required. *See People v Garcia,* 69 NY2d 903. The defendant consulted regularly with counsel. His appellate claims of ineffectiveness of counsel do not require review. *See People v Rivera,* 71 NY2d 705, 708-709. Judgment affirmed. (County Ct, Sullivan Co [Ledina, J])

Evidence (Prejudicial) **EVI; 155(106)**

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

People v Hayes, No. 11315, 3rd Dept, 12/14/00, 717 NYS2d 727

The defendant did not testify at his trial on rape charges involving forcible compulsion. The court had ruled at a *Sandoval* hearing that the prosecution would be allowed to question the defendant about prior convictions for assault, sexual abuse and kidnapping but not the underlying facts of those cases.

Holding: The prejudicial effect of allowing the prosecutor to cross-examine the defendant about similar prior convictions in a rape case outweighed the probative value of those convictions as to the defendant's credibility. *See People v Cooke,* 101 AD2d 983. A *Sandoval* compromise, allowing the prosecution to reveal only the existence of the convictions without disclosing their nature or the underlying facts, would have been appropriate. *See eg People v Stiffler,* 237 AD2d 753, 754 *lv den* 90 NY2d 864. The defendant was the only witness who could dispute the complainant's testimony about forcible compulsion, the only element in dispute. The court's ruling prevented this testimony and was an abuse of discretion. Judgment reversed. (County Ct, Washington Co [Berke, J])

Confessions (Duress) (Instructions) **CNF; 70(25)(40)**

People v Perretti, No. 75007, 3rd Dept, 12/14/00, 719 NYS2d 145

The defendant claimed that the statements he made to the police regarding the murder charge were involuntary. Despite his numerous requests for a lawyer, the police proceeded to interview him and obtain oral and written statements. The court denied the defendant's motion to suppress. At trial, the court refused to instruct the jury on voluntariness.

Holding: The defendant presented sufficient evidence at trial concerning the voluntariness of his statement to warrant a charge to the jury. *See* CPL 710.70 [3]; *People v Graham*, 55 NY2d 144. Where a fair question as to voluntariness is presented, it is error not to instruct the jury that they could ignore the statement if it they determined it was involuntary. *See Jackson v Denno,* 378 US 368, 377 (1964). Vigorous cross examination of prosecution wit-

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nesses about *Miranda* warnings and the procedures used to take the defendant's statements, and a defense witness who heard the defendant asking for a lawyer, along with the defendant's testimony, raised a genuine question of fact about his statements' voluntariness. *See People v Rose,* 223 AD2d 607. Judgment reversed, new trial ordered. (County Ct, Greene Co [Lalor, J])

Speedy Trial (Due Process) **SPX; 355(25)**

People v Edwards, No. 11459, 3rd Dept, 12/21/00, 717 NYS2d 749

The prosecution waited two years before indicting the defendant on arson charges for burning down a trailer. On appeal, the defendant claimed that the pre-indictment delay was prejudicial and violated due process. The appeal was held in abeyance and the case remanded to the trial court for assignment of counsel and a hearing. *People v Edwards,* 271 AD2d 812, 707 NYS2d 687. County Court found the delay unreasonable and a violation of due process.

Holding: The court's conclusion was proper. A two-year delay in prosecuting an arson case without a reasonable explanation or good cause entitled the defendant to dismissal even without a showing of prejudice. *See eg People v Lesiuk,* 81 NY2d 485, 490. The prosecutor's "suspicion/hunch" that someone else was involved might have justified some delay, but not two years. Judgment reversed. (County Ct, Broome Co [Mathews, J])

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

Plea Bargaining (General) **PLE; 284(10)**

People v Grune, No. 11703, 3rd Dept, 12/21/00, 717 NYS2d 750

The defendant released the county from civil liability in exchange for a sentence reduction upon a plea to felony DWI. The prosecution agreed to the reduction and the defendant waived his right to appeal. After the defendant withdrew his notice of claim in the civil action, he appealed the criminal case claiming that conditioning a sentence reduction upon a promise not to file a civil lawsuit made the plea and sentence illegal.

Holding: The prosecution exceeded their authority by extracting a release of civil liability in exchange for a plea bargain. This did not invalidate the plea and sentence. "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." *See Cowles v Brownell,* 73 NY2d 382, 384. The guilty plea and appeal waiver were not induced by the sentence reduction. Judgment affirmed. (County Ct, Otsego Co [Scarzafava, J])

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

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

People v Martin, Nos. 11007, 11206, 3rd Dept, 12/28/00, 718 NYS2d 445

The defendant pled guilty under a bargain in which he was to be sentenced to concurrent determinate prison terms of 7½ years on attempted first-degree sodomy and 3½ or 4 years on sexual abuse. He also waived the right to appeal. When the court learned, after sentencing, that a determinate sentence for attempted sodomy was not authorized, it resentenced the defendant to an indeterminate term of 4¾ to 9½ years, without permitting him to withdraw his plea.

Holding: The validity of the appeal waiver depended upon the merits of the defendant's claim that the court improperly denied a request to vacate the plea. *See People v Hill,* 170 AD2d 776 *lv den* 78 NY2d 923. By resentencing the defendant to a greater prison term, the court deprived him of the benefit of the plea bargain. The court erred when it denied the request to withdraw the plea. "Where the plea bargain includes a sentence which is illegal because the minimum imposed is less than that required by law . . . the proper remedy is to vacate the sentence and afford the defendant, having been denied the benefit of the bargain, the opportunity to withdraw the plea." *See People v Sellers,* 222 AD2d 941. The defense suggested the indeterminate sentence only at the request of the court and because the court did not vacate the plea. Judgment reversed. (County Ct, Saratoga Co [Scarano, Jr., J])

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

Plea Bargaining (General) **PLE; 284(10)**

People v Bateman, No. 11891, 3rd Dept, 12/28/00, 719 NYS2d 162

The defendant was indicted on a charge of second-degree burglary. A plea bargain was announced on the record that would require him to plead guilty to attempted third-degree burglary. At the court's prompting, defense counsel indicated that she had intended to say attempted second-degree burglary. After the defendant allocuted, the court asked how he pled with regard to attempted third-degree burglary and the defendant said guilty. The defendant was convicted and sentenced for attempted second-degree burglary. On appeal, he challenged the plea as involuntary and based on a mistake of fact.

Holding: Due to the factual confusion as to the charge to which the defendant pled, the plea was involuntary. "Although it would have been preferable for defendant to

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have raised the issue before County Court, because defendant's ostensible plea of guilty to the lesser crime of attempted burglary in the third degree raises an obvious question concerning the voluntariness of his plea to the crime for which he was convicted, we conclude that he is not prevented from raising the issue for the first time on appeal." *See People v Lopez*, 71 NY2d 662, 666. He should be permitted to withdraw the plea. Judgment reversed, matter remitted. (County Ct, Broome Co [Mathews, J])

Fourth Department

Discovery (*Brady* Material and Exculpatory Information) **DSC; 110(7)**

Police (Misconduct) **POL; 287(32)**

Kemp v Lynch, No. CA 99-01582, 4th Dept, 9/29/00, 275 AD2d 1024, 713 NYS2d 790

The plaintiff and defendant were State Troopers. The defendant conducted a criminal and internal investigation on the plaintiff that included a compelled statement and led to the plaintiff's arrest. The defendant placed all the evidence gathered into the plaintiff's personnel file and concluded that the charges were not substantiated. Although the material in the file was mostly exculpatory, the defendant did not turn it over to the prosecutor. The plaintiff successfully brought a malicious prosecution action.

Holding: Statements given by police officers under threat of dismissal, along with evidence derived from them, are immunized from use in criminal proceedings. *See People v Corrigan*, 80 NY2d 326, 329. But information that constitutes *Brady* or *Rosario* material must be shared by police with the prosecutor. "Material in a personnel file that is 'relevant to the guilt or innocence of the defendant must lose [its] privilege of confidentiality.'" *Matter of Rochester Police Dept v Bergin,* 68 AD2d 340, 344. Although the police originally had probable cause to arrest the plaintiff, it was dissipated when the defendant learned of exculpatory material. A malicious prosecution cause of action can be supported by continuation of a criminal proceeding without probable cause. *See Callan v State of New York,* 134 AD2d 882, 883-884. Judgment affirmed. (Supreme Ct, Oneida Co [Grow, J])

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

Sentencing (General) (Restitution) **SEN; 345(37) (71)**

People v Austin, No. KA 99-01668, 4th Dept, 9/29/00, 275 AD2d 913, 715 NYS2d 173

The defendant pled guilty with the understanding that he would receive a three-year prison sentence. At sentencing, the court added a restitution payment.

Holding: The court erred by not giving the defendant an opportunity to withdraw his plea when the sentence was enhanced. *See People v McCloskey,* 272 AD2d 983. It was also error to determine the amount of restitution without holding a hearing when it was not part of the plea agreement. *See People v Consalvo,* 89 NY2d 140, 144. Judgment modified, sentence vacated, matter remitted. (County Ct, Erie Co [McCarthy, J])

Forensics (General) **FRN; 173(10)**

Rape (Evidence) **RAP; 320(20)**

People v Rasmussen, No. KA 99-02116, 4th Dept, 9/29/00, 275 AD2d 926, 713 NYS2d 427

A witness for the prosecution volunteered that the complainant said that her underwear was wet following an alleged rape. A DNA test showed that the defendant was not the source of the semen found on the complainant's underwear and in her vagina.

Holding: The court did not err in precluding the DNA test from evidence because the defendant's identification was not an issue, the prosecutor offered no evidence of the presence of semen, made no further reference to the wet underwear, and argued that the defendant had not ejaculated. There was no "critical testimony that could be seriously impeached by the test results." *See People v De Oliveira,* 223 AD2d 766, 768 *lv den* 88 NY2d 1020. The evidence was properly excluded as irrelevant. *See People v Kalaj,* 247 AD2d 633, 633-634 *lv den* 92 NY2d 880. The defendant's contentions as to jury instructions and prosecutorial actions on cross-examination and summation were not preserved for review. Judgment affirmed. (County Ct, Genesee Co [Noonan, J])

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

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

People v Nuness, No. KA 99-02320, 4th Dept, 9/29/00, 275 AD2d 915, 715 NYS2d 174

Holding: The noninclusory concurrent counts of criminal use of a firearm (Penal Law 265.09[1][b]) are reversed and dismissed in light of the defendant's conviction on two counts of first-degree robbery (Penal Law 160.15[4]). *See People v Brown,* 67 NY2d 555, 560-561 *cert den* 479 US 1093. Although the issue was not preserved, it is reviewed as a matter of discretion in the interest of justice. Judgment reversed in part. (Supreme Ct, Erie Co [Marshall, J])

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Arrest (Custody) **ARR; 35(6)**

Escape (Elements) **ESC; 145(15)**

People v Lee, No. KA 99-05262, 4th Dept, 9/29/00, 275 AD2d 995, 714 NYS2d 177

Police apprehended the defendant and instructed him that he was under arrest. He managed to struggle free three separate times, and fled. He was later convicted of the driving while intoxicated charge for which he had been arrested, resisting arrest, and third-degree escape.

Holding: To be guilty of third-degree escape (Penal Law 205.05), the defendant must have been in custody, defined as "restraint by a public servant pursuant to an authorized arrest." *See* Penal Law 205.00(2). Since the officers were unsuccessful in their arrest attempts, the defendant was not taken into custody. *See People v Caffey,* 134 AD2d 923 *lv den* 70 NY2d 930. Conviction on that count is reversed and that count is dismissed. Judgment modified and as modified, affirmed. (County Ct, Wayne Co [Sirkin, J])

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

Judgment (General) **JGT; 220(13)**

Matter of Abigail P., No. CAF 99-07012, 4th Dept, 9/29/00, 275 AD2d 927, 714 NYS2d 181

The respondent did not appear at a family court hearing on allegations of child abuse. Upon learning of the hearing, the respondent's new attorney, appointed a few days before, appeared and said that the respondent's absence was due to medical reasons. At first, the court allowed the respondent's attorney to participate in the hearing, but subsequently found the respondent, who arrived during lunch, in default. The respondent's attorney made a motion to vacate the default judgment and continue the hearing. The court denied the motion and barred the respondent and his attorney from the courtroom during the rest of the hearing. A finding of child abuse was made.

Holding: "'Although no appeal lies from an order entered on default [citations omitted], the order on appeal was not properly entered on default.'" *Matter of Williams v Lewis,* 269 AD2d 841. The court's default judgment was improper, which entitled the respondent to appeal. The court allowed the respondent's attorney to cross-examine a witness and take an active role in the initial part of the hearing. The subsequent order was not entered on default. *See Matter of Cassandra M.,* 260 AD2d 961, 962-963. Order reversed, matter remitted for a new hearing. (Family Ct, Erie Co [Mix, J])

Juries and Jury Trials (Challenges) (Qualifications) (Voir Dire) **JRY; 225(10) (50) (60)**

People v White, No. KA 00-00465, 4th Dept, 9/29/00, 275 AD2d 913, 714 NYS2d 179

During jury selection in the defendant's sodomy trial, a prospective juror said that she was more inclined to believe a police officer than anyone else. She also expressed doubts about her ability to set aside that belief. The court inquired whether the juror was more likely to believe a police officer because he had no "motive to fabricate," and persistently questioned the juror until she gave an affirmative answer to the court's questioning.

Holding: The juror's prejudice in favor of police officers was conclusively established. *See People v Johnson,* 255 AD2d 136, 136-137. That, and her inability to unequivocally set aside that belief (*see People v Sharper,* 255 AD2d 139, 140), was sufficient to warrant dismissal for cause. The trial court applied the wrong standard by focusing on a police officer's motive to fabricate instead of inquiring whether the juror would scrutinize that testimony as closely as any other witness's. *See* 1 CJINY 2.52. Since the defense exhausted its peremptory challenges, the failure to dismiss for cause a clearly biased panelist warranted reversal and a new trial. Judgment reversed. (County Ct, Yates Co [Bender, J])

Counsel (Anders Brief) **COU; 95(7)**

Allah v Brunelle, No. KAH 00-01411, 9/29/00, 275 AD2d 1041, 718 NYS2d 249

The petitioner, a prisoner, filed a habeas corpus motion claiming that his release date was calculated incorrectly and the amount of time he was to serve improperly extended by three years.

Holding: The assigned attorney's motion to be relieved due to a lack of any appealable issues (*see People v Crawford,* 71 AD2d 38) was insufficient since it did not address the sentence miscalculation issue raised by the petitioner. Counsel is relieved of the assignment and new counsel assigned. New counsel is to address the release date question and review the record for any other issues. Order granted. (Supreme Ct, Erie Co [Cosgrove, J])

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

Sentencing (Persistent Felony Offender) **SEN; 345(58)**

People v McClemore, No. KA 97-05088, 4th Dept, 11/13/00, 276 AD2d 32, 716 NYS2d 497

The defendant's plea bargain for a prison sentence of one and a half to three years required him to admit to being a persistent felony offender. The plea was also conditioned on his not getting arrested. He was arrested outside the county before sentencing, an arrest that he explained as not based on his own criminal activity. The

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court found that he should have known he could not leave the county and entered a sentence of 25 years to life.

Holding: The court was not empowered to enhance the sentence because the defendant left the county where remaining was not an express condition of the plea. *See People v Roman,* 259 AD2d 977, 978. While the court can impose a no-arrest condition, it may not impose an enhanced sentence until it has ensured that, "the information upon which it bases the sentence is reliable and accurate." *See People v Outley,* 80 NY2d 702, 712-713. This inquiry lacked sufficient depth to show there was a legitimate basis for the arrest. The court's reliance on the prosecutor's unsupported assertions and summary disregard of the defendant's explanation violated due process. *See People v Collins,* 225 AD2d 1050.

If on remittal a legitimate basis for the arrest is found, the defendant must be given a chance to present evidence on whether he should be sentenced as a persistent felony offender. Requiring him to waive his right to present mitigating evidence, and failing to exercise judicial discretion, violates the sentencing statutes and is contrary to public policy. Judgment reversed, matter remitted. (County Ct, Monroe Co [Bristol, J])

Admissions (Evidence) **ADM; 15(15)**

Evidence (Hearsay) **EVI; 155(75)**

People v Ortiz, No. KA 97-05146, 4th Dept, 11/13/00, 277 AD2d 873, 716 NYS2d 489

Holding: The court erred by not admitting the defendant's entire statement made to police while in custody. The prosecutor used portions of it on cross-examination to attack the defendant's testimony as a recent fabrication, rendering the remaining portions admissible. *See People v Gallo,* 12 NY2d 12, 15-16. Judgment reversed. (County Ct, Monroe Co [Smith, J])

Dissent: [Wisner, J and Scudder, J] The same motive to falsify that existed at the time the statement was made existed at the time of testimony. Therefore, the prior inconsistent statement was not admissible to disprove the inference of recent fabrication. *See People v McClean,* 69 NY2d 426, 428.

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

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

People v Hunt, No. KA 98-05235, 4th Dept, 11/13/00, 277 AD2d 911, 716 NYS2d 264

The defendant told an investigator with the public defender office eight days before he was indicted that he wanted to testify before the grand jury, a fact not made known to the court until much later, when the defendant filed a grievance against the office. An assistant public defender moved 12 days after indictment to dismiss that indictment because the defendant had not been allowed to testify. When that attorney later sought to have the public defender office taken off the case because of the grievance and the facts underlying it, the request was denied and a different assistant public defender represented the defendant.

Holding: The defendant's right to challenge the indictment as having been obtained in violation of his right to testify before the grand jury was not forfeited by his guilty plea, because he was deprived of his right to assistance of counsel at the grand jury proceeding. *See People v Stevens,* 151 AD2d 704, 705. A plea counseled by a second attorney who knows of a prior attorney's asserted derelictions generally constitutes waiver of the former attorney's errors. *People v Petgen*, 55 NY2d 529, 532 *rearg den* 57 NY2d 674. Here, it cannot be said that the plea counseled by another member of the public defender office was free of the taint of that office's failure to communicate to the prosecutor the defendant's desire to testify. Judgment reversed, indictment dismissed without prejudice. (County Ct, Oneida Co [Brandt, J])

Bail and Recognizance (Forfeiture and Failure to Appear) (General) **BAR; 55(25) (27)**

Evidence (Weight) **EVI; 155(135)**

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

People v Vigliotti, No. KA 99-05311, 4th Dept, 11/13/00, 277 AD2d 890, 715 NYS2d 267

During trial on another charge, the judge instructed the defendant that if he was not present, the trial would start without him, and he would "be deemed to have waived your right without prejudice. . . . if you're not here, the trial will take place without you." The defendant was late to court one day of trial. The court said he would tell the defendant, if he did not show up, that he was going to be remanded. Defense counsel objected that the defendant had been told the trial would proceed without him. On the final day of his trial, the defendant was not present. Bail jumping charges were brought.

Holding: At the bail-jumping trial, the attorney who represented the defendant in the underlying trial testified that he instructed his client that he could waive his constitutional right to be present at trial by not appearing. The court found him guilty based solely on the underlying judge's testimony that he had required the defendant to appear. *Cf People v White,* 115 AD2d 313, 314. The jury failed to give the evidence the proper weight. On these unusual facts, the verdict is set aside as against the weight of the evidence. *See People v Bleakley,* 69 NY2d 490, 495. Judgment reversed, indictment dismissed. (County Ct, Onondaga Co [Burke, J]) ⚖

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