



Public Defense Backup Center **REPORT**

Volume XVII Number 1

January-February 2002

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

NYU Metropolitan Trainer 3/16

NYSDA's annual MCLE trainer at New York University Law School will be held this year on Mar. 16. Watch the web site, www.nysda.org, for details to be announced soon.

State of Public Defense 2002

Last September's attacks understandably took center stage in the State of the State and State of the Judiciary addresses in January 2002. Some aspects of the aftermath—fiscal, physical, and psychological—were also addressed. The impact on defense services of the 2001 state budget fiasco and the attacks, and other problems for the defense community, went unremarked by the Governor. Chief Judge Kaye did repeat her support for assigned counsel fees, and acknowledged the need for comprehensive public defense reform, but gave no details.

SOS: Much Old, Little New, No AC Fee News

In his State of the State address, Governor Pataki called for stronger anti-terrorism measures while reiterating criminal justice initiatives from past years, including: abolishing parole; "reforming" the Rockefeller Drug Laws; lowering the DWI limit to .08; expanding hate crimes; and ending the statute of limitations for rape and sexual assault as well as for terrorist acts. Absent from his remarks was the need to increase assigned counsel rates, or to address other defense issues. (*State of the State 2002*, available on the web at www.state.ny.us/sos2002.html.)

Lapp Departs with Fee Plan Unfinished

Soon after the Governor's speech, the lead member of the three-person Task Force charged with reviewing assigned counsel funding announced her departure. Katherine N. Lapp, Commissioner of the Division of Criminal Justice Services and Director of Criminal Justice, is leaving her position to become head of the Metropolitan Transportation Authority. Task Force member James J. Lack, Senate Judiciary Committee Chairman,

acknowledged that while most of the Task Force's research has been finished, the vital problem of securing funding for any fee increase is unresolved. On Feb. 5, the Governor announced the appointment of Chauncey G. Parker to replace Lapp. Parker, a 15-year veteran of law enforcement, was serving as Assistant US Attorney for the Southern District of New York and as Director of the New York/New Jersey High Intensity Drug Trafficking Area at the time of his appointment. No deadline for dealing with the fee crisis has been announced. (*New York Law Journal*, 1/16/02.)

Kaye Continues Support for Fee Increase

In her message to the State, Chief Judge Kaye noted that the wake of Sept. 11th has brought, along with stepped-up security and new routines for opening the mail, a decline in the economy accompanied by a rise in unemployment, substance abuse, and homelessness. Though Kaye did not say it, public defense lawyers surely heard, "rising caseloads." Kaye said, "We hear of civil rights concerns . . ." Defense lawyers surely thought, "hard legal fights ahead." Then she said, "The need for sacrifice and belt-tightening is on everyone's mind—and surely on ours." Public defense lawyers surely knew whose belts are to be pulled the tightest.

Kaye proclaimed success in the use of problem solving courts in the areas of domestic violence and drugs. She announced an initiative to create mental health courts to consolidate services and meet the needs of defendants and the community. No defense concerns about these initiatives were raised or invited.

The Chief Judge did stress the "intolerable situation" of poorly funded

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public defense, and placed the highest priority on increasing assigned counsel rates. She said, "The assigned counsel crisis is undermining our capacity to function as a court system and, even worse, is threatening the very foundation of our justice system—our commitment to equal justice under the law." (*State of the Judiciary 2002*, www.courts.state.us.ny/soj2002.html)

Legislature Did Not Move Fees in 2001

Efforts to increase assigned counsel rates yielded no change last year, despite many calls for action. In November, a coalition of New York judges associations and the New York State District Attorneys Association asked the Governor to take action. (*New York Law Journal*, 11/29/01; *New York Daily News*, 11/30/01.) A year-end editorial commenting on the deplorable state of defense funding noted "there has been a 60-percent-plus drop-off since 1989 in the number of attorneys willing to accept the work of defending those too poor to pay." It called upon the legislature to act and find the money to raise rates, "if the right to counsel is to have meaning in New York." (*Newsday*, 12/22/01.) The legislative session ended without moving on the issue. (*New York Law Journal*, 12/18/01.)

Federal Rates Increase

While state public defense lawyers labor on to increase their compensation, federal Criminal Justice Act (CJA) attorneys have received welcome news. Congress approved an increase in CJA rates to \$90 per hour—no distinctions for in-court and out-of-court compensation. Like New York's 18-B rates, federal CJA rates have not changed since 1986. Bipartisan support from the federal judiciary, the Attorney General's office and the American Bar Association, among other groups, was largely responsible for the successful passage of the increase. US District Judge John Heyburn II previously testified before the House that the old rate was "one of the biggest impediments to maintaining a fair system of justice." (*New Jersey Law Journal*, 1/3/02.) According to Conference Report 107-278, for funding bill HR 2500, the increase should be in place no later than May 2002.

Judicial Actions Continue Over NY Fees

As has been noted over many months in the *REPORT* and on NYSDA's web site, judges throughout the state have been finding that the requisite extraordinary circumstances exist to pay increased rates in a growing number of cases. The issue recently generated federal court action. In the Eastern District of New York, Judge Jack B. Weinstein ordered, in "a class action brought primarily on behalf of women who are battered and who, without fault on their part, have their children removed by the Administration for Children's Services (ACS), and on

behalf of children so removed," that assigned counsel in such cases were entitled to be paid at a rate of \$90 per hour. The court issued a preliminary injunction against the removals and ordering the fee increase. Judge Weinstein concluded that the inadequate compensation levels currently required by Article 18-B violate the procedural due process rights of indigent defendants in Family Court. *In re Nicholson*, No. CV-00-2229 (EDNY 12/21/01), 2001 US Dist. LEXIS 21619. (*New York Law Journal*, 12/31/01.)

Meanwhile, an attempt in state court to shift the final word on fee awards back from administrative judges to trial judges was rejected in the Appellate Division. The challenge to the court rule empowering administrative judges to review assigned counsel fee awards was declared not justiciable by the 1st Department. *Levenson v Lippman*, __ AD2d __ (1st Dept, 1/3/02; 2002 NY App. Div LEXIS 190). Section 127.2(b) of the Rules of the Chief Administrator of the Courts, amended last year, permits administrative judges to review and modify 18-B fee awards made by trial judges. Several assigned counsel affected by the rule filed an Article 78. The decision left the plaintiffs with the options to seek permission to appeal to the Court of Appeals or make a declaratory judgment motion in the trial court. Plaintiff Leonard Levenson has filed a notice of appeal, saying he did so because the First Department had barred any attack on an administrative judge's decision to cut his fees by more than half. (*New York Law Journal*, 1/30/02.)

The 4th Department has just dismissed a CPLR article 78 proceeding challenging the administrative rule. The court cited the *Levenson* decision. *Hinman v Straub*, OP 01-01840 (2/1/02).

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Amicus Author Acknowledged

NYSDA filed *amicus* briefs in both *Levenson* and *Hinman*. Former Staff Attorney Stephanie Batcheller, who authored the briefs, received a special President's Commendation from the New York State Association of Criminal Defense Lawyers (NYSACDL) on Jan. 25, 2002. Batcheller's unwelcome departure from the Backup Center was a result of NYSDA's continuing funding crisis (see "From My Vantage Point," p. 7).



Stephanie Batcheller (r) talks with Saratoga County Public Defender John Ciulla at the 2001 NYSDA Annual Conference.

**Attorneys Awarded Recognition,
Highlight Defense Reform**

Several other attorneys associated with battles to improve public defense also received awards in early 2002. These included NYSDA Executive Director Jonathan E. Gradess, NYSDA Immigrant Defense Project Director Manuel D. Vargas, NYSDA Board member Kathryn M. Kase of the Albany firm Crane, Greene & Parente, NYSDA Basic Trial Skills Program faculty member, solo practitioner, and part-time public defender Raymond Kelly, Jr., and Norman Reimer, of the New York City firm Gould Reimer & Gottfried, who last year received NYSDA's Service of Justice Award.

Reimer has been a major force in the pending New York County Lawyers Association (NYCLA) lawsuit concerning assigned counsel fees in New York City. His much-deserved receipt of the Service of Justice Award was one of the worthy news items left unreported in these pages due to the budget crunch that stalled production of the *REPORT* for the last half of 2001. We take this opportunity to congratulate him on that honor as well as for the more recent NYSACDL Gideon Award. Also receiving a Gideon Award, presented at NYSACDL's annual dinner

on Jan. 24, 2002, was the team of Davis Polk & Wardwell attorneys whose *pro bono* work have made the NYCLA suit a reality.



Norman Reimer (l) accepts the Service of Justice Award from Jonathan Gradess.

NYSDA's Gradess received a Gideon Award as well, for his ongoing efforts to ensure the quality of indigent defense in New York State. The growing public defense crisis was the theme of his acceptance remarks, as he called for a statewide, independent entity to address that crisis. (See "From My Vantage Point," p. 7).

Ray Kelly received NYSACDL's 2002 Thurgood Marshall Award for Outstanding Practitioner. In his acceptance speech, Kelly also called—as he did two years ago when he received the New York State Bar Association Criminal Justice Section's Charles F. Crimi Memorial Award as the Outstanding Practitioner—for statewide public defense reform.

This year's recipient of the Crimi Award, Kathryn Kase, likewise maintained the theme of statewide reform. As she accepted that award at the NYSBA Criminal Justice Section Annual Meeting, she called for an independent public defense commission.

Others lauded by the Criminal Justice Section included the Hon. Vincent E. Doyle, Jr. (Judicial Contribution to the Criminal Justice System), Myron Beldock (David S. Michaels Memorial Award for Courageous Efforts in Promoting Integrity in the Criminal Justice System), and Peter Gerstenzang (Special Recognition Award for Service to the Bar and Community), as well as the three court officers who were killed responding to the attack at the World Trade Center.

Manny Vargas, whose "Immigration Practice Tips" are a regular feature in the *REPORT* (see p. 12), also received an award at the Criminal Justice Section meeting, being recognized for Outstanding Contribution to the

Delivery of Defense Services. Vargas also received an NYSACDL President's Award. In February, he received "The Attorney General's Award for Distinguished Public Service in the Legal Profession," in conjunction with a February event "In Honor of Hispanic Heritage" at NYCLA.

Defense Denison Ray Awards

In other award news, the 2001 New York State Bar Association Denison Ray awards for criminal defense were presented to two NYSDA members. Robert E. Massi is Senior Assistant Public Defender in the Dutchess County Public Defender's Office, and Richard W. Rich was recognized for his work while Chemung County Public Defender. The awards, named for a renowned legal services advocate, recognize "professional, hands-on, innovative legal representation for low-income and disadvantaged clients."

Massi, who has done public defense work for nearly 30 years, takes some of the most difficult cases in the Dutchess County office, including several high-profile homicides, and is described as "tenacious in his defense of these clients." He was nominated by Chief Assistant Public Defender David Steinberg (a NYSDA Board member) who described Massi as "a courageous and zealous advocate for disadvantaged criminal defendants." (*Poughkeepsie Journal*, 12/15/01).

Rich was nominated by a member of the Chemung County Public Defender legal staff and was said to be an inspiration to the whole staff, making their jobs "fun, exciting, and rewarding—both spiritually and professionally." He has since moved to the firm of Ziff, Weiermiller, Hayden & Mustico in Elmira, NY.

Eligibility Standards Needed, SCJC Says

The State Commission on Judicial Conduct (SCJC), in its 2001 Annual Report, favorably cited a NYSDA publication when commenting on continuing problems with determinations of potential clients' eligibility for public defense services. The Commission found that: "Varying practices throughout the state require closer scrutiny and the development of uniform standards for both determining eligibility and effectuating the right to assign counsel." The SCJS Annual Report is on the Commission's web site under Publications: www.scjc.state.ny.us. *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* (1994), which the Commission cited, is in the Publications section of the Association's web site (www.nysda.org) under NYSDA Reports & Studies.

Disorder in the Court: Judges Disciplined

In a recent series of decisions, the SCJC has sanctioned a significant number of jurists for bias, prejudice, failing to follow the law, and violating the right to counsel. All Determinations described below are available on the Commission's web site, above.

In Saratoga County, Moreau Town Court Justice Edward Tracy, a non-lawyer, was censured by the Commission for an announced policy of sentencing DWI defendants with a BAC of .15 or more to jail and the maximum fine. The judge also presided over various cases of defendants suspected in the vandalism of his home and imposed on them the maximum fines. The Commission found evidence of bias and partiality. "Judicial discretion, which is at the heart of a judge's powers, is nullified when a judge imposes a 'policy' that will dictate sentences in future cases." (SCJC, Tracy Determination, 11/19/01.) Justice Tracy plans to appeal the finding. (*Newsday*, 12/27/01.)

In another Saratoga County case, James R. Nichols, Sr., Justice of the Malta Town Court, also a non-attorney, was admonished for summarily incarcerating a defendant unable to pay a \$100 traffic fine after trial. The judge failed to advise the defendant of his right to be resentenced (CPL 420.10[3]), thus violating the Rules Governing Judicial Conduct, 100.3(B), requirement to be "faithful to the law." In light of his practice of giving defendants who pled guilty by mail time to pay, the complained-of acts were found especially invidious. (SCJC, Nichols Determination, 11/19/01.)

The Commission censured Rensselaer County Town Justice Gary L. Moore for not following the law, and questioned his impartiality in domestic violence cases. In a harassment claim made by a daughter against her father, the judge stated that "if he were her father, he would have 'slapped her around' himself," and failed to issue an order of protection. In another case, he refused to suspend the driver's license of a DWI defendant confessing "I can't do that to a fellow truck driver." The judge also failed to advise a defendant of his right to assigned counsel. ([Albany] *Times Union*, 1/12/02; SCJC, Moore Determination, 11/19/01.)

Another Rensselaer County judge was found guilty of not informing defendants of their right to counsel and other misconduct. Alexander A. Shannon, Nassau Village Court Justice, was admonished for routinely requiring misdemeanor defendants to express their desire for an attorney before advising them that they had the right to assigned counsel. Only when defendants appeared later without an attorney did the judge inform them of the assigned counsel option. Another practice was not assigning attorneys to represent indigent defendants with violations. Lastly, Justice Shannon closed the courtroom to the public without justification while conducting criminal cases. (SCJC, Shannon Determination, 11/19/01.)

Westchester County Court and acting Family Court Judge Thomas A. Dickerson was admonished for undermining a prior decision by discussing it with the press. Judge Dickerson dismissed a telephone harassment charge because the complainant initiated the phone call. After public criticism of his decision, the judge reversed his position in statements he made to *The New York Times*. He detailed the steps he would take in future cases including setting high bail and incarcerating “abusers.” (*New York Times*, 2/25/01.) The Commission found that the judge’s actions made it appear that he succumbed to public pressure in changing his views and abrogated his responsibility to be impartial. (SCJC, Dickerson Determination, 11/19/01.)

Finally, the Commission censured Manhattan Criminal Court Judge Donna G. Recant for abusing her power by coercing guilty pleas and berating defendants. The judge used bail to bludgeon defendants into admitting guilt, had an improper *ex parte* conversation with a supervising prosecutor, and mistreated defendants, their families, and assigned counsel. She was found to have acted in a “manner that was coercive, discourteous and contrary to law,” and to have violated “well-established ethical standards requiring a judge to ‘comply with the law’ and to be ‘the exemplar of dignity and impartiality.’” (SCJC, Recant Determination, 11/19/01; *New York Law Journal*, 12/12/01.)

One recent editorial decried what was perceived as a low level of discipline given Recant and other judges. This was to be the first in a series of editorial examinations of judicial behavior and sanctions. ([Albany] *Times Union*, 2/3/02.)

Post-Release Supervision Advice Required at Plea

A memorandum from a departing senior prosecutor in the Suffolk County District Attorney’s office cautioned judges there about the need to advise defendants of post-release supervision in violent felony (*i.e.*, Jenna’s Law) cases. The memo cited a Kings County case now pending on appeal. *People v Alcock*, 188 Misc2d 284 (2001). The practice of advising defendants has been inconsistent among Suffolk judges, and post-conviction motions have been filed claiming that lack of notice of post-release supervision vitiated pleas and sentences. As a result, prosecutors are asking judges to advise defendants on the record. (*New York Law Journal*, 12/14/01.) The 3rd Department has held that post-release supervision was a direct consequence of pleading guilty about which a defendant must be advised. *People v Goss*, 733 NYS2d 310 (2001).

Sequential Lineup Gaining Momentum

Last summer NYSDA publicized a challenge to traditional line-up procedures being made by the Bronx Defenders. Motion papers sought to persuade the court and the police that simultaneous line-ups were inherently unfair and unreliable. Research shows that a sequential method of showing suspect and fillers to a witness one at a time, instead of all at once, reduces the risk of misidentification. The motion in *People v Franco*, No. 903-01 (Sup. Ct. Bronx County 2001) was denied, but efforts continue.

New Jersey was the first state to adopt guidelines mandating sequential lineup procedures. According to Mitchell Sklar, Executive Director of the New Jersey State Association of Chiefs of Police, “It’s pretty convincing and if it means better policing and prosecuting we’re all for it.” (*LexisONE*, 11/26/01.) One impetus behind the reexamination of identification procedures was a US Justice Department report, *Eyewitness Evidence* (NIJ 1999), showing that misidentification had led to convictions later overturned by DNA evidence. (See Criminal Appeals Bureau, The Legal Aid Society, attorney David Crow’s article, *Backup Center REPORT*, Vol XVI, #4, p. 7).

The Capital Defender Office convinced a Brooklyn Supreme Court judge to order a sequential lineup in a pending murder case. Justice Kreindler held that “the scientific community is unanimous in finding that sequential lineups are fairer and result in a more accurate identification” In *re Thomas*, 733 NYS2d 591 (Sup. Ct. Kings County 2001). For information and papers in the *Franco* and *Thomas* cases, as well as new developments, see the Eyewitness Identification Hot Topics page on the NYSDA web site, www.nysda.org. Some prosecutors remain unconvinced. (*New York Post*, 12/23/01.) Still, prosecutors and law enforcement in New York and other states have begun exploring a change in their lineup procedures. (*ABA Journal*, 12/01.)

Good Science, Bad Science

Whether they are innovative procedures or ones allegedly tried and true, many kinds of scientific evidence are available to law enforcement and defense lawyers. Deciding what prosecution evidence can and should be challenged, or what expert to seek to help the defense, is a major challenge. A few developments in this area are noted below. For breaking stories, check the Defense News section of NYSDA’s web site (www.nysda.org) regularly. Past *REPORT* items and articles on other types of evidence—laser speed measuring devices, polygraphs, dogs claimed to sniff out drugs, bombs, or even money—are archived on the site, which also has Hot Topic pages devoted to the social science area of Eyewitness Identification and the most talked-about biological science of the era, DNA. A broader reach for help is available through the Research Links on the site, which can lead to

forensic science resources, other defense sites with further links, etc.

Fingerprint Matches Prohibited in PA

For some time, defense lawyers have been challenging the scientific merit of fingerprint evidence. (See Defense News Archives on NYSDA's site, noting articles on the issue in the *ABA Journal*, 12/00 and the *Fulton County Daily Report*, 11/2/00.) Last November, a Brooklyn judge rejected an attempt by the defense to introduce expert evidence that attacked the scientific validity of fingerprint matching. *People v Hyatt*, NYLJ, 12/7/01, at 17 (Kings Co. Sup. Ct.). It seemed no one would listen, until the issue was presented to a federal judge in Pennsylvania. (*Legal Intelligencer*, 1/9/02.) The court in *United States v Plaza*, No. 98-362-10, 2002 U.S. Dist. LEXIS 344 (EDPA, 1/7/02), held that fingerprint testing did not satisfy the *Daubert* test. It ordered that "the parties will not be permitted to present testimony expressing an opinion of an expert witness that a particular latent print matches, or does not match, the rolled print of a particular person and hence is, or is not, the fingerprint of that person."

Horizontal Gaze Nystagmus Under Review

A judge in Franklin County recently permitted testimony concerning the reliability of the Horizontal Gaze Nystagmus test (HGN) to judge whether someone's ability to drive is impaired by drugs or alcohol. In a case involving vehicular manslaughter and DWI, the court held a hearing to assess the admissibility of a technique that relies on the measurement of eye movements. Eric Sills, an associate to noted DWI defense expert Peter Gerstenzang (see awards item, *supra* p. 3), assisted in the case and argued that the test was not administered according to guidelines from the National Highway Transportation Safety Administration, *Horizontal Gaze Nystagmus the Science and the Law* (NHTSA 2001), <http://www.nhtsa.dot.gov/people/injury/enforce/nystagmus/>, and that state troopers did not receive adequate training to conduct proper tests. (*Press Republican*, 11/28/01.)

Knife Mark Comparison Fallible

The alleged infallibility of knife mark evidence caused the Supreme Court of Florida to reverse the conviction of a man facing the death penalty. The unwarrantedly damning testimony came from a crime technician who stated: "The result of my examination made from the microscopic similarity, which I observed from both the cut cartilage and the standard mark, was the stab wound in the victim was caused by this particular knife *to the exclusion of all others.*" In the absence of peer review, standards or general acceptance, the court found the witness's novel knife mark identification procedure unreliable. It deviated too far from acceptable toolmark evidence under the *Frye*

standard. *Ramirez v Florida*, No. SC92975, 2001 Fla. LEXIS 2305 (Fla., 12/20/01)

Coming Soon? Anti-Terror Science and Technology Developments

The attacks of Sept. 11th have spurred development or publicity about a range of techniques to prevent terrorism or convict terrorists. Some may never reach the police car or the courtroom, but defense teams should be aware of new gimmickry that could pop up in their cases.

Recognition Testing, a/k/a Brain Fingerprinting

"Threat Recognition Testing," or, when used in criminal investigations, "Evidence Recognition Testing," has been touted on the Internet as a way to spot terrorists. According to such reports, the object is "to determine whether the subject being tested recognizes certain items—which may be images of physical items, pictures, or terminology." If the test subject recognizes enough specific items not usually known to ordinary citizens, the theory is that "he or she can be assumed to have certain training or experience." It is claimed that: "In actual testing, the technique was used to find 100 percent of the FBI agents in a test group without falsely selecting civilians as FBI agents." Similarly, the test could supposedly expose a suspect's knowledge of scene images that no one else [other than the investigating officers, passers by, etc.] could know. (ZDNetAnchorNet, 10/5/01).

You Blushed, You Liar

New technological security devices cannot automatically be dismissed as science fiction that will never crawl off the Web. Prestigious institutions are directing their research at terrorism, and techniques that they endorse could be rapidly adopted in the current atmosphere. Any technique made available to law enforcement is likely to be applied to suspected low-level, non-violent felons as well as to suspected terrorists.

According to scientists at the Mayo Clinic, a thermal imaging camera that measures the amount of heat in a body can show changes in color around the eyes indicating signs of deception. (*Nature*, 1/3/02.) The camera detected a faint blushing around the eyes of six of eight people who lied in a test. The device tagged as innocent 11 of the 12 volunteers who did not lie. James A. Levine, endocrinologist and author of the released study, said that while the experiment was small, its results warrant "aggressive investigation" for potential security applications. The technology could be used to screen crowds at airports and border crossings. Critics have called for more rigorous testing. (*Findlaw Legal News*, 1/2/02.)

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From My Vantage Point*

by Jonathan E. Gradess

Stronger?

The aphorism—"that which doesn't kill us makes us stronger"—may turn out to be right. But if so, it will come at a very high human price. For the moment the Backup Center seems poised to survive last year's fiscal crisis, but we are reeling, having lost a third of our staff.

Loss

It's hard to think about being stronger from loss when the loss is Sybil McPherson, who performed defender intake, ran Gideon Day, helped with community legal education and smiled willingly at every assigned task. She struggled in the heavy Albany snow to get to work in her wheelchair, raised consciousness in the state about disabilities, and carried the spirit of City University of New York Law School and Neighborhood Defender Service of Harlem to our office eight years ago.



Former NYSDA Staff Attorney Sybil McPherson with her son, Sayeed, at NYSDA's 2001 Annual Conference.

It's hard too to think we'll be stronger when the loss is Stephanie Batchellor. Stephanie is a career defender. She was a public defender in Georgia, a federal public defender in Maryland, and an appellate defender in Rochester before she came to the Backup Center. Her last task before leaving was to file the second of two *amicus* briefs challenging the legality of Judge Lippman's administrative order permitting administrative judges to cut trial court assigned counsel vouchers. (See p. 3.) Sybil and Stephanie raised sons in the Backup Center family. Their sons grew up with us. We stepped over their Duplos and listened to

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

their jokes and watched them try their mothers' patience on snow days. Now two good lawyers—and two families—are gone from the Backup Center because our state has negligent partisan defects at the core of its budget process.

Those defects are why Kate Dixon, who could retrieve internet information for defenders in nano-seconds, is on the unemployment line; they are why Jim Pogorzelski, who silently and happily comforted the computer phobic in our office, is no longer here to help; those defects are why Sejal Zota, a young, energetic and talented lawyer, left our immigration project; they are why Nancy Steuhl, our conference coordinator and secretary, is not seated at our reception desk.

Thanks to this year's budget fiasco our entire social science unit is also gone. We are already lost in a forest of needs and requests hard for us to fill without Tom Brewer and his research interns, Debernee Pugh and Jennifer Poe, all victims of this year's budget wars.

As we continue to await last year's money and seek funds to pursue our work, our office lives. But the price has been too high and it is hard to think, as the aphorism goes, that we will grow stronger from this loss of friends and colleagues whose only professional mistake was to cast their lot with defenders and their clients.

Undeterred!

NYSDA has lost valuable people and valuable time. It has been hard for us to plan and hard to act. We have lost more than \$1,000,000 in funding, and how much will be restored is still up in the air. And yet we will not be deterred from pursuing our Association's course. We were here before the current government configuration. We will be here after this configuration has moved on.

NYSDA was founded 35 years ago, in 1967, by fighting defense lawyers who saw and claimed the future for their clients. They knew the state needed an entity to birth a new form of zealous advocacy for poor people and they formed NYSDA to shepherd in the new day. In that year, George Pataki had just graduated from Yale as an undergraduate, Shelly Silver was still in law school, Joe Bruno was working for Nelson Rockefeller. In that year, the ink was hardly dry on the *Miranda* decision, New York had all but abolished the death penalty, the "new" Penal Law had just become effective and Judith Kaye was four years admitted to the bar.

None of us can tell the future by reading the past, but there is power in persistence. The Backup Center was once staffed with VISTA volunteers. It borrowed law books, and was funded by church money. It will do so again if necessary, because we aren't going away. We have a job to do and we are going to do it, for you and for our clients.

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Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Ethics For Criminal Defense Lawyers
Date: March 1, 2002
Place: New York City
Contact: Patricia Marcus, tel (212) 532-4434, e-mail nysacdl@aol.com, web site www.nysacdl.org

Sponsor: National Legal Aid & Defender Association
Theme: Life in the Balance (Death Penalty Training)
Dates: March 9-12, 2002
Place: Kansas City, MO
Contact: Aimee Gabel at NLADA: tel (202) 452-0620, ext. 214; e-mail a.gabel@nlada.org; web site www.nlada.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Immigration Workshop
Date: March 9, 2002
Place: New York City
Contact: Patricia Marcus, tel (212) 532-4434, e-mail nysacdl@aol.com, web site www.nysacdl.org

Sponsor: New York State Defenders Association
Theme: 16th Annual New York Metropolitan Trainer
Date: March 16, 2001
Place: New York City
Contact: New York State Defenders Association, 194 Washington Ave., Suite 500, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; e-mail info@nysda.org; web site www.nysda.org

Sponsor: Office of Continuing Legal and Professional Education, Chicago-Kent College of Law, Illinois Institute of Technology
Theme: 19th Annual Conference on Section 1983 Civil Litigation
Dates: March 21-22, 2002
Place: Chicago, IL
Contact: tel (312) 906-5090; fax (312) 906-5093; web site www.kentlaw.edu/depts/cle/sect1983

Sponsor: National Association of Criminal Defense Lawyers
Theme: Spring Meeting & Seminar: Racial Injustice
Dates: May 1-4, 2002
Place: Cincinnati, OH
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

Sponsor: Santa Clara University, California Attorneys for Criminal Justice, California Public Defender Association, ABA Death Penalty Representation Project
Theme: Bryan R. Shechmeister Death Penalty College
Dates: August 10-15, 2002
Place: Santa Clara, CA
Contact: Ellen Kreitzberg, (408)554-4724; e-mail kreitzberg@scu.edu; web site www.scu.edu/law/dpc ⚡

Job Opportunities

The position of **Broome County Public Defender** is open. The successful candidate will run an 11-attorney office in Binghamton, NY providing public criminal representation at trial and appellate levels. Required: trial and administrative experience, and bar admission in New York State. AA/EOE. Salary base \$91,536. Applications must be received by March 15, 2002. For an application, contact the Broome County Department of Personnel, PO Box 1766, Binghamton NY 13902. (607) 778-2276.

The Capital Resource Oversight Committee of the Federal Public Defender system seeks an experienced **capital litigator** to provide direct representation to persons charged with federal capital crimes and training, consultation and support to other attorneys appointed to represent persons charged with federal capital crimes. Required: be a licensed attorney in good standing admitted in at least one United States District Court and US Court of Appeals and eligible for admission in other federal jurisdictions; be "learned in the law" of capital cases consistent with 18 USC 3005; and have extensive experience in the representation, at trial and sentencing, of persons charged with capital offenses. Also required: experience and skills in the development and delivery of legal training. The office of Capital Resource Counsel will be located at a host Federal Defender Organization (FDO), subject to negotiation with selected applicants. Extensive travel required. Salary commensurate with experience, but may not exceed the salary of the Federal Defender in the host FDO (current range \$120-\$129,000). Full position description available at www.md-fd.org. Send résumé

and cover letter detailing capital litigation and training experience to: James Wyda, Federal Public Defender for the District of Maryland, 100 S. Charles Street, Tower II, Suite 1100, Baltimore, Maryland 21201. ⚡

Community Conference on Criminal Justice

April 26-27

with a Reception for Newly-Appointed Federal Magistrate Judge Randall Treece and Albany City Court Judge William A. Carter

Save the date for this always well-attended event!

For more information, contact:
The 9th Annual Capital District Community Conference on Criminal Justice
c/o Center for Law and Justice, Inc.
Pine West Plaza Building 2, Washington Ave. Extension,
Albany NY 12205
Tel (518) 427-8361; Fax (518) 427-8362

The conference is seeking sponsors to publicize the event and contribute to conference expenses.

One of those jobs is to create a new public defense system.

Independent Public Defense Commission

I'm happy to announce that I was recently invited to join the Committee for an Independent Public Defense Commission. I'm honored to join with others who believe we can no longer wait to affirmatively improve the state's ailing public defense system. The Independent Public Defense Commission would set standards and bring accountability to the defense of those unable to afford counsel. The Committee supporting this commission is growing, as is support for the commission. New York City has been invited to join with upstate New Yorkers to examine and support this idea. The Committee's bill will shortly have legislative sponsors. The League of Women Voters has made the Independent Public Defense Commission one of its five legislative priorities. *The New York Times* has endorsed the idea, as have 29 counties and scores of defense providers.

At bar association meetings throughout New York City in January, the idea of an independent public defense commission was being called for, debated and discussed. The New York State Association of Criminal Defense Lawyers (NYSACDL) unanimously endorsed the idea at its January 25th board meeting.

Additionally, 24 local bar associations have endorsed a statement of principles concerning the governance of indigent legal services. In pertinent part the statement calls for a study of the system that would require the

development of mechanisms that "[articulate] minimum quality standards [and insulate] all indigent legal services providers from political influence" protecting "their professional independence in the representation of their clients." The long march toward reform has taken important steps.

On January 24th I was honored to be one of the recipients of the NYSACDL's Gideon Award. In referring to the Independent Public Defense Commission, I asked but one thing of those assembled. We must come to speak with one voice on the issue of client representation. The divisions, the turf, the barriers to joint action must cease. We must stop allowing ourselves to be played by those who would choose to see us in factions. The clash between the private and public bar, the critical remarks made by public defenders about assigned counsel lawyers, the conflict between part time and fulltime providers, between the Legal Aid Society and the alternative providers in New York City, between those who worship the past and those with faith in the future, all must cease. We must come together and fight together. Our clients deserve a great deal more than this from us, but they certainly deserve nothing less. ♡



Jonathan Gradess (I) with (clockwise) his son Sam, Evan O'Brien, and Jason Batcheller, at the Basic Trial Skills Program, 2001.

Pro Bono Counsel Needed for Death Row Prisoners

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

“A Certificate of What?”: The Mysterious Certificate of Relief from Disabilities

by Glenn Edward Murray

“A Certificate of what?” That’s a common response to questions about Certificates of Relief from Disabilities (“CRD”), an obscure and commonly misunderstood means of mitigating collateral consequences of conviction. Prominent Buffalo attorney, former Judge, and noted commentator Eugene W. Salisbury states that CRDs “until recently, have not been widely known or properly handled.” Yet, evaluating CRD eligibility and impact is often critical in advising criminal, civil, and business clients.

What is the purpose of a CRD?

In 1966, CRDs were created by Corrections Law (“Corr. L.”) Article 23 (Sec. 701, *et seq.*) to allow discretionary relief from the sentencing court or Board of Parole for eligible offenders from most forfeitures or disabilities that are automatically imposed upon conviction, and from which there is no other means to appeal to discretion based on the favorable character or fitness of the offender. See *Rehman v. I.N.S.*, 544 F.2d 71 (2d Cir. 1976).

Many licensing statutes in New York generally bar persons convicted of felonies and other enumerated criminal acts. Some such statutes provide an exception for individuals pardoned or granted a CRD, such as Alcoholic Beverage Control Law Sec. 102 & 126; Exec. Law Sec. 435; General Business Law Sec. 69-0; Gen. Mun. Law Sec. 189-a, 191, 476 & 481 and Unconsolidated Law Sec. 10051 & 10052).

A CRD does not operate as a pardon and will not prevent any administrative or licensing authority from exercising its discretionary powers to suspend, revoke or refuse to issue or renew any license. Corr. L. Sec. 701, 706. See *Ivory v. NYC Dep’t of Environmental Protection*, 125 A.D.2d 217 (1st Dep’t 1986)(court-granted CRD upon gambling conviction did not prohibit termination of a laborer who collected football bets while on duty); *Pulaski Inn, Inc. v. N.Y.S.L.A.*, 182 A.D.2d 1116 (4th Dep’t 1986) (discretionary SLA penalty upheld against corporation upon no-contest plea by former president who was granted CRD); *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001)(CRD did not immunize convicted alien from immigration consequences).

Although a CRD will avoid the statutory ineligibility of a felon to serve as a fiduciary, a CRD does not prohibit discretionary denial to withhold letters of administration. In *Matter of Pullman*, 89 A.D.2d 608 (2d Dept. 1982), the

Second Department held that where a felon had obtained a CRD and applied for letters, the Surrogate had discretion to issue temporary letters testamentary, however, the Second Department found that the applicant could not obtain the letters because he was a “dishonest” person with the meaning of SCPA 707(1)(e).

What is the criteria for granting a CRD?

Although described as a “badge of rehabilitation” the statutory predicates are findings that the relief granted is consistent with the rehabilitation of an eligible offender and consistent with public interest. Corr. L. Sec. 702-4.

Who is eligible for a CRD?

A “person who has been convicted of a crime or of an offense but who has not been convicted more than once of a felony” is an “eligible offender.” Corr. L. Sec. 700(1)(a). Because a youthful offender adjudication (N.Y. Criminal Procedure Law Article 720) is not a deemed a conviction, such offender is not eligible for a CRD. *People v. Doe*, 52 Misc.2d 656 (Dist. Ct., Nassau County, 1967).

May a CRD be obtained from a NY Court if the defendant is convicted in federal court or the courts of other states?

Some defendants convicted in federal court or the courts of other states are eligible offenders. See *Application of Helmsley*, 152 Misc.2d 215 (N.Y. Co. Sup. Ct., 1991). Where the conviction is imposed under federal law or the law of other states, CRD eligibility depends on what N.Y. penal laws are “comparable.” *Southland Corp. v. N.Y.S.L.A.*, 181 A.D.2d 19 (1st Dep’t 1992).

May a CRD be obtained by a corporation?

A corporation may be eligible for a court-granted CRD, but only if the offender has the requisite predicate conviction. See *In re C.P. Ward, Inc.*, 184 Misc.2d 57 (2000); *Southland Corp. v. N.Y.S.L.A.*, 181 A.D.2d 19 (1st Dep’t 1992).

How is a CRD obtained?

If sentenced to “felony time” (a sentence of more than one year), a CRD must be obtained from the State Parole Board. Corr. L. Sec. 703-b. If sentenced to a revocable sentence (such as conditional discharge, probation or “local time” (a sentence of not more than one year), a CRD must be obtained from the sentencing Court. *Id.* at 702. See *Application of Helmsley*, 152 Misc.2d 215 (1991)(defendant convicted in federal court of tax fraud and sentenced to “felony time” not eligible for court-granted CRD); *Da Grossa v. Goodman*, 72 Misc.2d 806 (Sup. Ct. N.Y. Co. 1972)(equal protection clause of NYS Constitution requires that relief from federal conviction be available in state court). N.Y. Court Rule 200.9(b) requires that at sentencing, unless the court grants a CRD, the court shall advise every eligible defendant of such eligibility. Every presentence report notes whether the defendant is CRD eligible and whether it is recommended.

* Glenn Edward Murray is a Buffalo criminal defense lawyer and the author of: *Collateral Consequences of Criminal Conduct* (NYSBA, 1992).

Is a CRD revocable?

If the offender is or was sentenced to a revocable sentence, a CRD is deemed temporary until such time as the court's authority to revoke the sentence expires. Corr. L. Sec. 702(4).

May a CRD be granted with limited relief?

Yes. There are three kinds of CRDs: Type A, if granted by the sentencing court, relieves the holder of all forfeitures, disabilities and bars to employment; Type B relieves the holder of all disabilities and bars to employment (not forfeitures); Type C relieves the holder only of those specifically enumerated forfeitures, disabilities and bars to employment. Corr. L. Sec. 706. Certain kinds of forfeitures, disabilities and bars to employment, including forfeiture of public office, membership in the bar, the effect of Public Health Law Sec. 2806 (hospital operating certificate) and most drinking-driving suspensions and revocations are not relieved by a CRD.

Does a CRD entitle the holder to sealing of the records of conviction or prosecution?

No. However, a CRD may be entered on the criminal records maintained by the NYS Division of Criminal Justice Services ("DCJS"). Certified copies of granted CRDs should be mailed to DCJS (at the address on the CRD form) for entry.

Does a CRD entitle the holder to conceal a record of arrest or conviction?

No. *Rogers v. NYC Human Resources*, 154 A.D.2d 233 (1st Dep't 1989)(fact issue raised whether employee who provided CRD to employer had given notice of conviction); See 1981 Op. Atty. Gen. (inf.) 124.

Does a CRD bar impeachment of the holder?

No. A CRD does not vitiate a conviction and does not make evidence of the conviction inadmissible for impeachment purposes. *U.S. v. Hourigan*, 66 F.3d 458 (2d Cir. 1995); *U.S. v. DiNapoli*, 557 F.2d 962 (2d Cir. 1977) cert. denied, 434 U.S. 858; See *Morrisette v. Dilworth*, 59 N.Y.2d 449, 451, n.2 (1983)(CRD "does not eradicate or expunge the underlying conviction."); See also *Able Cycle Engines v. Allstate Ins. Co.*, 84 A.D.2d 140 mot for lv to app. den. 57 NY2d 607.

Does a CRD prohibit employment discrimination?

For some offenders, Corr. L. Article 23-a (Sec. 752 et seq) provides protection from unfair public or private employment discrimination. Article 23-a provides that discrimination is explicitly permissible where "the granting of employment would involve an unreasonable risk . . . to the safety or welfare of specific individuals . . ." and enumerates factors an employer may consider.

How does a CRD affect firearms possession?

In *People v Flook*, 164 Misc 2d 284 (Ontario Co. Ct., 1995), the court dismissed an indictment charging Criminal Possession of a Weapon in the Fourth Degree (Penal Law 265.01, which prohibits a person from possessing a rifle or shotgun after having been convicted of a felony or serious offense). Although that penal statute does not expressly except the holder of a CRD, it does except the holder of a certificate of good conduct issued pursuant to Corrections Law 703-b. The court in *Flook* found the distinction between the two kinds of certificates to be "insignificant."

In *Matter of Valhos*, 145 Misc.2d 657 (Schoharie County Court, 1989), a local criminal court-granted CRD specifically stating that the offender may retain any and all pistol permits, upon conviction of sexual misconduct, was held not to bar automatic or discretionary revocation of pistol permit. See 1975 Op. Atty. Gen. (inf.) 306; 1971 Op. Atty. Gen. 8.

Federal CRDs involving enforcement of the Federal Criminal Code are authorized by federal law, however funding and appropriations for the Bureau of Alcohol, Tobacco and Firearms to perform this administrative function is excluded by regulation. See *In re C.P. Ward, Inc.*, 184 Misc.2d 57 (2000).

Will a CRD avoid the impact of any drinking/driving conviction?

Only for some commercial drivers. If a CRD is obtained from the court, a commercial driver convicted of drinking/driving might be eligible to operate a commercial motor vehicle on a conditional license. Such CRDs are commonly granted as "Type C," stating that the holder is relieved of the "application of VTL Sec. 1196(7)(g) prohibiting the operation of a commercial motor vehicle with a conditional license."

Although a second Drinking/driving conviction within 10 years does not prevent a motorist from operating a commercial motor vehicle on a conditional license, a second Sec. 1192 conviction within 5 years does. See generally Gerstenzang, *Handling the DWI Case in New York*, Sec. 51:2 (West Publishing Co.).

Can a CRD avoid all prejudice resulting from conviction?

No. In advising clients about CRDs, attorneys must avoid general statements such as "a CRD will avoid all consequences of the conviction" or "a CRD will make it like it never happened."

Advice concerning the effect of a CRD requires case-by-case analysis that differentiates whether the prejudice from conviction is: (1) automatic or discretionary, (2) based on the conviction or independent evidence of misconduct, and (3) of a kind within the scope of the particular statutes. ⚖

Defense-Relevant Immigration News

by Manuel D. Vargas*

Federal Courts Issue Decisions Favorable to Immigrants in INS Detention and/or Removal Proceedings Based on Criminal Charges

Following up on the two important immigrants' rights decisions issued by the US Supreme Court in June, 2001—*Immigration and Naturalization Service v St. Cyr* and *Zadvydas v Davis* (see *Backup Center REPORT*, Vol XVI, #4, p. 14)—federal courts in New York and elsewhere have recently issued several decisions favorable to immigrant petitioners on some key outstanding immigration detention or removal legal issues:

- *Patel v Zemski*, 2001 US App LEXIS 26907 (3d Cir. 2001)—In this decision, filed on Dec. 19, 2001, the US Court of Appeals for the 3rd Circuit struck down as unconstitutional provisions of the Illegal Immigration Reform and Individual Responsibility Act of 1996 (IIRIRA) that mandate the detention without the right to release on bond of immigrants in removal proceedings based on certain criminal charges. Although many federal district courts have come to the same conclusion, this is the first federal court of appeals to issue such a ruling. The 3rd Circuit's decision has immediate impact on New York and other immigrants held by the INS in prisons or other facilities located in Pennsylvania and New Jersey. (More recently, the 9th Circuit found that the IIRIRA mandatory detention provisions are unconstitutional as applied to lawful permanent resident immigrants, see, *Kim v. Ziglar*, No. 99-17373 [9th Cir. 2002].)
- *Greenidge v INS*, 2001 US Dist LEXIS 19816 (SDNY 2001)—On Nov. 27, 2001, US District Judge Victor Marrero accepted and adopted the Report of US Magistrate Judge Henry Pitman finding that the lawful permanent resident immigrant petitioner was eligible to apply for a waiver of deportation under former section 212(c) of the Immigration and Nationality Act even though he has now served more than five years in prison for conviction of an aggravated felony. Although service of more than five years for such a conviction barred relief under former section 212(c), the court found that the petitioner had not yet served five years at the time of his original hearing before an Immigration Judge. The court further found that the five-year mark had now passed only because the Immigration Judge had incorrectly found the peti-

tioner ineligible at the time of the hearing for reasons since rejected by the Supreme Court in *St. Cyr* (where the Supreme Court held that the 1996 IIRIRA amendments should not be applied retroactively to take away the right to apply for deportation relief from individuals who pled guilty to deportable offenses before the effective date of these amendments). The court therefore remanded the case for consideration of the petitioner's application for section 212(c) relief. See also *Fejzowski v Ashcroft*, 2001 US Dist LEXIS 16889 (ND Ill. 2001) (noting that the petitioner "may have a viable claim that it violated his due process rights for the INS to lie in the weeds waiting for the five year period to run before seeking removal"); *Bosquet v INS*, 2001 US Dist LEXIS 13573 (SDNY 2001); *Lara v INS*, No. 3:00CV24 (D Conn. 2000).

- *Henry v Ashcroft*, 2001 US Dist LEXIS 19795 (SDNY 2001)—On Nov. 30, 2001, US District Judge Denny Chin held that the lawful permanent resident immigrant petitioner could seek cancellation of removal under the 1996 IIRIRA amendments even if she had not resided in the United States for seven years prior to commission of a pre-IIRIRA removable offense. Although the IIRIRA eligibility requirements for cancellation relief require continuous residence of seven years prior to the commission of some offenses triggering removability, the court applied a *St. Cyr*-type analysis to find that in this case these amendments should not be applied retroactively to a pre-IIRIRA offense.
- *Borrero v Aljets*, No. 00-2351 (D Minn. 2001) – On Dec. 18, 2001, a federal court in Minnesota found that the *Zadvydas* decision—in which the Supreme Court ruled that the government may not indefinitely detain noncitizens whom the government is unable to remove—applied to an individual ordered excluded after being stopped at the border and "paroled" into the United States. Although the *Zadvydas* case dealt with an individual who had instead been formally "admitted" to the US, who has greater rights under the U.S. Constitution, the court noted that the *Zadvydas* decision was ultimately based not on the Constitution but on statutory interpretation. Further observing that these statutory provisions do not distinguish between different groups of detainees, the court ordered the petitioner released unless the government submits evidence demonstrating that there is a significant likelihood that the petitioner actually will be removed from the U.S. in the reasonably foreseeable future.

Help From the Immigrant Defense Project

The petitioner in *Henry v Ashcroft*, *supra*, was represented by the law firm of Cleary, Gottlieb, Steen & Hamilton, which agreed to take the case pro bono after referral from

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

NYSDA's Immigrant Defense Project. The Project provides a variety of assistance for immigrants and the lawyers representing them.

Pro Bono Referral in Selected Cases

As previously reported, the Project has commenced a new initiative to provide or obtain legal help for immigrants placed in removal proceedings based on conviction or accusation of a crime. (See *Backup Center REPORT*, Vol. XVI, #5, p. 15). The initiative will include expanded efforts to obtain *pro bono* legal representation for immigrants without counsel whose deportation cases raise important legal issues involving the interplay between criminal and immigration laws. The Project encourages *REPORT* readers to contact the Project regarding any such cases.

Removal Defense Checklist in Criminal Charge Cases Updated

The Removal Defense Checklist in Criminal Charge Cases prepared by the Immigrant Defense Project has been updated to include the above citations and other new legal developments of relevance in deportation cases based on criminal convictions. To access and/or download this resource material (now updated through Jan. 4, 2002), visit NYSDA's website at www.nysda.org and click on Immigrant Defense Project Resources. If you do not have access to the Internet, contact the Backup Center for a hard copy.

Legal Resource Materials, Training, and Backup Support for Those Representing Noncitizens Detained after Sept. 11

As reported in the last *REPORT*, the federal government has taken several steps in response to the events of Sept. 11 that create new risks for noncitizens suspected of criminal conduct or immigration law violations. (See *Backup Center REPORT*, Vol. XVI, #5, p. 14). To provide information and guidance to noncitizens and their lawyers regarding these new measures, NYSDA's Immigrant Defense Project has provided, and will continue to offer, backup support, training, and resource materials on legal issues arising in the cases of noncitizens targeted and detained by law enforcement authorities since Sept. 11.

For detailed information on immigration law developments and issues arising in these cases, *REPORT* readers are referred to the following two new Project resource materials (available on the Immigrant Defense Project page in the NYSDA Resources section of the NYSDA web site, www.nysda.org):

- Outline re: "New Developments in Representing Noncitizens Post-September 11"

- Law student memo re: "Constitutional Limits on Federal Government's Power to Detain Immigrants Whom the Government Suspects to Be Terrorists"

On Jan. 26, 2002, Project Director Manny Vargas was a panelist in a training session entitled "Special Considerations for Representing Non-Citizens," as part of an all-day CLE program, *Rights on the Line: Consequences and Implications of the USA PATRIOT Act for Client Representation*, co-sponsored by the New York City Chapter of the National Lawyers Guild, the Center for Constitutional Rights, the NLG Post 9-11 Project, the Legal Aid Society, and the New York Law School Justice Action Center.

Defense lawyers and other immigrant advocates may contact the Project hotline (212-367-9104) on Tuesdays and Thursdays between 1:30 p.m. and 4:30 p.m. for individual case guidance and backup support.

New Immigration Law Resource for Criminal Lawyers Published by ABA

The American Bar Association has published a useful resource for criminal lawyers who represent noncitizen defendants, or otherwise face immigration law issues in criminal cases. *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (ABA 2001) was written by Robert James McWhirter, an Assistant Federal Public Defender for the District of Arizona since 1989. He is an expert on the intersection between criminal and immigration law and has written and lectured extensively on criminal/immigration issues.

The Criminal Lawyer's Guide offers a well-organized overview of immigration law for criminal lawyers presented in an accessible question-and-answer format. It is divided into three parts:

Part I: Immigration Law for Criminal Lawyers (including subparts on immigration consequences of criminal convictions, and border stops);

Part II: Immigration Crimes (including subparts on crimes of employing aliens and marriage fraud, illegal entry and reentry after deportation, and alien smuggling and document fraud); and

Part III: Noncitizen Witnesses and Defendants (including subparts on witnesses outside the United States, international extradition, and treaty transfer of noncitizen prisoners).

The Criminal Lawyer's Guide should be particularly valuable for defense lawyers who have a federal criminal practice as it covers many federal practice issues not extensively covered elsewhere, such as federal immigration crimes. The resource also contains useful appendices, including pertinent immigration statute provisions. ♪

Book Review

Undoing Time: American Prisoners In Their Own Words

Jeff Evans, Ed.

Northeastern University Press, 2001. 262 pp.

By Barbara DeMille*

The essays written from prisons that Jeff Evans has edited are a collage: the piano-playing chicken a young boy finds trapped within a glass cage at the penny arcade; a mother on her knees, sobbing, in a closing elevator, the last glimpse of an eleven year old boy she is abandoning to foster care; the bodies of teen-aged soldiers sprawled in grotesque and bloody positions after an ambush somewhere in South Vietnam; the 100 soldiers an inmate has learned we have all left behind, one by one, at the places of injury in our lives—until none are left, and we are numb. And most poignant, the kite made of newspaper, run aloft on braided dental floss, as heads crane, in the prison yard.

This collection can be notable for what it is not. For there are many tales of a child ignored, abandoned, beaten, sexually abused, left to care for him or herself while a parent drank or used drugs, but there is very little bitter blame. There are honest admissions of that once-child with a good home who opted for the rush of running with a gang and the status of robbing and killing. And there are the inevitable accounts of that child growing into drug use, gradually upping the ante from marijuana to heroin, stealing, and dealing. One first-person account of a lost weekend shooting up in a cheap motel is worthy of a literary award, it is so immediate and vivid.

These writers are pragmatic, realistic, for the most part honest, and always down to earth in a way that only those held in a zoo of hundreds of needy, angry, clamoring men can be. For it is the descriptions of daily life in the prison that create the most guilt for us all. It is not the guards, who, for the most part come across as neutral and at times even kind, who are the terror. It is the walls, the crowding, the noise, and most of all, the other prisoners, organized into gangs, menacing and controlling, rapists and robbers of the weak and frail. If a man—or woman—has not already learned the take-no-prisoners tactics of the street, in prison they will quickly learn them or perish. Bleach, to burn, shampoo, to stick, mixed in boiling water works well when thrown directly in the face. Knives are as common as drugs. All is for sale or barter, including the services of drag queens.

* **Barbara DeMille** holds a PhD in English Literature, earned at SUNY at Buffalo. Her work was heard on Northeast Public Radio from 1993 to 1995. She has published numerous essays and articles.



This of course, as several of these writers point out, is no way with which to redeem the “penitent.” More likely our present prisons are schools in which survival is taught for a further life of forgery, robbery, burglary, drug-dealing, and various other refinements in crime. Time done is not time spent in sorrowful contemplation, rather in despair and boredom and often fear. And when a twenty year portion of a sentence upon an unwitting and teenage accomplice to murder is done, a parole board can capriciously deny you, as one articulate thirty-five year old jail-house lawyer learns.

Protective custody in prison is equivalent to solitary. A fellow inmate can send a note to the warden that you are in danger, and suddenly your meager prison freedom is further curtailed. There is much in this group of stories that only those who’ve been to this other country will fully understand. For prison is another country, a separate world in which we detain those who’ve crossed the social line.

Perhaps the beginning was a troubled childhood, poverty, drug and alcohol use that got out of hand. Perhaps it was an innate evil, though rarely in these pages will you find someone for whom violence is a distinct thrill. (The exception is a serial rapist and murderer’s account of his untreated prior and pressing urges to harm women, now, and belatedly, under hormone control.)

Rather in these stories from those who’ve given great chunks of their lives to satisfy a world that often ignores and maltreats them, you will find frank admissions of guilt, some remorse, a great deal of yearning, and, in spite of a past filled with obstacles and bad choices, a preponderance of hope. There is that kite climbing, as “all eyes are cast upward, including the guards.” As “murmurs of awe ripple through the [yard],” there is ever that kite high in the sky, soaring and free. ♪

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

Constitutional Law (United States Generally) CON; 82(55)

Prisons (Civil Liabilities) (Federal [General]) PRS II; 300.5(3) (15)

Correctional Services Corp v Malesko, No. 00-860, 11/27/01, 534 US __, 122 S Ct 515

A former federal inmate sued Correctional Services Corporation (CSC), a private company contracting with the Bureau of Prisons, for injuries occurring in their facility. The trial court interpreted the complaint as a *Bivens* v *Six Unknown Fed. Narcotics Agents* (403 US 388 [1971]) action and dismissed it, finding *Bivens* applied only to individuals. *FDIC v Meyer*, 510 US 471 (1994). The Court of Appeals for the 2nd Circuit held that private entities were liable under *Bivens* and read *Meyer* to preclude suits against federal agencies.

Holding: *Bivens* first recognized an implied private action for money damages against individual federal officers who violated constitutional rights. Limited circumstances justified a judicially created remedy to deter unconstitutional acts of individuals and provide relief not available elsewhere. *Carlson v Green*, 446 US 14 (1980). The absence of available relief is not controlling. Permitting suit against an agency or employer would shift the focus from the individual to the organization and blunt the deterrent effect of *Bivens*, which is aimed at individual actions, not institutional policy. Other administrative and tort remedies exist for federal prisoners held in privately run facilities. A special circumstance might exist where the government directed a contractor to do the thing that is the basis for the claim. *Boyle v United Technologies Corp*, 487 US 500 (1988). Judgment reversed.

Concurrence: [Scalia, J] *Bivens* is a relic and even the narrowest interpretation of it should not be applied in a new context.

Dissent: [Stevens, J] *Carlson* created a remedy for violations of the 8th Amendment regardless of the Federal Tort Claims Act (FTCA) and it was not qualified by later cases. *Farmer v Brennan*, 511 US 825 (1994). CSC was an agent of the federal government, not a federal agency entitled to sovereign immunity, and should not be treated differently than a human agent.

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

Search and Seizure (Consent) (General) (Warrantless Searches) SEA; 335(20) (42) (80)

United States v Knights, No. 00-1260, 12/10/01, 534 US __

Police, who were aware that the terms of the respondent's probation required him to submit to warrantless searches by probation officers or law enforcement, suspected the respondent of arson. After observing the respondent's apartment, police searched it and found incendiary materials. He was charged with arson and related federal offenses, and moved to suppress the evidence. The trial court held that the police had reasonable suspicion, but suppressed the evidence because the search was investigatory, not probationary. The Court of Appeals for the 9th Circuit affirmed.

Holding: The 4th Amendment does not limit searches based on a probation condition to probationary purposes. *Griffin v Wisconsin* (483 US 868 [1987]) established a special needs standard for searches pursuant to a state regulation that was not a condition of the probation at issue. *Griffin* explicitly did not reach the question of whether warrantless searches of probationers could be reasonable in other circumstances. The detective here had reasonable suspicion that the respondent was engaged in criminal activity. As a probationer, the respondent had significantly diminished privacy interests. The police search was reasonable under the totality of the circumstances. *Ohio v Robinette*, 519 US 33, 39 (1996). The constitutionality of a suspicionless search based solely on a probation condition is not addressed. Judgment reversed.

Concurrence: [Souter, J] The question remains whether the abandonment in *Whren v United States*, 517 US 806 (1996) of a police officer's "subjective intentions" in probable cause analysis should be extended to searches based on reasonable suspicion.

New York State Court of Appeals

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

Evidence (Sufficiency) EVI; 155(130)

Trial (Trial Order of Dismissal) TRI; 375(60)

People v Hines, No. 137, 10/23/01

After the prosecution rested, the defendant unsuccessfully moved to dismiss under CPL 290.10, claiming insufficient proof to support an inference that the defendant exercised the requisite dominion or control over the

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apartment to establish constructive possession of narcotics found there. After all proof was in, the defendant requested a charge reduction but did not renew the motion to dismiss. The charge reduction was denied; the jury found the defendant guilty of first-degree criminal possession of a controlled substance. After the verdict but before sentencing, on the defendant's CPL 330.30 motion, the court set aside the verdict finding that it had erroneously denied the mid-trial 290.10 motion. Considering only the prosecution's evidence, the court ruled the proof insufficient to establish constructive possession. The Appellate Division reversed.

Holding: "A court adjudicating a CPL 330.30 motion may consider only issues of law which 'would require a reversal or modification as a matter of law by an appellate court.'" CPL 330.30[1]. The trial court erred in addressing the insufficiency argument because it was not properly preserved for review. *See People v Carter*, 63 NY2d 530. When the defendant did not rest after the court denied his motion to dismiss at the close of the prosecution's case, he proceeded at the risk that he might inadvertently supply a deficiency in the prosecution's case. *See People v Kirkpatrick*, 32 NY2d 17, 21. An indictment may be dismissed due to insufficient evidence only when sufficiency was preserved by a motion to dismiss at trial. *See People v Gray*, 86 NY2d 10. Order affirmed.

Dissent: [Smith, J] The sufficiency issue is preserved, although the reviewing court may look at all evidence. The evidence was insufficient.

Evidence (Other Crimes) EVI; 155(95)

People v Rojas, No. 132, 10/25/01

The defendant allegedly tried to assault another jail inmate and was placed in a "behavioral unit." During a required clothing exchange, the defendant struck a guard and was indicted for assault. On defense motion, the court ordered the prosecutor not to discuss the alleged attempted assault on the inmate. In opening statement, the defense focused on the hardships of detention and portrayed the event in question as the defendant sitting on his bed when suddenly his cell door opened, five guards entered, and a scuffle broke out. On cross-examination of the prosecution's first witness, the defense elicited testimony about conditions in the behavioral unit. When the prosecution's second witness described the defendant's alleged assault on the other inmate, the defense objected. The court overruled, but cautioned the jury not to use this as evidence of guilt. A defense motion for mistrial was denied.

Holding: The five general *Molineux* exceptions under which prior crime evidence may be admitted are not exhaustive. *See People v Alvino*, 71 NY2d 233, 241. Evidence of a prior crime or bad act may be admissible without *Molineux* analysis. *Eg People v Sandoval*, 34 NY2d 371, 376. If a defendant offers evidence of good character, the prosecutor may independently prove a previous conviction tending to negate the trait in issue. *See CPL 60.40[2]*; *See also People v Jones*, 278 AD2d 246, 247-248. This defendant expressly claimed that he had done nothing to deserve being held in isolation. While the better practice would have been to discuss amending the preclusion order at sidebar, the court properly admitted the evidence. Order affirmed.

Dissent: [Smith, J] An opening statement is not evidence. Nothing in the defense cross-examination of the first prosecution witness misled the jury. Admitting the highly prejudicial evidence of a pending charge was improper.

Juveniles (Detention) JUV; 230(35)

Huang, as next of friend of Yu v Johnson,
No. 133, 11/15/01

The plaintiff's son was adjudicated a juvenile delinquent and placed in a residential center by the Office of Children and Family Services (OCFS). OCFS required the son to report daily to the center, which he failed to do for a period. OCFS subsequently discovered that the plaintiff's son was jailed at Riker's Island on unrelated charges. OCFS set his release date back to reflect the time that he spent on Riker's Island. The 2nd Circuit certified the question of whether OCFS properly refused to credit him for the time served at Riker's Island when the charge did not culminate in a conviction until after his release from OCFS custody.

Holding: Under Executive Law Section 510-b(7)(b), the right to credit for time served at another facility is contingent on establishing that the other charge did not culminate in a conviction, adjudication or adjustment. It must be shown that a favorable culmination of those other charges occurred before the time for credit to be determined. This interpretation is supported by the legislative history of Section 510-b(7)(b). Certified question answered in the affirmative.

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

Evidence (Sufficiency) EVI; 155(130)

People v Whipple, No. 145, 11/15/01

The defendant was charged with driving while intoxicated in a "public parking lot." However, the prosecution failed to present evidence that the parking lot contained four or more spaces as required under the definition of a

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“parking lot” in the Vehicle and Traffic Law. The defendant moved to dismiss due to this evidentiary insufficiency. The prosecution then successfully moved to reopen its case, and elicited testimony that the parking lot did contain the required number of spaces. The defendant was convicted. The Appellate Division reversed, finding that the trial court’s discretion to permit witnesses to testify out of order did not extend to a situation in which the case was reopened after a meritorious motion to dismiss.

Holding: Where the missing element of a charge is simple to prove and is not seriously contested, and reopening the case does not unduly prejudice the defendant, a court may use its discretion to grant the prosecution’s motion to reopen. The statutory framework of Criminal Procedure Law 260.30 does not interfere with the court’s common law power to alter the order of proof at least until the case goes to the jury. *People v Olsen*, 34 NY2d 349, 353. Order reversed.

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

People v Bludson, No.149, 11/15/01

Holding: The trial court erred in denying the defendant’s challenges for cause regarding two prospective jurors. Despite instructions regarding the presumption of innocence, the prosecution’s burden of proof, and the defendant’s right not to testify, one prospective juror indicated that she would require the defense to prove innocence before she would return a not guilty verdict. Another stated that the defendant’s failure to testify would “make it a little hard for [him] to . . . say that [the defendant was] not guilty.” The court took no corrective action before or after the defense interposed proper challenges for cause, which were denied. The defense then peremptorily challenged both prospective jurors and exhausted all peremptory challenges. The court was required to elicit some unequivocal assurance from the prospective jurors that they would be able to reach a verdict based only on the court’s instructions. The jury’s earlier, collective, acknowledgment that it would follow the court’s instructions was insufficient to constitute the required, unequivocal assurance. *See People v Arnold*, 96 NY2d 358, 363. Order reversed and a new trial ordered.

Constitutional Law (General) CON; 82(20)
Unlawful Imprisonment (General) UNI; 377(17)

Martinez v City of Schenectady, No. 139, 11/19/01

The plaintiff was convicted of drug-related offenses. Her conviction was subsequently overturned and sup-

pression of evidence granted. She sued the City of Schenectady and the individual officers involved, seeking damages for false imprisonment, malicious prosecution, and violations of the New York State Constitution. The court dismissed the complaint and the Appellate Division affirmed.

Holding: Summary judgment was properly granted on all counts. The objective of deterring unconstitutional searches was satisfied by the exclusion of the evidence and reversal of a conviction notwithstanding proof of guilt beyond a reasonable doubt. *Brown v State of New York* (89 NY2d 172) is distinguishable, because the plaintiffs there were never criminally charged, making money damages the only relief available to redress unconstitutional police action.

The existence of probable cause serves as a legal justification for an arrest and an affirmative defense to a claim of false imprisonment. *Broughton v State of New York*, 37 NY2d 451, 458 *cert den sub nom Schanbarger v Kellogg*, 423 US 929. The plaintiff has not met the requirement for recovery for malicious prosecution; the criminal case did not end in a manner that meets the “favorable termination” requirement. *Smith-Hunter v Harvey*, 95 NY2d 191, 199. Order affirmed.

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

People v Nicholas, No. 156, 11/19/01

The defendant was sentenced *in absentia*. The court signed a bail forfeiture order but stayed its enforcement pending further motion of the prosecution. The order was filed in the County Clerk’s office and the prosecution moved to vacate the stay. The company that posted the bail bond argued in opposition that the order was unenforceable because the prosecution had failed to timely file it under CPL 540.10(2), which required that such an order be filed within 60 days. The company asserted that the statutory period runs from the date of the defendant’s first non-appearance. The prosecution countered that the filing of the order was timely because the time period did not begin to run at least until the date when the court first declared that the defendant’s absence was unexcused. The court ruled that the filing of the order was untimely and that the order was therefore unenforceable. The Appellate Division reversed.

Holding: Under the clear language of the statutes addressing bail forfeiture, the time periods for filing a bail forfeiture order and for obtaining vacatur or remission of such an order begin to run when the court “directs” or “declares” forfeiture of the bail bond. Forfeiture does not occur automatically but requires judicial action. The filing of this order, within 60 days of the court’s indication that it would order forfeiture, was timely. Order affirmed.

NY Court of Appeals *continued*

Evidence (Missing Witnesses) EVI; 155(86)

Witnesses (Confrontation of Witnesses) (Interpreters) WIT; 390(7) (35)

People v Diaz, No. 136, 11/20/01

After three mistrials, the complainant, who had testified through a Spanish interpreter, moved to Mexico permanently. Before the next scheduled trial, law enforcement contacted the complainant by phone and asked him to return. No interpreter was used during the phone call. Prosecutors sought to introduce the prior testimony. The defendant objected that this would violate his right to confront prosecution witnesses, but the court admitted the testimony. Upon conviction, the Appellate Division affirmed.

Holding: The prosecutor was required to exercise due diligence to seek the trial presence of a non-English speaking witness by using language that witness understood. The statute that creates an exception to the 6th Amendment right of confrontation, CPL 670.10, must be strictly interpreted. Only English-speaking prosecutors spoke with the complainant via telephone, and one said the complainant “appeared to understand me at some point.” The prosecution failed to explain fully and plainly to the complainant the steps it would take to facilitate his testifying here. That they used an interpreter at previous trials, but not in their attempts to recall the complainant, underscored the lack of diligence. Order reversed.

Dissent: [Wesley, J] Evidence showed that the complainant knew English well enough to comprehend the telephone calls from the prosecution. This case presented a mixed question of law and fact and was beyond the review of the high court. *People v Budd*, 46 NY2d 930, 931.

Ethics (Judicial) ETH; 150(10)

Misconduct (Judicial) MIS; 250(10)

Matter of Going, No. 170, 11/27/01

Judge Going of the Montgomery County Family Court was accused of judicial misconduct based allegations that he had a romantic relationship with a court attorney; mistreated court employees; permitted personal problems to affect his performance and conduct in court; and retaliated against the Chief Clerk for advising the District Administrative Judge of his conduct. He also demonstrated favoritism to a long-time friend, in the midst of a divorce proceeding, through *ex parte* assistance regarding the suspension of the friend’s driver’s license for arrears in child support. The State Commission on

Judicial Conduct sustained charges that Judge Going violated the Rules Governing Judicial Conduct through his lack of judgment and judicial temperament, and the appearance of impropriety. Rules Governing Judicial Conduct 100.1, 100.2[A], 100.2[B], 100.3[B][3], 100.3[B][6], 100.3[C][1], 100.4[A][2]. The Commission directed Judge Going’s removal from office.

Holding: That the second charge was added after the initial complaint did not warrant its dismissal on procedural grounds under Judiciary Law 44, where the judge did not object when notified before the hearing that it would include questioning on the facts that became Charge II. There was sufficient evidence to support the Commission’s decision that the charged conduct “transcends poor judgment” and met the test of “truly egregious,” warranting removal. *Matter of Assini*, 94 NY2d 26, 31. Order affirmed.

Police (Misconduct) POL; 287(32)

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

People v Robinson, Nos. 141, 142, 143, 12/18/01

In three separate cases, police stopped defendants for traffic infractions and arrested them for more serious offenses. The defendants claimed the stops were pretexts to investigate other crimes and moved for suppression of the evidence based on NYS Constitution Article I §12. In *Reynolds*, the decision to suppress the evidence and dismiss the charges was affirmed on appeal. In *Robinson* and *Glenn*, the suppression motions were denied and the convictions upheld on appeal relying on *Whren v United States*, 517 US 806 (1996).

Holding: *Whren* is adopted as a matter of state law. Where a police officer has probable cause to believe that the driver of a vehicle committed a traffic violation, the officer’s primary motivations or the actions of a reasonable officer in that situation are irrelevant under the NYS Constitution. Assuming the traffic stop was justified, the “scope, duration and intensity of the seizure,” and any search are subject to NYS Constitution Article I §12 and judicial review. *People v Troiano*, 35 NY2d 476. Concerns about improper, discriminatory law enforcement can be addressed in civil actions. See *Brown v State of New York*, 89 NY2d 172. Orders affirmed in *Robinson* and *Glenn*, and reversed in *Reynolds*.

Dissent: [Levine, J] Requiring probable cause for a traffic stop does not protect citizens against arbitrary police conduct or racial profiling. *Whren* is inadequate to protect against overreaching by police. New York’s Constitution has afforded greater protections against arbitrary searches than the federal constitution. See *People v*

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Belton, 55 NY2d 49, 52. An objective standard assessing the conduct of a reasonable officer under the circumstances would be appropriate, rather than a subjective primary motivations test. See *United States v Cannon*, 29 F3d 472.

Appeals and Writs (General) APP; 25(35) (45)
(Judgments and Orders Appealable)

Parole (Board/Division of Parole) PRL; 276(3) (10)
(General)

Matter of *Moissett v Travis*, No. 162, 12/20/01

Holding: In a decision without opinion, the appeal is found to be moot. Order affirmed.

[In the trial court, the petitioner had been sentenced to 8 $\frac{1}{3}$ to 25 years in prison. The Parole Board twice denied his release after he reached the minimum time. The petitioner filed an administrative appeal, which was denied, and then an Article 78 proceeding, claiming that the Board did not follow the statutory criteria for making a release determination. The motion was denied and the petitioner appealed. While the appeal was pending, the petitioner appeared before the Board, which again denied his release. The Board of Parole then moved to dismiss the appeal of the first denial as moot. The Appellate Division, by decision and order dated February 8, 2001, held that the Board's subsequent denial of parole release in 1999 rendered the petitioner's Article 78 challenge to the earlier denial moot, and so dismissed the appeal.]

First Department

Juries and Jury Trials (Challenges) JRY; 225(10) (55) (60)
(Selection) (Voir Dire)

Racism (Black Americans) RAC; 317(10)

People v Lopez, 284 AD2d 115, 725 NYS2d 339
(1st Dept 2001)

Holding: The court committed reversible error by determining that no racial discrimination was present in the prosecution's preemptory challenges to remove three of four black prospective jurors where the prosecutor provided a race-neutral explanation only for the third one. *People v Davis*, 253 AD2d 634, 634-635. (Supreme Ct, New York Co [Beal, J])

Impeachment (General) IMP; 192(15)

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

People v Mayo, 284 AD2d 111, 726 NYS2d 32
(1st Dept 2001)

Holding: The defendant's state and federal due process rights were not violated by the nine-year delay between the date of the crime and the defendant's arrest. The delay did shift the burden to establish good cause to the prosecution. See *People v Singer*, 44 NY2d 241, 254. That burden was met by testimony from the prosecution's witness, nine years old at the time of the killing, who explained why she did not come forward until later. See *People v McNeill*, 204 AD2d 975. The record fails to support the defendant's claim that the prosecution violated CPL 60.35(1) by indirectly impeaching their eyewitness during cross-examination of a defense witness. The court gave clear instructions to the jury that the questioning was only an impeachment of the defense's witness. See *People v Davis*, 58 NY2d 1102. Judgment affirmed. (Supreme Ct, Bronx Co [Stadtmauer, J])

Sentencing (Persistent Violent Felony Offender) SEN; 345(59)

People v Gines, 284 AD2d 134, 725 NYS2d 846
(1st Dept 2001)

Holding: The defendant is entitled to resentencing with further proceedings on his persistent violent felony offender status. See *People v Sailor*, 65 NY2d 224 *cert den* 474 US 982. He was statutorily entitled to an adjournment of the hearing for at least two days where he contested his persistent violent felony offender status and did not receive copies of the predicate offender statements until the day of sentencing. See CPL 400.15(6); 400.16(2); *People v Shabazz*, 104 Ad2d 776 *lv den* 64 NY2d 654. Additionally, these statements did not meet the requirements to toll the ten-year period after which a previous conviction may not be used for purposes of sentencing as a second or persistent violent felony offender, because they did not set forth the dates of commencement and termination, or place of imprisonment. Order modified. (Supreme Ct, Bronx Co [Torres, J])

Contempt (General) CNT; 85(8)

Defenses (General) DEF; 105(31)

People v D'Angelo, 284 AD2d 146, 728 NYS2d 132
(1st Dept 2001)

Holding: The prosecution established that the defendant had knowledge of the order of protection by demonstrating the defendant's presence in court, his initials acknowledging receipt of the order, and the court clerk's testimony. See *People v Clark*, 95 NY2d 773. While the contempt statute, Penal Law 215.50(3), sets apart cases growing out of labor disputes as defined by law, this does not

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create an exception that must be proved by the prosecution. It is merely a defense the defendant may raise. See *People v Devinny*, 227 NY397, 401. Order affirmed. (Supreme Ct, New York Co [Obus, JJ])

Possession (General) POS; 288.3(10)

Weapons (Firearms) WEA; 385(21)

In Re Christine E., 284 AD2d 167, 728 NYS2d 429 (1st Dept 2001)

Holding: Family Court’s finding, based on constructive possession, that the appellant had committed two firearm offenses is reversed. There is no evidence that the appellant, who was merely present in the apartment, exercised dominion or control over the guns found there. See *People v Edwards*, 206 AD2d 597 *lv den* 84 NY2d 907. Neither the guns nor the ammunition were in the room where the appellant was seated and they were not in plain view. Compare *People v Bundy*, 90 NY2d 918. There was no evidence that the appellant exercised control or dominion over the apartment. No keys to it were found in her possession and none of her property was found there. See *People v Casanova*, 117 AD2d 742. Order reversed, petition dismissed. (Family Ct, New York Co [Rand, JJ])

Contempt (General) CNT; 85(8)

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

In re Stephen F. Steward, 284 AD2d 173, 727 NYS2d 74 (1st Dept 2001)

Holding: Criminal contempt was proven beyond a reasonable doubt by evidence that the appellant disclosed only a tiny part of his criminal record in a questionnaire and continued the concealment during oral *voir dire*. Although he was arrested on charges unrelated to this matter, “his concealment directly tended to impair the respect due the court’s authority . . .” See *Clark v United States*, 289 US 1, 10-11. Due process was not denied; the amended order to show cause gave sufficient notice of the accusation by stating that the appellant “intentionally and purposefully failed to disclose his arrests and convictions, as set forth in his NYSID . . . sheet.” Counsel was appointed before service of the notice, served with copies of the questionnaire and the NYSID sheet, and given a fair opportunity to present a defense. Specific notice that part of the contempt consisted of answers to the prosecutor’s questions would not have facilitated the defense on the merits. See *Matter of Spector v Allen*, 281 NY 251, 257. The court properly exercised its discretion by denying a motion for recusal. There was no indication that the court

was unable to reach its decision based on the evidence presented at the hearing, and pretrial comments did not reflect bias but a reasonable view based on facts learned through the court’s adjudicatory functions. See *People v Moreno*, 70 NY2d 403, 405-406. Order affirmed. (Supreme Ct, Bronx Co [Price, JJ])

Insanity (Civil Commitment) ISY; 200(3)

In Re Application of Anonymous v Carmichael, 284 AD2d 182, 727 NYS2d 408 (1st Dept 2001)

The petitioner had been diagnosed with schizoaffective disorder, bipolar type. He had been in and out of mental hospitals since 1974 and had been treated with the antipsychotic Haldol. He was transferred to Bronx Psychiatric Center in 2000 after which a court ordered that he be retained for up to a year under Mental Hygiene Law (MHL) 9.33. When he sought rehearing and review under MHL 9.35, a physician testified that he examined the petitioner, reviewed his medical records, spoke to his physicians and family, and concluded that inpatient hospitalization was absolutely essential for the petitioner’s welfare. The doctor opined that if released, the petitioner would deteriorate and would be a danger to himself and others. The jury found that while the petitioner was mentally ill, retention was not essential. A motion for judgment notwithstanding the verdict (jnov) was denied.

Holding: The court erred. The respondent established by clear and convincing evidence the necessary elements: the petitioner is mentally ill, in need of continued, supervised care and treatment, and poses a substantial threat of physical harm to himself and/or others. See *Matter of Ford v Daniel R.*, 215 Ad2d 294, 295. No rational interpretation of the evidence presented would support the finding that the petitioner did not need involuntary hospitalization. See *Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499. Order reversed, jnov granted. (Supreme Ct. Bronx Co [Silver, JJ])

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

Motions (Pre-trial) MOT; 255(25)

People v Hill, 284 AD2d 193, 726 NYS2d 103 (1st Dept 2001)

Holding: The court had warned the defense not to use as a sword its pretrial ruling barring admission of the drug-trafficking relationship between the defendant and the complainant, and their status as codefendants in a pending case. The defendant then revealed these facts during direct testimony, making it appear that the prosecution had hidden them. The court’s resulting instructions to the jury that the evidence had originally been precluded at the defendant’s request was a proper exercise of discretion. Cf *People v Fardan*, 82 NY2d 638. There was nothing in the curative instructions that could be viewed

First Department *continued*

as disparaging the defendant or defense counsel. *Compare People v Henderson*, 169 AD2d 647. Order affirmed. (Supreme Ct, Bronx Co [Marcus, J])

Impeachment (General) IMP; 192(15)

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

People v Byrd, 284 AD2d 201, 728 NYS2d 134
(1st Dept 2001)

Holding: The court properly exercised its discretion in imposing reasonable limitations on the defendant's questioning of prospective jurors during voir dire. The defendant was not prevented from pursuing any substantively relevant line of inquiry. The precluded inquiries were "generally improper in form, particularly when they consisted of open-ended invitations to the panelists to relate anecdotes, factual information and opinions concerning their attitudes towards drug trafficking and law enforcement." See *People v Hernandez*, 276 AD2d 274 lv den 95 NY2d 964. The court properly precluded impeachment of two police witnesses with their omission of certain facts during testimony because the defendant failed to lay a proper foundation. See *People v Bornholdt*, 33 NY2d 75, 88 cert den sub nom *Victory v New York*, 416 US 905. Order affirmed. (Supreme Ct, New York Co [Cropper, J])

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

Insanity (General) ISY; 200(27)

People v Anonymous, 284 AD2d 207,
726 NYS2d 547 (1st Dept 2001)

Holding: The order civilly committing the defendant clearly arose out of the criminal proceeding against him. See *People v Santos*, 64 NY2d 702. It is not a disposition listed as appealable in Criminal Procedure Law 450.10 or 450.15, which provide the sole basis for criminal appeals. See *People v Stevens*, 91 NY2d 270, 277. Therefore, the order cannot be appealed from. Appeal dismissed. [Supreme Ct, New York Co [Kahn, J]]

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

Insanity (Civil Commitment) ISY; 200(3)

In Re Application of Bronx Psychiatric Center,
283 AD2d 73, 728 NYS2d 10 (1st Dept 2001)

Holding: Suffering from a worsening psychosis and noncompliant with treatment, the respondent was transferred to Bronx Psychiatric Center. She objected to pro-

posed anti-psychotic medication. Her treating physician and a reviewing doctor found the respondent likely to be dangerous to herself and others, and impaired in her capacity to make a decision about treatment. On Nov. 15, the respondent's counsel was notified that court authorization of treatment would be sought; counsel did not receive the treating physician's evaluation until Nov. 17. The court was correct to dismiss the proceeding to compel treatment of the respondent over her objection because the petitioner had failed to provide counsel with timely notice of the treating physicians' determination. The purposes of the regulatory scheme involving involuntary treatment (see gen 14 NYCRR 527.8, promulgated in response to *Rivers v Katz*, 67 NY2d 485) include not only swift delivery of critically important psychiatric services, but respecting the autonomy of the patient. Counsel is made available for that purpose, and no reason has been shown why the notification to counsel here was tardy or why it could not have been timely delivered. Order affirmed. (Supreme Ct, Bronx Co [Bowman, J])

Insanity (Post-Commitment Actions) ISY; 200(45)

In re Order of Conditions, People v Dennis S.,
284 AD2d 241, 728 NYS2d 136 (1st Dept 2001)

The defendant was charged with murder, and was found not guilty by reason of insanity in 1980. He remained hospitalized, and has been gradually afforded furlough privileges that now permit him to live in the community and spend only one night in 14 in the hospital.

Holding: The prosecution challenged an order issued by the Criminal Term pursuant to Criminal Procedure Law 330.20(12) setting forth conditions upon which the defendant's release from a psychiatric center was to be premised. The statute vests ultimate authority with the court, not the Office of Mental Health. The court has broad discretion to fashion an order of conditions including any conditions in addition to those prescribed by the statute, that it determines are reasonably necessary and appropriate. CPL 330.20 does not require a separate hearing as to the contents of an order of conditions. Nor does it require that the order be issued in the presence of the defendant to facilitate contempt proceedings for noncompliance. Resort to contempt to coerce compliance or address noncompliance is unnecessary. See CPL 330.20(14); see also Mental Hygiene Law 9.37, 9.39, 9.40, and 9.43. This order provides for modification of the conditions, allowing the Commissioner to exercise statutory and regulatory authority to insure proper treatment and protect the public. Order affirmed. (Supreme Ct, New York Co [Soloff, J])

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

First Department *continued*

People v Hausman, 285 AD2d 352, 727 NYS2d 109 (1st Dept 2001)

The defendant was charged with manslaughter. Defense counsel intended to argue self-defense and raised with the jury during *voir dire* the fact that an illegal handgun was involved. One juror expressed the opinion that someone who puts a gun in his pocket “plans to use it.” Asked if his feelings about guns would interfere with his ability to be fair, the juror repeated his belief that someone carrying an illegal gun was predisposed to use it. The court asked if the juror could follow the court’s self-defense instructions; the juror said, “I believe I could.” The court denied the defendant’s challenge for cause.

Holding: The potential juror was never asked to state unequivocally that he could render an impartial verdict. CPL 270.20[1][b]. Where no unequivocal assurance of impartiality is given, reversal is required. *People v Braxton*, 277 AD2d 39 *lv den* 95 NY2d 961. Courts should discharge jurors for cause if any doubt remains that they cannot be unbiased. *People v Blyden*, 55 NY2d 73, 77-78. The juror’s opinions about gun possession were not dispelled through a promise to follow the court’s instructions. *People v Arnold*, 96 NY2d 358. Judgment reversed, indictment dismissed with leave to represent. (Supreme Ct, New York Co [Berkman, JJ])

Evidence (Hearsay) EVI; 155(75)

People v Lopez, 285 AD2d 356, 728 NYS2d 145 (1st Dept 2001)

Holding: In a trial for aggravated criminal contempt, the prosecution offered out-of-court statements made by the complaining witness, who claimed to have been attacked by the defendant, to the police who arrived at the scene in response to 911 call. The defense raised a hearsay objection. Excited utterances made while the speaker’s excitement persists are an exception to the rule against admitting hearsay. *People v Brown*, 70 NY2d 513, 519-522. The complainant’s statements were made shortly after a physical attack and while she still suffered from injuries. There was no time for studied reflection. *People v Edwards*, 47 NY2d 493, 497. Judgment affirmed. (Supreme Ct, New York Co [Zweibel, JJ])

Evidence (Newly Discovered) EVI; 155(88)

People v Wainwright, 285 AD2d 358, 727 NYS2d 106 (1st Dept, 2001)

Based on newly discovered evidence, the defendant filed a CPL 330.30 motion to set aside the verdict convict-

ing him of selling heroin. The defendant believed that his co-defendant had made an exculpatory statement about the defendant to the police when the defendant was arrested. At the post-trial hearing, the co-defendant testified that he did not purchase drugs from the defendant, but denied making a statement to that effect when he was arrested. The defendant admitted knowing about the co-defendant earlier but made no effort to locate him, lacking an address, or inform his attorney until trial, when he told the attorney that the co-defendant was probably “dead.” By that, he later said, he meant the co-defendant’s whereabouts were unknown. At trial, a decision was made not to call witnesses since no prosecution witness was called to testify that drug money was found on the defendant. The court set aside the verdict.

Holding: The defendant failed to meet the standard for setting aside a verdict based on newly discovered evidence. He knew of the co-defendant’s existence before trial. His interest in the co-defendant as a witness really dated from an encounter with him in jail after conviction. The co-defendant’s testimony probably would not have changed the result of the trial. *People v Salemi*, 309 NY 208, 215-216 *cert den* 350 US 950. The defendant did not use due diligence to find the witness before trial, and failed to inform his attorney until much later. See *People v Copeland*, 185 AD2d 280 *lv dismd* 80 NY2d 902. The attorney’s decision not to call any witnesses was a reasonable trial strategy and done with the defendant’s consent. Order reversed, verdict reinstated. (Supreme Ct, New York Co [Drager, JJ])

Contempt (Procedure) CNT; 85(10)

Application of Brodeur v Levitt, 285 AD2d 365, 726 NYS2d 661 (1st Dept 2001)

The defendant appeared in court during calendar call wearing a ripped T-shirt and boxer shorts. Speaking with the judge, he asserted a free speech right to extend his two middle fingers and to engage in verbal ridicule. The judge warned the defendant to be quiet and after another outburst ordered him removed from the courtroom. Several hours later, when the courtroom was almost empty, the defendant was returned, held in contempt, and sentenced to 30 days in jail.

Holding: Summary contempt is reserved for actions that disrupt or threaten to disrupt proceedings, and decisions must be determined and punished immediately. 22 NYCRR 604.2[a]. The defendant’s actions would have justified a contempt finding. See *Matter of Levine v Recant*, 278 AD2d 124. When the court deferred the contempt finding and punishment, the immediateness of the response was lost and summary action was no longer appropriate. *Matter of Breitbart v Galligan*, 135 AD2d 323. Order nullified. (Supreme Ct, New York Co [Lippmann, JJ])

First Department *continued*

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

People v Jackson, 285 AD2d 416, 727 NYS2d 881 (1st Dept 2001)

The defendant was arrested for criminal possession of a controlled substance after being stopped at a roadblock. Prosecution witnesses stated various reasons for the roadblock, including detection of carjackings and taxi/livery robberies, to suppress crime generally, and safety inspection for licenses and vehicle registrations. The defendant moved to suppress the evidence.

Holding: The prosecution witnesses' generalized assertions about the increase in various types of crime were insufficient to support the roadblock. *Cf Matter of Muhammad F.*, 94 NY2d 136. Assuming without deciding that detecting carjackings and taxi/livery robberies would meet the lawful goals for roadblocks in *Indianapolis v Edmond* (531 US 32 [2000]), the nonspecific evidence here required suppression. Judgment reversed, indictment dismissed, matter remitted. (Supreme Ct, New York Co [McLaughlin, J at hearing, Drager, J at plea and sentence])

Search and Seizure (General) (Stop and Frisk) SEA; 335(42) (75)

In re Koleaf J, 285 AD2d 418, 729 NYS2d 18 (1st Dept 2001)

Police received an anonymous tip regarding "two black males, about 14 years old, wearing red, carrying a gun" at a particular location. Upon arriving, the police saw a group of teenagers, two (including the defendant) wearing red sweatshirts. One officer approached the defendant, who was sitting on a bench with a few other teenagers, and asked him to stand up. The defendant did not act threateningly, suspiciously or try to flee. The officer touched the defendant's waistband area and discovered a hard object underneath his sweatshirt. He asked the defendant to lift his shirt, revealing a gun. Suppression of the gun was denied. The court found the police officer's pat down reasonable based on the information received. The defendant was adjudicated a juvenile delinquent for criminal possession of a weapon.

Holding: An anonymous tip that a person was carrying a gun, without more, was insufficient to meet the standard for reasonable suspicion needed to justify a stop and frisk. *Florida v J.L.*, 529 US 266 (2000). The anonymous tip was only a detailed description by an unaccountable person of the visible attributes a certain person said to be at a certain location with a gun. *People v Ballard*, 279 AD2d 529.

Order reversed, petition dismissed. (Family Ct, New York Co [Bednar, J])

Insanity (General) (Post-Commitment Actions) ISY; 200(27) (45)

Application of Manhattan Psychiatric Center, 285 AD2d 189, 728 NYS2d 37 (1st Dept 2001)

The respondent was voluntarily transferred, under Mental Hygiene Law (MHL) 9.13, to the Manhattan Psychiatric Center (MPC) following his commitment under a CPL 730 finding that he was incompetent to stand trial on felony assault charges. One year later, MPC, with the respondent's consent, petitioned for an "assisted outpatient treatment" (AOT) order pursuant to Kendra's Law, MHL 9.60. The petition was ultimately granted, but earlier denials were appealed.

Holding: Although the AOT order was eventually granted, this case is not moot because it concerns issues that are likely to be repeated and typically evade review, and implicates substantial and novel issues concerning the interpretation of a newly enacted statute balancing the rights of mentally ill persons with the need for public safety. It raises the issue of whether the court, which held the order and judgment granting AOT in abeyance for an independent psychiatrist's opinion, exceeded its authority. *See Chenier v Richard W.*, 82 NY2d 830.

Kendra's Law empowers courts to order psychiatric treatment for mentally ill persons, when necessary, through AOT. Here, the treating psychiatrist testified that the respondent met the statutory criteria for Kendra's Law. A court's role under this statutory scheme is limited to ascertaining whether a petitioning hospital has proved justification for restricting a patient's liberty by ordering AOT. The question under Kendra's Law is not whether to release the patient, but whether to do so with or without an AOT order. Orders of Apr. 3 and May 8, 2000, denying AOT, reversed. (Supreme Ct, New York Co [McCooe, J])

Search and Seizure (Automobiles and Other Vehicles) SEA; 335(15)

People v Rivera, 286 AD2d 235, 729 NYS2d 481 (1st Dept 2001)

Police stopped a van for traffic violations. When the van stopped, the police observed a passenger, the defendant, jump out, grasp his waist area, and run. They pursued him and saw a gun in his hand. After he entered a building, then an apartment in which he did not reside, he was captured. Charged with possessing a weapon, the defendant moved to suppress the evidence. The trial court granted the motion finding that the police had no suspicion of criminality regarding the passenger of a stopped vehicle.

First Department *continued*

Holding: There was a basis to stop the van for running a red light and nearly striking the undercover police car. *See People v Ingle*, 36 NY2d 413. When the defendant grasped his waist area, he signaled that he might have a weapon, justifying police action. *People v De Bour*, 40 NY2d 210, 221; *People v Benjamin*, 51 NY2d 267, 271. The defendant’s own conduct “provided the predicate for the chase within the parameters” of *People v Holmes* (81 NY2d 1056) and provided a basis for seizing the weapon. *See People v Leung*, 68 NY2d 734, 736. Order reversed, matter remanded. (Supreme Ct, New York Co [Altman, J])

Concurrence: [Tom, J] On the facts of this case, “what else would a reasonable and responsible police officer do?”

Judges (Powers) JGS; 215(10)

Sentencing (General) SEN; 345(37)

People v Dottery, 286 AD2d 247, 728 NYS2d 373 (1st Dept 2001)

Holding: The defendant pled guilty to second-degree robbery. At first, the sentencing court had offered a seven-year sentence, contingent upon consent of a previous Justice before whom the case had been pending before the plea. Based on the earlier Justice’s recommendation, the sentencing court sentenced the defendant to eight years. The defendant’s claim that the sentencing court improperly delegated its duty to exercise sentencing discretion to another Justice was unpreserved for appellate review. *See People v Samms*, 95 NY2d 52, 58. However, it was improper for the sentencing court to defer its decision to the previous Justice. *See People v Farrar*, 52 NY2d 302, 305. The defendant’s sentence should be reduced to the originally offered seven years. Judgment modified. (Supreme Ct, New York Co [FitzGerald, J])

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

Misconduct (General) (Prosecution) MIS; 250(7) (15)

Ramos v City of New York, 285 AD2d 284, 729 NYS2d 678 (1st Dept 2001)

The plaintiff sued New York City and a prosecutor under several tort theories and 42 USC 1983 for violating his civil rights (by, *inter alia*, failing to disclose exculpatory *Brady* material) when he was successfully but wrongly prosecuted for sexually abusing a child. After he had spent seven years in prison, his conviction was overturned, largely on the basis of information provided by an investigator hired by the City in defense of a civil suit brought by the alleged victim and her mother. The prose-

curator’s office obtained a partial protective order from discovery in the negligent supervision action. The Human Resources Administration (HRA), which investigated the case, claimed to have turned over all files to the District Attorney (DA) at the time of prosecution. The City moved for summary judgment on several of the causes of action.

Holding: “[I]n view of the particular contempt society holds for such individuals [sexual predators], diligent prosecutions must also be scrupulous prosecutions to avoid convictions of innocent persons caught in the public frenzy to remove these predators from society.” Summary judgments for malicious prosecution against HRA and the 1983 claim based on the District Attorney’s alleged policies or customs were improperly granted. The plaintiff’s allegations of withholding exculpatory material and negligent investigation stated valid factual issues for malicious prosecution against HRA. *See Parkin v Cornell University*, 78 NY2d 523, 529. The DA’s actions raised questions of fact; the DA’s role as policymaker and manager did not absolve the City of liability. The plaintiff has “made a sufficient threshold showing that systemic failure rather than merely [ADA] Farrell’s conduct caused the constitutional harm here.” Discovery must be expanded; Federal law, not state norms, govern 1983 actions. Order modified, fifth cause of action reinstated, and as modified, affirmed. (Supreme Ct, Bronx Co [Green, J])

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

People v Gil, 285 AD2d 7, 729 NYS2d 121 (1st Dept 2001)

At the defendant’s arraignment for burglary, kidnapping and robbery, he met his attorney, hired by a relative, for the first time. The prosecution served notice of its intent to introduce the defendant’s statement and three identifications. Defense counsel proposed to waive pre-trial motions if the prosecution was ready for trial, and on his advice, the defendant consented. The trial began the same day. Upon conviction, the defendant filed a CPL 440 motion alleging ineffective assistance of counsel. The motion was denied since it lacked an affidavit from counsel explaining trial tactics.

Holding: Failure to include trial counsel’s affidavit or an explanation for not providing it generally warrants denying a post-conviction motion without a hearing. CPL 440.10; *see People v Morales*, 58 NY2d 1008. Circumstances may justify omission of the affidavit; defense counsel’s disbarment before the post-conviction proceeding was sufficient to prevent summary denial of the motion. Even without an affidavit, the record supported a finding of ineffective assistance of counsel. *See People v Brown*, 45 NY2d 852. Defense counsel’s decision to go to trial at arraignment without preparation or discovery and waiving all suppression motions was not “a reasoned, profes-

First Department *continued*

sional judgment.” The possible advantages for a speedy trial claim by “calling the People’s bluff” were outweighed by the importance of challenging the statement and identifications before trial. *People v Rivera*, 71 NY2d 705, 709. The defendant did not receive meaningful representation. Judgment reversed, matter remanded for new trial. (Supreme Ct, Bronx Co [Price, JJ])

Ethics (General)

ETH; 150(7)

Matter of Holley, 285 AD2d 216, 729 NYS2d 128
(1st Dept 2001)

Accused of improperly disclosing a sealed court document to a news service and then denying the action at a hearing in federal court, the respondent attorney was charged by the Disciplinary Committee with professional misconduct. All the charges were dismissed except a violation of DR 1-102(A)(8)[now (7)][conduct which adversely reflects on a lawyer’s fitness to practice law]. Public censure was recommended after the sanction hearing based on the respondent’s failure to assess the impact of disclosing the document to the media. ABA Standards for Imposing Lawyer Sanctions §4.23. The respondent argued that the sanction was unwarranted in light of his prior unblemished record and minimal harm to the parties involved, and that the application of a new standard of conduct violated due process.

Holding: The respondent failed in his duty to preserve client confidences by negligently disclosing a sealed court filing to the news media. Public censure was warranted to put the bar on notice of the importance of taking precautions to preserve confidential client information. The respondent’s failure to do so was careless and reflected adversely on his fitness to practice law. *Matter of Marrin*, 207 AD2d 239. The respondent’s due process rights were not violated by discipline, since a reasonable attorney would have been on notice that revealing sensitive information about client matters to reporters could be held to reflect adversely on his or her fitness as a lawyer. *Matter of Holtzman*, 78 NY2d 184, 191 *cert den* 502 US 1009. Motion to confirm granted, stay pending appeal and anonymous publication denied.

Homicide (Murder [Defenses])

HMC; 185(40[a])

Instructions to Jury (Theories of Prosecution and/or Defense)

ISJ; 205(50)

People v Roche, 286 AD2d 290, 729 NYS2d 722
(1st Dept 2001)

The defendant was charged with the murder of his wife. Evidence showed that the defendant attacked her in

a fit of rage. The defense characterized the action as loss of self-control; the prosecution called it anger. Evidence also showed that the wife verbally and emotionally abused the defendant.

Holding: The trial court improperly denied the defendant’s request for a jury charge on extreme emotional disturbance. Penal Law 125.25[1][a]. This affirmative defense depends on the presence of both a subjective element, the defendant’s state of mind at the time of the crime, and an objective element, a reasonable explanation or excuse for the emotional disturbance. *People v Harris*, 95 NY2d 316, 319. The evidence of this defendant’s loss of self-control and the abusive relationship was sufficient to permit a jury to consider whether extreme emotional disturbance was proven by a preponderance of the evidence. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [White, JJ])

Dissent: [Tom, JJ] The defense at trial was that the defendant did not kill the victim. No testimony was elicited to explain what trauma would have supported a defense of extreme emotional disturbance.

Second Department**Evidence (Exclusionary Rule)**

EVI; 155(53)

Identification (Suggestive Procedures)

IDE; 190(50)

People v Joyner, 284 AD2d 344, 726 NYS2d 434
(2nd Dept 2001)

Holding: The court should not have permitted the prosecution to introduce into evidence the grand jury testimony and audiotaped interview of the complainant referring to the lineup identification of the defendant. The testimony of the detective who conducted the lineup should also not have been allowed. The court had determined that the lineup identification resulted from an unduly suggestive procedure and that evidence of that lineup was not to be allowed at trial. While the court found at a later *Sirois* hearing (*see Matter of Holtzman v Hellenbrand*, 92 AD2d 405) that threats by the defendant had made the complainant unavailable to testify, that did not justify the introduction of this evidence. Use of prior identification evidence that was the product of impermissibly suggestive circumstances offends due process. *See People v Cotto*, 92 NY2d 68. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Aiello, JJ])

New York State Agencies (Law, Department of)

NYA; 266.5(165)

Prosecutors (Decision Making)

PSC; (310)(10)

Second Department *continued*

People v Gilmour, 284 AD2d 341,
725 NYS2d 668 (2nd Dept 2001)

The defendant contended that the Attorney General (AG) lacked authority to prosecute him in this case alleging multiple counts of possession of sexual performances by a child. The AG relied on a letter he received from counsel for the New York State Police, asking his office to investigate and prosecute the defendant.

Holding: The AG has no general prosecutorial authority and, except where permitted by statute, no power to prosecute criminal actions. *See Della Pietra v State of New York*, 71 NY2d 792, 796-797. Executive Law 63(3) permits the AG to prosecute “indictable offenses ‘[u]pon request of the governor * * * or the head of any other department, authority, division or agency of the State . . .’” This statute should not be strictly construed, but read in a way that accomplishes the purpose intended. *See People v Liebowitz*, 112 AD2d 383, 384. The authority to act on behalf of a department head may be established by extrinsic evidence. *See People v Stuart*, 263 AD2d 347. But here there was no indication in the letter or anywhere in the record that the Superintendent of the State Police requested a prosecution or authorized the AG to act on his behalf. “Neither the ‘presumption of regularity’ applicable to all official acts of individuals functioning under an oath of office (*Virag v Hynes*, 54 NY2d 437, 443), nor the Superintendent’s general authority under regulations to appoint a counsel, can constitute a proper authorization under Executive Law §63(3) (*see, People v Fox*, 253 AD2d 192 . . .).” Lacking prior authorization, the AG had no authority to proceed. Judgment reversed, indictment dismissed, matter remitted. (Supreme Ct, Richmond Co [Rooney, J])

Trial (Public Trial) TRI; 375(50)

Witnesses (Police) WIT; 390(40)

People v Blake, 284 AD2d 339, 726 NYS2d 433
(2nd Dept 2001)

The defendant wanted his brother and cousin in the courtroom while an undercover officer was testifying. Evidence was submitted by the prosecution at a *Hinton* hearing (*see People v Hinton*, 31 NY2d 71 *cert den* 410 US 911). The court determined that because of ongoing investigations, the safety of the officer and of cases would be endangered if their identities were revealed.

Holding: When a defendant seeks to limit closure to allow the attendance of certain individuals, the prosecution must present evidence that those individuals threaten the witness’s safety. *See People v Nieves*, 90 NY2d 426. The defendant’s brother and cousin lived within the area

of the undercover operations. The officer reasonably feared that they would be able to identify him working, jeopardizing himself and his team. *See People v Feliciano*, 228 AD2d 519. Judgment affirmed. (Supreme Ct, Richmond Co [Rooney, J])

Burglary (Elements) BUR; 65(15)

Evidence (Sufficiency) EVI; 155(130)

People v Lowe, 284 AD2d 413, 728 NYS2d 167
(2nd Dept 2001)

After the defendant was convicted of second-degree burglary, the court set aside the verdict concluding that the prosecution had failed to establish one of the elements, *ie* that the building the defendant entered was a dwelling. According to the defendant the building wasn’t furnished, it hadn’t been lived in for a year, and the owner had no intention of living there himself.

Holding: The prosecution argues that because the building was designed as a residence, was in a residential neighborhood, and had not been used as anything but a residence, it was a dwelling under Penal Law 140.00(3). *See People v Quattlebaum*, 91 NY2d 744. The building was under renovation and was not a dwelling. At the time of the burglary, it was entirely unfurnished. Nobody regarded it as their place of residence, either permanent or temporary. It was not suitable for civilized habitation in a practical sense at the time. Judgment affirmed. (Supreme Ct, Queens Co [Dunlop, J])

Trials (Public Trials) TRI; 375(50)

People v James, 284 AD2d 409, 728 NYS2d 166
(2nd Dept 2001)

At the prosecution’s request, a spectator who had been conferring with the defense was asked to leave the courtroom because it was alleged that the spectator’s presence was intimidating.

Holding: In support of the request, the prosecutor said that the father of the decedent in the case said another testifying witness said the spectator had made threatening gestures to him, and another potential witness said the spectator had harassed her. The court noted on its own when excluding the spectator that his red clothing worn two days in a row signified gang membership. The court did not ask the prosecutor to name the witness who had allegedly complained of harassment or inquire of that witness himself despite his immediate availability. There was nothing in the record to support the trial court’s finding that the spectator was a gang member. This limited inquiry was insufficient to justify the removal of the spectator. *See People v Tolentino*, 90 NY2d 867, 869. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Goldberg, J])

Second Department *continued*

Trial (Public Trial) TRI; 375(50)

People v Ematro, 284 AD2d 408, 728 NYS2d 162
(2nd Dept 2001),

Holding: The defendant's girlfriend was excluded from the courtroom during the testimony of two undercover officers. The prosecution conceded on appeal that the defendant was denied the right to a public trial. *See* US Const, 6th Amend; Civil Rights Law §12; Judiciary Law §4; *People v Jones*, 47 NY2d 409 *cert den* 444 US 946. The evidence adduced at the *Hinton* hearing (*People v Hinton*, 31 NY2d 71 *cert den* 410 US 911) was not enough. "Before a trial court may exclude a specific individual from the courtroom by a closure order, the People must present evidence that the individual poses a threat to the safety of an undercover officer, who is going to testify (*see, People v Rentas*, 253 AD2d 469; *People v Scott*, 237 AD2d 544; *People v Gayle*, 237 AD2d 532). Here, the girlfriend's residence in Brooklyn, where the 'buy and bust' operation took place, was the only reason advanced by the People for her exclusion. This reason was insufficient [citations omitted] and therefore the defendant is entitled to a new trial." Judgment reversed, new trial ordered. (Supreme Ct, Kings Co, [Carroll, JJ])

Third Department

Driving While Intoxicated (Prior Convictions) DWI; 130(20)

Sentencing (Excessiveness) SEN; 345(33)

People v Price, 286 AD2d 802,
730 NYS2d 355 (3rd Dept 2001)

The defendant pled guilty to operating a motor vehicle under the influence of alcohol.

Holding: The defendant argues that her sentence was excessive given that she is an alcoholic, and that she should be sent to an inpatient treatment program. A prison sentence may be modified on appeal in the interests of justice. *See People v Sheppard*, 273 AD2d 498, 500 *lv den* 95 NY2d 908. This is so even where, as here, the defendant has waived the right to appeal. *See People v Coleman*, 281 AD2d 653. However, no showing has been made that this case presents extraordinary circumstances warranting modification. *See People v Gotham*, _ AD2d_, 725 NYS2d 235. The defendant has an extensive criminal record and stands convicted of serious crimes for which the sentence imposed was appropriate. *See People v McNeil*, 268 AD2d 611, 612. Judgment affirmed. (County Ct, Schoharie Co [Bartlett III, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

People v Chilson, 286 AD2d 828, 731 NYS2d 88
(3rd Dept 2001)

Holding: The defendant was classified as a level 3 sex offender pursuant to the Sex Offender Registration Act. She contends that her guilty plea and participation in a sex offender treatment plan indicate her acceptance of responsibility for her actions. However, the presentence report says that after plea allocution, the defendant denied sexually abusing her children, and participation in the treatment program was a condition of probation. While a guilty plea could be viewed as an initial step toward the acceptance of responsibility (*see People v MacNeil*, 283 AD2d 835), denial of guilt during the presentence investigation reflects a lack of acceptance of responsibility uncontradicted by the record. *Cf Matter of Van Dover v Czajka*, 276 AD2d 945. Order affirmed. (County Ct, Cortland Co [Avery Jr., JJ])

Driving While Intoxicated (Chemical Test) DWI; 130(5)

Sentencing (Concurrent/Consecutive) SEN; 345(10) (33)
(Excessiveness)People v Richburg, 731 NYS2d 256
(3rd Dept 2001)

The defendant was convicted of operating a motor vehicle under the influence of alcohol and aggravated unlicensed operation of a motor vehicle. Consecutive sentences were set of one and one-third to four years plus a fine on each charge.

Holding: A defendant's refusal to submit to a chemical test is admissible as evidence if the prosecution shows that "the person was given sufficient warning . . . of the effect of such refusal and that the person persisted in the refusal." *See eg People v Thomas*, 46 NY2d 100 *app dismd* 444 US 891; Vehicle and Traffic Law 1194(2)(f). The officer who spoke to the defendant in the hospital before the defendant's surgery said the defendant spoke in incomplete sentences, smelled of alcohol even wearing an oxygen mask, and refused to submit to a blood test after being read the applicable warnings. After the warnings were repeated, the defendant turned away from the officer. The refusal was properly admitted into evidence.

The imposition of consecutive sentences for felony driving while intoxicated and first-degree aggravated unlicensed operator is not prohibited by Penal Law 70.25 (2), nor are the sentences harsh and excessive. Judgment affirmed. (Supreme Ct, Albany Co [Lamont, JJ])

Third Department *continued*

Discovery (*Brady* Material and Exculpatory Information) (Preservation of Materials) DSC; 110(7) (25)

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

People v Bryce, 731 NYS2d 263 (3rd Dept 2001)

The defendant was convicted of second-degree murder for the death of his child. His CPL 440.10 motion to vacate the conviction, based in part on evidence of no skull fracture found when the body was later exhumed, was denied.

Holding: The defendant’s medical experts were unable to examine the infant’s skull prior to the trial, while several prosecution experts had done so. Regardless of who was to blame for the unavailability, it “fundamentally affected the reliability of the verdict.” Although there was testimony establishing the infant’s considerable injuries aside from the purported skull fracture, in the exercise of discretion in the interest of justice, the defendant is entitled to a new trial. *See* CPL 440.10 (3) [last paragraph]; 470.15(1)(3)[c]; 470.25(2)[a]. Order reversed, motion granted, new trial ordered. (County Ct, Albany Co [Rosen, J])

Concurrence: [Crew III, J] The defendant is entitled to relief based on ineffective assistance of counsel, though that ground was not raised in the 440 motion.

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

People v Dove, 731 NYS2d 769 (3rd Dept 2001)

The defendant was convicted of possession and sale of drugs.

Holding: Despite receiving a favorable ruling prohibiting the introduction of evidence of uncharged crimes, much of defense counsel’s attempt to attack the credibility of the prosecution’s confidential informant consisted of eliciting numerous prior uncharged drug sales between the confidential informant and the defendant. Coupled with counsel’s failure to request limiting instructions regarding this evidence, and the court’s failure to include such a limitation in its charge, this constituted ineffective assistance of counsel for which reversal is mandated. *See People v Butts*, 177 AD2d 782; *People v Vannoy*, 174 AD2d 790. Judgment reversed, new trial ordered. (County Ct, Schenectady Co [Austin, J])

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

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

People v Perron, 731 NYS2d 512 (3rd Dept 2001)

The defendant was convicted of rape, sodomy, attempted murder, and assault. He unsuccessfully appealed, then moved to vacate the convictions and set aside the consecutive sentences (aggregating to 25 to 50 years) because he had received ineffective assistance of counsel. The trial courts’ denial of those motions without a hearing was reversed. On remittal, the court refused to vacate the convictions and, after a hearing, imposed sentences aggregating to 16½ to 50 years.

Holding: The claim of ineffectiveness is based primarily on two inadequacies: (1) counsel’s mistaken assurances that the defendant would be sentenced concurrently if convicted, and (2) counsel’s failure to contest the defendant’s status as a second felony offender, which was shown at the remittal hearing to have been improper. Such inadequate representation demonstrates patent prejudice, as the defendant was prevented from properly assessing the risks associated with going to trial as opposed to taking a plea. *See People v Bachman*, 272 AD2d 718 *lv den* 95 NY2d 903. Order reversed, motion to vacate granted, new trial ordered. (County Ct, Washington Co [Berke, J])

Evidence (Burden of Proof) EVI; 155(10)

People v Neff, 731 NYS2d 269 (3rd Dept 2001)

The defendant was convicted in a nonjury trial of endangering the welfare of a child.

Holding: During a discussion of the standard of proof in a bench trial, the prosecutor asked the court to consider the evidence “in the light most favorable to the People.” Defense counsel objected, and the court said that was the standard for dismissal, but went on to say “I certainly will, in my deliberations, consider the evidence in the light most favorable to the People.” These comments prior to the prosecution’s closing argument diluted the presumption that the court applied the constitutional reasonable doubt standard. *See Matter of Winship*, 397 US 358, 362 (1970). The result was the conviction of the defendant under a “standard of proof less exacting than proof beyond a reasonable doubt.” *Reed v State of New York*, 78 NY2d 1, 8-9. Judgment reversed, new trial ordered. (County Ct, Tioga Co [Sgueglia, J])

Narcotics (Possession) (Sale) NAR; 265(57)(59)

Sentencing (Excessiveness) SEN; 345(33)

Third Department *continued***People v Lockenwitz, 731 NYS2d 674 (3rd Dept 2001)**

The defendant was convicted of the sale and possession of a controlled substance. He was sentenced to nine consecutive prison terms of three years to life for second-degree drug sales, which would run concurrently with sentences for drug possession.

Holding: In imposing its sentence, the court relied heavily on its conclusion that there was no likelihood of rehabilitation. The record contains no evidence to support that conclusion. Considering the defendant's age, the absence of any prior felony convictions or convictions for drugs, absence of any violence, and the defendant's acknowledgment of responsibility, the sentence should be reduced to an aggregate term of 15 years to life. *See People v Sheppard, 273 AD2d 498, 500 lv den 95 NY2d 908; People v Davis, 267 AD2d 597, 598-99; People v Sturgis, 202 AD2d 808, 810 lv den 84 NY2d 833.* Judgment modified and, as modified, affirmed. (County Ct, Columbia Co [Czajka, JJ])

Admissions (Interrogation) (*Miranda* Advice) 15(22) (25)

Sex Offenses (Sentencing) SEX; 350(25)

Subpoenas And Subpoenas Duces Tecum (General) SUB; 365(7)

People v MacGilfrey, 733 NYS2d 254 (3rd Dept 2001)

Holding: Time-Warner Cable records concerning the defendant's residence were improperly obtained through a grand jury subpoena *duces tecum* when no grand jury proceeding concerning the defendant was pending. *See People v Natal, 75 NY2d 379, 385 cert den 498 US 862.* The defendant lacked standing to seek suppression, having no possessory or proprietary interest in the records. *See People v Di Raffaele, 55 NY2d 234, 242.*

The court's refusal to suppress the defendant's unMirandized statements to police because he was not in custody is a factual finding entitled to great weight. *See People v Gagliardi, 232 AD2d 879, 880.* The defendant was not under arrest, drove himself, and was free to leave at any time (although not specifically told this). The police conduct in having him bring overdue cable boxes to the station and only there disclosing that they wanted to talk to him about the instant sex charges was not so fundamentally unfair as to impinge upon his right to due process. *See People v Tarsia, 50 NY2d 1, 10; CPL 60.45(2).* The consecutive two to four year prison sentences on both rape convictions fall within the permissible sentencing parameters. There was no clear abuse of discretion or extraordinary circumstances. *See People v Spencer, 272 AD2d 682, 685 lv den 95 NY2d 858.* The material elements of rape and sodomy are distinct and require separate, dis-

crete acts, making consecutive sentences proper. *See People v Laureano, 87 NY2d 640, 643.* Judgment affirmed. (County Ct, Albany Co [Breslin, JJ])

Guilty Pleas (General) GYP; 181(25)

Sentencing (Excessiveness) SEN; 345(33)

People v Morton, 734 NYS2d 249 (3rd Dept 2001)

The defendant was indicted for two counts of third-degree drug possession. The court advised him that if he pled guilty and waived appeal, he would be sentenced as a second felony offender to two to four years. The defendant pled not guilty and was convicted of third-degree possession, for which he received twelve and a half to twenty-five years, and seventh-degree possession, for which he was sentenced to a concurrent term of one year.

Holding: The sentence was harsh and excessive. The defendant's election to proceed to trial did waive any right to the previously negotiated sentence. *See People v Price, 256 AD2d 596 lv den 93 NY2d 928.* However, the considerable disparity between the early sentence offer and the sentence imposed "strikes us as too extreme a penalty for defendant's exercise of his constitutional right to a jury trial." No particular problem with the prosecution's case existed to justify a substantial disparity (*cf People v Maldonado, 205 AD2d 933, 934 lvs den 84 NY2d 906, 908*), nor was the offer made to induce testimony against another. *Cf People v Pena, 50 NY2d 400, 411 cert den 449 US 1087.* The court may have placed undue weight upon the defendant's ill-advised decision to reject the favorable plea bargain. *See People v Cosme, 203 AD2d 375.* Judgment modified, sentence for third-degree possession reduced to five to 10 years. (County Ct, Rensselaer Co [McGrath, JJ])

Guilty Pleas (General) GYP; 181(25)

People v Bruno, 732 NYS2d 279 (3rd Dept 2001)

The defendant, represented by counsel, entered a guilty plea and was sentenced in accordance with the negotiated plea agreement.

Holding: Due to the defendant's failure to withdraw the guilty plea or to vacate the judgment, his challenge to his conviction was not preserved for review. *See People v Washington, 262 AD2d 868, 869 lv den 93 NY2d 1029.* Requiring the court to specifically advise the defendant of his right to counsel while he was already actively represented would be an "unnecessary formalism." *See People v Harris, 61 NY2d 9, 16.* The court's failure to so advise did not invalidate the defendant's knowing, voluntary and intelligent plea. During the plea allocution, the defendant stated that he was satisfied with counsel's representation

Third Department *continued*

and had no questions for counsel or the court. The court fully appraised the defendant of the rights that he would be waiving in exchange for his plea and the defendant indicated that he understood the terms and consequences of the plea and freely admitted his guilt of the charges. See *People v Moissett*, 76 NY2d 909. Order affirmed. (County Ct, Columbia Co [Leaman, J])

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

Sentencing (Excessiveness) SEN; 345(33)

People v Harris, 732 NYS2d 664 (3rd Dept 2001)

Holding: The 27-year-old defendants were convicted of drug sales and possession. Neither was denied effective assistance of counsel due to conflicts of interest with attorneys who represented them at some point. The “innocent overlapping pretrial representation of the informant” by the lawyer who represented defendant Harris before trial had no negative impact. See *People v Ortiz*, 76 NY2d 652, 657. The prosecutor’s failure to bring the overlap to light is inexcusable, but did not impact the defendant’s case. The informant waived his right to have the codefendant’s lawyer protect confidences obtained during prior representation of the informant, so the codefendant was not harmed.

The defendants received sentences aggregating to 62 years to life and 50 years to life. Each had only one prior conviction. The informants, who procured customers and provided a sales location, testified for the prosecution and received light sentences. The prosecutor had offered the defendants plea bargains of 6 years to life and 3 years to life. After balancing the length of the defendants’ sentences, their histories, and their ages against the harm caused by their sales, the witnesses’ sentences, the pre-plea offers, and the trial evidence, the sentences are reduced in the interest of justice. See *People v Delgado*, 80 NY2d 780. CPL 470.15[6][b]. All sentences are to run concurrently, reducing the aggregate time. See *People v Sheppard*, 273 AD2d 498, 500 *lv den* 95 NY2d 908. Judgment modified. (County Ct, Fulton Co [Lomanto, J])

Misconduct (Defense) MIS; 250(5)

People v Dean, 732 NYS2d 696 (3rd Dept 2001)

The defendant’s attorney failed to appear for an initial conference in this Greene County murder case and did not file an affidavit of engagement. At the time the attorney was scheduled to appear, he was before another judge in Albany County. The attorney had written and spoken

with the Greene County Court and personnel as to a different criminal case about being unavailable during the week of the scheduled appearance, and had filed an affidavit. The Greene County Court confirmed the Albany County appearance. The attorney believed that as the court was personally familiar with his trial schedule, he did not need to file an affidavit of engagement in this case.

Holding: The court did not abuse its discretion by sanctioning the attorney for not appearing in court as scheduled. See *Matter of Gurwitch*, 256 AD2d 180. The attorney was actually engaged in another court, he had a good record of appearances on other matters, and nothing showed that his failure to appear at an initial conference caused significant harm to his client or the prosecution. See 22 NYCRR 130-2.1 [b][1], [7], [8]; see also *Matter of Walsh v People*, 206 AD2d 434. However, the attorney did not file an affidavit of engagement (see 22 NYCRR 125.1 [e]) after learning of the scheduled conference. See 22 NYCRR 130-2.1 [b][2], [3], [5]). The \$250 sanction was excessive. Order modified, sanction reduced to \$50. (County Ct, Greene Co [Pulver, J])

Defenses (Notice of Defense) DEF; 105(43.5)

Witnesses (Experts) WIT; 390(20)

People v Kelly, 732 NYS2d 484 (3rd Dept 2001)

Holding: The defendant was charged with sodomy. The prosecution turned over DNA laboratory notes one business day before trial. *Cf People v Da Gata*, 86 NY2d 40. During jury selection the defense indicated they might call an expert. When the defense sought to introduce a defense expert on DNA analysis to refute the prosecution’s tests, the prosecution objected to the witness, claiming prejudice due to late notice. The court’s preclusion of defendant’s expert witness was a drastic remedy unwarranted under the circumstances. While a court does have discretion to sanction failure to comply with notice requirements (see *Taylor v Illinois*, 484 US 400 [1988]), the court here abused that discretion. The defense witness was called in response to prosecution evidence, and not as part of an affirmative defense. See *People v Almonor*, 93 NY2d 571. No new scientific issues were being raised and only the identity of the expert was in question. Judgment reversed, new trial ordered. (County Ct, Ulster Co [Bruhn, J])

Instructions to Jury (Theories of Prosecution and/or Defense) ISJ; 205(50)

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

Third Department *continued*

In response to a jury note about timing and intent, the court reread the burglary instruction and asked them to focus on the definition of intent. Defense counsel objected to the court's instruction as misleading on the issue of timing. No curative instruction was given. The court's supplemental instruction misled the jury by suggesting that the definition of "intent" would resolve any question concerning the time frame of when it was formed. This suggested that the defendant could have formed the necessary intent after entry and denied the defendant a fair trial. *People v Brown*, 87 NY2d 950. The conviction on burglary must be reversed and a new trial held on that count. Judgment modified. (County Ct, Chenango Co [Avery Jr., J])

Fourth Department

Assault (Evidence) ASS; 45(25)

Evidence (Sufficiency) EVI; 155(130)

People v Walker, 283 AD2d 912, 725 NYS2d 259
(4th Dept 2001)

Holding: The evidence with respect to the defendant's conviction for first-degree assault is legally insufficient. The victim's injury did not create a substantial risk of death or "cause death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law §10.00 [10]; see, *People v Santos*, 161 AD2d 816, *lv denied* 76 NY2d 864 . . .) Judgment modified by reducing first-degree assault conviction to third-degree assault, as modified affirmed, remitted for resentencing. (Supreme Ct, Monroe Co [Cornelius, J])

Search and Seizure (Arrest/ SEA; 335(10[a]) (15[f]) (80[f])
Scene of the Crime Searches
(Automobiles and Other
Vehicles) (Automobiles and
Other Vehicles [Impound
Inventories]) (Warrantless
Searches [Moveable Objects])

People v Bennett, 283 AD2d 997; 724 NYS2d 922
(4th Dept 2001)

Holding: The search incident to arrest exception to the warrant requirement does not apply where the closed container was taken from the vehicle after the vehicle's occupants had both been placed under arrest, removed from the vehicle, and placed in patrol cars. See *People v*

Walker, 198 AD2d 785, 786-787. The search of the vehicle was not justified as an inventory search. The prosecution presented no evidence at the suppression hearing that the police were acting pursuant to standardized procedures when they opened the container. See *Florida v Wells*, 495 US 1, 4-5 (1990). Judgment reversed, plea vacated, motion to suppress granted, matter remitted. (County Ct, Ontario Co [Harvey, J])

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

People v Escoto, 283 AD2d 962, 725 NYS2d 771
(4th Dept 2001)

The defendant was convicted of drug offenses.

Holding: A potential juror challenged for cause by the defendant had a brother who worked in law enforcement and was assigned to drug enforcement. The juror admitted a bias in favor of drug enforcement. When asked if he could put aside this bias to judge the case impartially, he gave several equivocal responses, including "I feel that I can work around my biases" and, in response to a question of whether he could be fair and impartial, "I think so." Courts "'should lean toward disqualifying a prospective juror of dubious impartiality, rather than testing the bounds of discretion by permitting such a juror to serve' (*People v Branch*, 46 NY2d 645, 651 . . .) Absent "'express and unequivocal' declarations that the juror will put preconceptions aside and render an impartial verdict based solely on the evidence," equivocal responses are insufficient. *People v Burdo*, 256 AD2d 737, 740. Judgment reversed, new trial granted. (County Ct, Onondaga Co [Burke, J])

Discovery (Prior Statements of Witness) DSC; 110(26)

People v Potter, 283 AD2d 1011, 725 NYS2d 778
(4th Dept 2001)

The court denied the defendant's CPL article 440 motion to vacate his judgment of conviction for burglary.

Holding: The prosecution has not contested that the defense did not receive copies of tape-recorded conversations between a prosecution witness and accomplices to the crime and written statements of that witness. The tape-recorded conversations were destroyed, but hearing testimony indicated that the subject matter of those conversations related to the trial testimony of the witness. The written statement that the witness gave to the police also related to that testimony. As was stated in the prior appeal, the defendant did establish a reasonable possibility that the nondisclosure of these items materially contributed to the verdict. *People v Potter*, 254 AD2d 831, 832.

Fourth Department *continued*

The defendant is entitled to a new trial based on these *Rosario* violations. Order reversed, motion granted, judgment vacated, and new trial granted. (County Ct, Herkimer Co [Kirk, J])

Counsel (Conflict of Interest) COU; 95(10)
 Misconduct (Prosecution) MIS; 250(15)

People v Astafan, 283 AD2d 907, 725 NYS2d 484 (4th Dept 2001)

The defendant was convicted of grand larceny and falsifying business records for applying for employee family health insurance without being married or having adopted the child of his girlfriend, with whom he lived.

Holding: During trial, it was revealed that defense counsel had agreed with the prosecutor to stipulate to the admission of uncharged crimes, in exchange for which neither the defendant nor his girlfriend would be indicted for those crimes. The defendant’s girlfriend then testified against the defendant. At sentencing, the defendant said that he had no prior knowledge of the agreement. The court erred in failing to conduct a *Gomberg* inquiry (see *People v Gomberg*, 38 NY2d 307) when the agreement was revealed at trial. Defense counsel was also acting on behalf of the defendant’s girlfriend, who received a benefit from the agreement for her testimony. An inquiry was required to ascertain that the facts had been disclosed to the defendant and that he had made a reasoned decision with his attorney about whether to proceed. See *People v Mattison*, 67 NY2d 462, 468-469 cert den 479 US 984. The conflict bore “a substantial relation to the conduct of the defense.” *People v Ortiz*, 76 NY2d 652, 657.

The prosecutor’s cross-examination of the defendant, eliciting the defendant’s religious affiliation and asking whether his faith would prohibit him from lying, was completely improper (although not objected to). See *gen People v Wood*, 66 NY2d 374. Judgment reversed, new trial granted on counts one and two. (County Ct, Herkimer Co [Kirk, J])

Misconduct (Prosecution) MIS; 250(15)
 Trial (Summations) TRI; 375(55)

People v Glen, II, 283 AD2d 987, 723 NYS2d 923 (4th Dept 2001)

Holding: The defendant did not preserve his contention that the prosecutor’s summation denied him due process of law. See CPL 470.05(2); *People v Brinson*, 265

AD2d 879 *lv den* 94 NY2d 860. The prosecutor did improperly express a personal opinion of the defendant’s guilt (see *People v LaCava*, 75 AD2d 997) and refer to the defendant as a “‘convicted criminal.’” These actions were “‘unseemly and unprofessional in the extreme.’” *People v Mott*, 94 AD2d 415, 418. This conduct is not condoned, but did not cause such substantial prejudice that the defendant has been denied due process of law. Judgment affirmed. (Supreme Ct, Onondaga Co [Brunetti, JJ])

[Ed Note: The following two cases relate to compensation for counsel in capital cases, *lvs gntd at* 285 AD2d 998, 727 NYS2d 374]

Death Penalty (Cost) (Right to Counsel) DEP; 100(35) (140)

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

Mahoney v Pataki, 283 AD2d 976, 726 NYS2d 308 (4th Dept 2001)

Holding: “Appeal and cross appeal unanimously dismissed without costs (see, *Matter of Eric D.* [appeal No. 1], 162 AD2d 1051.” (Supreme Ct, Genesee Co [McCarthy, JJ])

Death Penalty (Cost) (Right to Counsel) DEP; 100(35) (140)

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

Mahoney v Pataki, 283 AD2d 1036, 726 NYS2d 309 (4th Dept 2001)

Holding: “Judgment unanimously affirmed without costs.” (Supreme Ct, Genesee Co [McCarthy, JJ])

Trial (Presence of Defendant [Trial in Absentia]) (Verdicts) TRI; 375(45) (70)

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

People v Horne, 284 AD2d 986, 728 NYS2d 614 (4th Dept 2001)

The defendant was convicted of three counts of first-degree offering a false instrument for filing.

Holding: The defendant’s contention that the imposition of restitution increased the penalty beyond the prescribed statutory maximum, violating *Apprendi v New Jersey* (530 US 466 [2000]), is rejected. The crimes for which the defendant was convicted provide a sufficient basis for an award of restitution (see *Matter of Margini v DeBuono*,

Fourth Department *continued*

255 AD2d 639), and the contention that restitution was based on crimes for which the defendant was acquitted is also rejected.

The jury verdict was announced at the end of the day. Before the jury was discharged, the defendant moved to set aside the verdict. The court reserved decision and sent the jurors home with instructions to return. The next morning, the court accepted the verdict outside of the defendant's presence, without ascertaining whether her absence was deliberate. *See People v Brooks*, 75 NY2d 898, 899 *not to amend remittitur gntd* 76 NY2d 746. Rendering a verdict is a material proceeding at which the defendant has the right to be present. *See* CPL 310.40 [1]. The steps required by CPL 310.80 (verdict recorded in the trial minutes and read to the jury and jurors collectively asked if such is their verdict) were taken in the defendant's presence. The proceeding at which the court denied the defendant's motion was an ancillary one at which the defendant's presence was not required. *See People v Rodriguez*, 85 NY2d 586, 580-591. Judgment modified and as modified affirmed. (County Ct, Monroe Co [Maloy, JJ])

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| Defenses (Agency) | DEF; 105(3) |
| Instructions to Jury (Theories of Defense) | ISJ; 205(50) |

People v Coleman, 284 AD2d 915, 728 NYS2d 603
(4th Dept 2001)

The defendant was convicted of possession and sale of a controlled substance.

Holding: The defendant testified that he did not sell drugs, that he was merely helping the undercover police officer who had approached him to obtain cocaine, that he wanted to smoke cocaine with the officer, and that money was never discussed or exchanged. That evidence, viewed in the light most favorable to the defendant was sufficient to require an instruction on the agency defense. *See People v Sierra*, 45 NY2d 56, 58-59. The court is required to "give the instruction if 'some evidence, however slight . . . support[s] the inference that the supposed agent was acting, in effect, as an extension of the buyer.'" *People v Ortiz*, 76 NY2d 446, 448 *remittitur amended* 77 NY2d 821. Judgment reversed, new trial granted. (County Ct, Monroe Co [Bristol, JJ])

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| Counsel (Anders Brief) | COU; 95(7) |
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People v Martinez, 284 AD2d 1019, 730 NYS2d 888
(4th Dept 2001)

Holding: The defendant's assigned appellate counsel moved to be relieved of the assignment pursuant to *People*

v Crawford (71 AD2d 38) after submitting a brief concluding that there are no nonfrivolous issues meriting consideration. The record raises several potential issues: whether the complainant's photo identification of the defendant after an anonymous tip should have been suppressed, whether there was probable cause for the issuance of a warrant to search the defendant's vehicle, and whether the aggregate sentence of 12½ to 25 years was unduly harsh. Counsel is relieved, and new counsel assigned to brief these issues, and any others that counsel's review of the record may reveal. (County Ct, Cayuga Co [Corning, JJ])

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| Lesser and Included Offenses (Instructions) | LOF; 240(10) |
| Sentencing (General) | SEN; 345(37) |

People v Sullivan, 284 AD2d 917, 728 NYS2d 320
(4th Dept 2001)

Holding: The court erred by denying the defense request to charge second-degree obstructing governmental administration (Penal Law 195.05) as a lesser included offense of second-degree assault (Penal Law 120.05[3]). The part of *People v Walker* (83 AD2d 990) relevant here was not affected by *People v Ranieri* (144 AD2d 1006 *lv den* 73 NY2d 895). A reasonable view of the evidence supports a finding that the police officer sustained no physical injury, supporting a conviction on the lesser offense but not the greater. *See gen People v Glover*, 57 NY2d 61, 63. Reversal is warranted. *See People v Maharaj*, 89 NY2d 997, 999.

The order of protection here exceeds the maximum legal duration. The certificate of conviction indicates that the order shall extend for nine years, but the order itself says that it will remain in effect for 12 years. The order of protection was entered in regard to the conviction relating to the complainant only, it could not extend beyond nine years. *See* CPL 530.13(4); *People v Nunez*, 267 AD2d 1050 *lv den* 94 NY2d 905. The defendant's other contentions are without merit. Judgment modified, reversing the conviction on count six, granting a new trial on that count, and amending the order of protection. (County Ct, Ontario Co [Henry Jr., JJ])

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| Burglary (Sentence) | BUR; 65(35) |
| Sentencing (Excessiveness) | SEN; 345(33) |

People v Sexton, 284 AD2d 940, 726 NYS2d 325
(4th Dept 2001)

Holding: The determinate term of imprisonment of 24 years imposed on the defendant on his conviction for first-degree burglary is unduly harsh. As a matter of discretion in the interest of justice (*see* CPL 470.15[6] [b]), the judgment is reduced to a determinate term of 10 years. *See*

Fourth Department *continued*

Penal Law 70.02(3). Judgment modified and as modified affirmed.

Evidence (Sufficiency) EVI; 155(130)

Narcotics (Possession) NAR; 265(57)

People v Gray, 284 AD2d 940, 726 NYS2d 325 (4th Dept 2001)

The defendant was convicted of multiple drug offenses.

Holding: The evidence adduced at trial is legally insufficient to establish the defendant’s guilt of first-degree criminal possession of a controlled substance. Viewed in the light most favorable to the prosecution, the evidence established that the defendant, in Rochester, telephoned his supplier in New York City and ordered a quantity of cocaine. The drugs were found, hidden in a secret compartment of a car driven by an agent of the supplier, en route to Rochester and seized before delivery and payment. The defendant was not an accomplice to the driver’s possession. *See* Penal Law 20.10. The defendant’s solicitation of the cocaine was “necessarily incidental to that possession,” and the statute limits the defendant’s culpability to that resulting from his own conduct. *See People v Manini*, 79 NY2d 561, 569-572. The contention that the defendant is guilty under the theory of constructive possession is similarly without merit. The evidence established that the shipment was controlled exclusively by the supplier. The defendant had no control over the person in actual possession. Judgment reversed, counts one and two of the indictment dismissed. (Supreme Ct, Monroe Co [Mark, JJ])

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

Conflict of Interest (General) COI; 75(10)

People v Jones, II, 284 AD2d 931, 726 NYS2d 313 (4th Dept 2001)

Holding: The defendant made a voluntary and intelligent waiver of his right to appeal. This encompasses his contention that defense counsel’s former representation of a complainant created an appearance of impropriety or an impermissible conflict of interest. *See gen People v Allen*, 82 NY2d 761, 763. Judgment affirmed. (Supreme Ct, Erie Co [Forma, JJ])

Forensics (General) FRN; 173(10)

Post-Judgment Relief (440 Motion) PJR; 289(15)

People v Hayes, 284 AD2d 1008, 726 NYS2d 891 (4th Dept 2001)

The defendant was re-convicted of second-degree murder in 1991, following an appeal. In 1997, he filed a motion pursuant to CPL 440.30(1-a) seeking DNA testing of fingernail scrapings recovered from the decedent. DNA testing was not available when the defendant was convicted. The motion was denied. Without appealing that ruling, the defendant filed a second, identical motion on Aug. 20, 2000, which the court granted.

Holding: The second motion was procedurally improper. As a matter of discretion in the interest of justice, the defendant’s second motion is treated as one to renew. It was properly granted. There is a reasonable probability that the verdict would have been more favorable to the defendant if a DNA test had been conducted and the results had been admitted at trial. Order affirmed. (County Ct, Erie Co [D’Amico, JJ])

Accusatory Instruments (Sufficiency) ACI; 11(15)

Evidence (Sufficiency) EVI; 155(130)

Rape (Evidence) RAP; 320(20)

People v Richardson, 284 AD2d 920, 728 NYS2d 605 (4th Dept 2001)

Holding: The court erred in dismissing the counts of the indictment charging the defendant with first-degree rape based on a determination that the evidence before the grand jury was legally insufficient to establish forcible compulsion under Penal Law 130.00(8). Consideration of the evidence, viewed most favorably to the prosecution and unexplained and uncontradicted (deferring all questions as to the weight or quality) supports a finding that it would warrant conviction. *People v Swamp*, 84 NY2d 725, 730. The complainant testified that on five occasions when she was alone with the defendant, her mother’s boyfriend, he grabbed her, pulled her into a bedroom, removed her clothes, and engaged in sexual intercourse. She testified that she cried, said “no,” and said that he was hurting her. She further testified that she was “in a state of shock” and was afraid to report these incidents because the defendant told her not to tell anyone. The testimony constitutes prima facie evidence satisfying the element of forcible compulsion. *See People v Bermudez*, 109 AD2d 674, *app dismd* 67 NY2d 758. Order reversed, counts reinstated, matter remitted for further proceedings. (County Ct, Erie Co [Drury, JJ])

Would It Know Your Face Anywhere?

Face-recognition technology, highly publicized when it was used to scan the crowds at the 2001 Super Bowl, is a small but growing industry. The American Civil Liberties Union has released its findings after an investigation of a Tampa police experiment with this biometric law enforcement tool. According to the report, the “system has never correctly identified a single face in its database of suspects, let alone resulted in any arrests.” (ACLU, *Drawing a Blank*, 2002, at http://www.aclu.org/issues/privacy/drawing_blank.pdf.) Already used by casinos and some law enforcement agencies, face recognition involves turning video images, photos, or even police composites of faces into strings of numbers, then comparing them with other strings of numbers that stand for scanned faces stored in a database. A system in use in the London borough of Newham since 1998 has been said to bring up “only a few false matches a week.” (ft.com [*Financial Times*, <http://news.ft.com>], 12/5/01.)

Freeze Frame Justice

Surveillance cameras are becoming a common extension of the constable’s gaze. There are so many in New York City, 2300, that the New York Civil Liberties Union has compiled a flag pin map of their locations. (*New York City Surveillance Camera Project*, <http://www.mediaeater.com/cameras/>). The civil liberties implications of such surveillance has raised concerns among many observers, not just the ACLU. One commentator noted that such cameras are widespread in England. “By one estimate, the average Briton is now photographed by 300 separate cameras in a single day.” The idea of combining this ubiquity with face recognition systems raises many concerns, not least of which is the waste of resources it would take to implement such a system, for questionable results. The Newham system failed to result in a single arrest in three years. (Rosen, *The New York Times Magazine*, 10/5/01.)

Open-Ended Voir Dire Under Attack

Jury selection expert Joseph V. Guastaferrro, well known to graduates of NYSDA’s Defender Institute Basic Trial Skills Program (BTSP), stresses “The Art of the Open-Ended Conversation” when picking a jury. For those who are not BTSP grads, a glance at the outline of one of his presentations shows that he teaches “steps in conducting the ‘group interview,’” “five elements of the open-ended conversation,” and “using the open-ended question.” (<http://www.proedgroup.com/programs/details/jg1.cfm>.) Nor is Guastaferrro alone in proclaiming the necessity to an effective voir dire of open-ended questioning about jurors’ backgrounds. (See e.g. *Trial Manual 5 for the Defense of Criminal Cases*, Anthony G. Amsterdam, Reporter, Vol. 3, p. 46 [1989].)

Now, however, the 1st Department has attacked open-ended voir dire. In a short, unanalytical decision, the court said that a trial court properly exercised its discretion in imposing restrictions on a defendant’s questioning of prospective jurors. Inquiries were particularly improper, the panel said, when consisting of “open-ended invitations to the panelists to relate anecdotes, factual information and opinions concerning their attitudes towards drug trafficking and law enforcement.” *People v Byrd*, 284 AD2d 201, 728 NYS2d 134 (1st Dept, 2001), *lv den* 12/17/01, (see summary p. 21).

The *Byrd* court cited *People v Hernandez*, 276 AD2d 274 *lv den* 95 NY2d 964. However, *Hernandez* stands for no more than the general proposition that the judge may impose reasonable restrictions on the questioning of prospective jurors and bar undefined, “improper formulation of the inquiries.” Attorneys should preserve strong, pointed objections to overly burdensome judicial encumbrance of their opportunity to determine hidden juror biases, etc. See e.g. the language of Justice White’s plurality opinion in *Rosales-Lopez v US*, 451 US 182, 188 (1981): “Voir dire plays a critical function in assuring the criminal defendant that [the] Sixth Amendment right to an impartial jury will be honored . . . [and] lack of adequate voir dire impairs the defendant’s right to exercise peremptory challenges where provided by statute. . . .”

Whren Lands in New York

The Court of Appeals has adopted *Whren v US*, (517 US 806 [1996]) as state constitutional law. The decision, issued in three consolidated cases, states that “[t]his Court has never held that a pretextual stop, as opposed to subsequent police conduct, was violative of article I, § 12” of the state constitution. Over Judge Levine’s dissent, the court found that improper arbitrary and discriminatory traffic stops premised on minor violations of the Vehicle and Traffic Law can be adequately addressed in civil actions (citing *Brown v State of New York*, 89 NY2d 172 [1996]) and by subjecting any search made subsequent to a traffic stop to judicial scrutiny. The dissent observes that, that given the ubiquity of automobiles and the heavily regulated nature of vehicle use, almost any driver can be stopped for a technical traffic violation, threatening all with arbitrary police control. It quotes, among others, the petitioners in *Whren*, Prof. David Harris (*Car Wars: The Fourth Amendment’s Death on the Highway*, 66 George Wash L Rev, 556 [1998]), and US Supreme Court Justice Anthony Kennedy (dissent in *Maryland v Wilson*, 519 US 408, at 423 [1997]).

The decision can be found on the Web, through Research Links at NYSDA’s web site (www.nysda.org) or directly at <http://www.courts.state.ny.us/ctapps/decision.htm>. *People v Robinson*, Nos. 141, 142, 143 (12/18/01). (See digest on p. 18.) ☺

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 Legal Aid Attorney Law Student Concerned Citizen

(Attorneys and law students please fill out) Law School _____ Degree _____

Year of graduation: _____ Year admitted to practice _____ State(s) _____

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