



# Public Defense Backup Center **REPORT**

Volume XVII Number 4

July-August 2002

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### ***NYSDA's Annual Meeting Goes Digital***

NYSDA's 35th Annual Meeting and Conference, held in Niagara Falls in late July, marked the inauguration of the electronic Criminal Defense Information Exchange. A familiar feature at prior meetings, the Exchange used to be a public defense lawyer's book fair, with rows of tables covered with articles, motions, and publications of interest to criminal practitioners. Desired items had to be ordered, for shipping after the conference.

This year, what formerly required an entire room with separate staffing at the conference and much photocopying afterward was reduced to a single CD-ROM disk. NYSDA selected the best recent articles, reports, and motions concerning public defense and burned them onto a CD-ROM distributed to every attendee. The disk contains a library of dozens of publications from NYSDA and other sources: pleadings and decisions; reports and briefs concerning sequential lineups; charts and checklists on immigration issues and Megan's Law developments; manuals on using courtroom technology and computer generated evidence; and the last year of the Backup Center *REPORT*. On one disk, participants brought home a criminal defense library containing thousands of pages.

### ***Publication Discounts and More CD-ROMs***

A showcase of new West Group and Lexis publications was displayed at the conference registration table. Conference goers received substantial discounts from both publishers on New York titles. NYSDA's own *Immigration Manual* (2nd edition) and *Case Digest System* (a CD-ROM with 7000 summaries of New York criminal cases from the past 15 years), drew attention as well. The Association's 2001 Annual Report was also available.

In conjunction with a presentation on "New Legal Resources on the Internet," participants received a copy of *The Insider's Guide: Criminal Justice Resources on the Web 2002* and its companion CD-ROM. The disk accompanying the book empowers readers to access hundreds of criminal defense resources on the web by merely clicking on the links. Soon after the annual conference, the Internet presentation was repeated for the Appellate Advocates

office in New York City at the request of Lynn Fahey, the head of that office. Fahey frequently lectures on appellate practice for NYSDA, and was a presenter at the annual conference.

### ***Choice Topics at Conference, Materials Available***

Presentations on July 26 and 27, including breakout sessions that gave conferees a choice of topics, were:

- Recent Developments in New York Criminal Law and Procedure—Ed Nowak
- Time Management for Better Client Relations—Steve Rench
- Energy, Economy, and Engagement: Persuasive Legal Writing—Kevin Doyle
- The State of NY Assigned Counsel Fee Litigation—Vince Warren
- Fundamentals of Effective Sentencing Advocacy—Alan Rosenthal
- Cross Examination of Snitches—Tom Eoannou
- Current Methods of Attacking Fingerprint Evidence—James Starrs
- Fertile Ground: Successful Appellate Issues and Strategies: Panel Discussion—Lynn Fahey, Drew Dubrin, and Al O'Connor
- Defense Conflicts of Interest—Laura Johnson
- 2002 Legislative Update—Al O'Connor and Jonathan Gradess
- New Legal Resources on the Internet—Ken Strutin
- Fighting for Sequential Lineups—David Feige

Twelve MCLE credits were available. The training materials are available from the Backup Center for \$25.

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### Arthur Eve Receives Service of Justice Award

Retiring Deputy Speaker of the New York State Assembly, Arthur O. Eve, spoke passionately at Friday night's Award Reception about seeking to meet the needs of poor people. This year's recipient of the Service of Justice award for distinguished service in the cause of justice, Eve has fought for legislation helping poor people, working families, and people of color since becoming an Assembly member in 1967. As a negotiator during the Attica riots, in his political life, and through the foundation he is now establishing, Eve has served justice by focusing on those most in need.

### Lynne Stewart Gives Conference Keynote

New York City attorney Lynne Stewart told those attending Saturday's Defender Luncheon that governmental intrusion into attorney-client conferences threatens the core of client representation. Allegations about what occurred in attorney-client visits underlie most of the federal charges currently lodged against Stewart in connection with her representation of Sheik Omar Abdel Rahman. The government will not tell attorneys representing Stewart and others charged in the same matter whether or not it is monitoring their current attorney-client conversations. (*New York Law Journal*, 6/24/02.) Such intimidating interference in the attorney-client relationship warrants objection by all defense lawyers, Stewart said. The audience gave her a standing ovation at the conclusion of her keynote remarks.

### Chiefs Convene to Consider Problem-Solving Courts

At a Chief Defender Convening held in conjunction with the NYSDA conference, public defense attorney-administrators from across the state met to discuss prob-



Edward J. Nowak, Arthur O. Eve, and Jonathan E. Gradess, 35th Annual Meeting and Conference

### Discounts Extended!

**West Group** is extending to all NYSDA members the discounts it offered at NYSDA's Annual Meeting until October 31st.

Receive a **30% discount** on Charges to the Jury and Request to Charge in a Criminal Case New York by Howard G. Leventhal (West Group 1988 Revised ed. & Cum. Supp. 2001) [2 vol] and 20% on West New York criminal law titles.

Contact Cathy Erlien: (800) 328-9352 x77331, or e-mail [cathy.erlien-fendler@westgroup.com](mailto:cathy.erlien-fendler@westgroup.com).

**Lexis Publishing** has agreed to extend the **15% discount** on print publications given to conference participants to all NYSDA members until the end of October. For more information, contact Dan McConnell, Regional Sales Executive, (800) 227-9597 x54110, [dan.mcconnell@lexisnexis.com](mailto:dan.mcconnell@lexisnexis.com).

lems associated with "problem-solving courts." Among the issues:

- Precipitous imposition of such courts without adequate planning and defense input,
- insufficient protection for confidential client information,
- "net-widening" (pulling into or keeping in court clients who normally would receive minimal attention from the system), and
- a presumption of guilt when identifying potential cases for such courts.

### Public Defense Backup Center REPORT

A PUBLICATION OF THE DEFENDER INSTITUTE  
Volume XVII Number 4 July-August 2002

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The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone (518)465-3524; Fax (518)465-3249. Our web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

THE REPORT IS PRINTED ON RECYCLED PAPER

The Backup Center plans to produce a position paper on the problems (and positive aspects) identified by chief defenders and their staffs. Additional information is welcome—contact Mardi Crawford at the Backup Center, (518) 465-3524 tel, (518) 465-3249 fax, [mcrawford@nysda.org](mailto:mcrawford@nysda.org) e-mail.

### **New Broome County Public Defender**

Among the attendees at the Convening and conference was newly appointed Broome County Public Defender Jay Wilbur. A 13-year veteran of the Public Defender office, he was selected after a national search. Broome County Executive Jeffrey Kraham, who appointed Wilbur to serve a five-year term, commented, “I was impressed by his tremendous enthusiasm for the job. He got very high marks from different people in the community.”

### **Scarcity of Public Defense Funding Threatens AC**

One of the big issues Wilbur faces is development of a plan for an alternative defender office when the Public Defender’s office has a conflict. The county wants to limit costs for the assigned counsel program after losing several lawsuits over fee and rate increases. (*Press & Sun Bulletin*, 6/26/02). It is not alone.

Monroe County Executive Jack Doyle recently proposed reducing defense expenditures by eliminating that county’s Assigned Counsel Program. (Monroe County Executive Press Release, 8/2/02; *Democrat and Chronicle*, 8/3/02). In New York City, the City Council proposed shifting a significant portion of money from the assigned counsel plan to The Legal Aid Society (LAS). The Bloomberg administration indicated, while finalization of a new LAS contract remained pending, that it would approve such a shift. (*New York Law Journal*, 7/3/02)

Proposals to switch from one type of defense provider to another in response to piecemeal funding and political maneuvering is inevitable under New York’s current chaotic, underfunded statutory scheme for provision of public defense services. NYSDA noted this perpetual problem in last year’s position paper, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services* (included on the Information Exchange CD-ROM described above). Faced with budget deficits, localities will continue to play musical chairs with public defender offices, legal aid societies, and assigned counsel programs, in search of ever-cheaper alternatives.

Looming over all providers and their clients is the very real threat that things can, in fact, get worse. As was discussed in the “From Our Vantage Point” column in the last issue, a bill was introduced this year to allow the County of Tioga to contract directly with private lawyers, eliminating the assigned counsel system entirely. The bill



Drew R. Dubrin and Al O'Connor, 35th Annual Meeting and Conference

would have deleted from the county law, as to Tioga County, the requirement that the services of private counsel be rotated and coordinated by an administrator, and permitted the county to develop and approve a contract with a private attorney or firm. The bill contained no language barring low-bid contracts.

Such contracts, which lack quality control mechanisms, are universally condemned in national standards for provision of all indigent defense services including conflicts. As long ago as 1976, the National Study Commission on Defense Services stated clearly that “Contracts for defender services should not be let on the



Laura Johnson, 35th Annual Meeting and Conference

basis of competitive bidding.” Guideline 2.6. The ABA’s Standards for Criminal Justice, Providing Defense Services (3rd ed, 1992), Standard 5-3.1, states explicitly that “The contracting authority should not award a contract primarily on the basis of cost.” But localities desperate to save money (see related story below) may well try to do just that. As NYSDA’s Executive Director, Jonathan E. Gradess, has observed, “Organized defenders and assigned counsel practitioners should join to oppose low-bid alternatives that fail to serve clients well.”

### **Scenes From NY’s Public Defense System**

A trial that may set the most important precedent for public defense in the 21st Century—the New York County Lawyers’ Association lawsuit over assigned counsel rates—began in New York City just as the *REPORT* went to press. *New York County Lawyers’ Association v State of New York*, No. 102987/00 (Sup Ct App T 1st Dept). In his opening remarks, Attorney Frank Moseley pointed out that the current fee structure is “woefully inadequate” and violates “the constitutional rights of indigent children and adults on a daily basis by depriving them of qualified lawyers, who are not willing to work for the current rate.” Witness after witness followed, describing the problems created by the paucity of lawyers available to work at 18-B rates. (*New York Times*, 8/7/02.)

Two former family court judges described routine expeditions to find lawyers for juveniles in probable cause hearings or parents in neglect and abuse proceedings. One witness said that “youths in a small number of cases spent either a night or weekend in custody before a probable cause hearing was held because no lawyer was available for assignment.” (*New York Law Journal*, 8/6/02.) Another witness revealed New York City’s bonus plan for night work. The City agreed to pay lawyers \$10 and \$20 above the statutory rates for night or weekend work in



Jonathan E. Gradess and Steve Rench, 35th Annual Meeting and Conference

family and criminal courts. The plan was essential to increase the attorney pool during these times. The system is in bad shape, according to the former head of the assigned counsel program in the First Department. Only a fraction of the attorneys needed to staff Manhattan and Bronx courts are willing to take cases. The trial will continue for several weeks. (*New York Law Journal*, 7/30/02.)

### **NYCLA Injunction Raising Rates Stayed**

Back in May, a preliminary injunction had been granted increasing rates to \$90 an hour, as was noted in the last issue of the *REPORT*. However, the victory was short-lived. The order was in effect for one day, May 6, before being automatically stayed by a notice of appeal. (*New York Law Journal*, 6/28/02.) The 1st Department denied a motion to lift the stay, but the appeal has been expedited. (*New York Law Journal*, 7/12/02.)

### **Weinstein Order in Effect**

In another arena, New York City lost its bid to stay an order increasing rates to \$90 per hour for lawyers assigned to represent mothers facing neglect charges in domestic violence cases. The 2nd Circuit Court of Appeals rejected a request to stay the federal court’s order in *In re Nicholson*, No. CV-00-2229 (EDNY 3/11/02). (*New York Law Journal*, 6/28/02.)

### **NYSAC Protests Court-Ordered Fees**

The New York State Association of Counties (NYSAC) expressed in a letter to the legislature its concern about court-ordered compensation above the statutory rates. The group complained that judges are “usurping the legislative process at county taxpayers’ expense.” (*New York Law Journal*, 6/27/02.)

### **Goldman Now NACDL President**

Well-known New York City criminal defense attorney Lawrence W. Goldman is the 44th President of the National Association of Criminal Defense Lawyers (NACDL). This follows his earlier tenures as President of the New York State Association of Criminal Defense Lawyers and the New York Criminal Bar Association. In his first presidential column for NACDL’s magazine, *The Champion*, he noted that, like firefighters, criminal defense lawyers are rescue workers, seeking to rescue persons accused of crime from death, imprisonment, or disgrace. He told the *Backup Center REPORT* he feels strongly that the criminal defense bar—made up of public defense lawyers, white-collar crime defense practitioners, and others—is one, and should not split itself into factions. He reflects this in his own practice. For example, he first joined NYSDA in 1988, and serves on the board of the Bronx Defenders (whose Executive Director, Robin Steinberg, is a member of NYSDA’s board). NYSDA congratulates him on his latest achievement.

## Confession at AA Meeting Not Privileged

In 1988 Paul Cox entered his childhood home in Westchester while under the influence and killed the occupants. Two years later, he joined Alcoholics Anonymous. He began suffering nightmares about what happened. As part of his program, Cox confessed to fellow AA members seven times. One AA member revealed this confession to the police, leading to Cox's arrest and conviction for manslaughter. The trial court denied a motion to suppress the confession as privileged under the cleric-congregant communications rule, CPLR 4505. After his appeals were denied, Cox filed a federal *habeas corpus* motion under 28 USC 2254, again claiming that admission of the confession violated the privilege and his 1st and 14th Amendment rights. The district court held that AA was a religion for Establishment Clause purposes; thus the confession and forensic evidence derived from it were inadmissible. However, the 2nd Circuit found that "Cox failed to establish that his communications to other AA members would have been privileged, even were New York's cleric-congregant privilege required to be construed to protect communications made among members of AA." He did not make the statements to "seek spiritual guidance." *Cox v Miller*, No. 01-2515 (2nd Cir 7/17/02)

## Environment and Diet Can Moderate Anti-Social Behavior

Scientific fact often confutes penological theory. Recent scientific studies point to the importance of environment, nutrition, and biology in anti-social behavior. While prison wardens believe solitary confinement and



Lynne W.L. Fahey, 35th Annual Meeting and Conference

restrictive diets are appropriate measures for controlling behavior, medical research in Britain is drawing different conclusions.

At King's College in London, researchers discovered the presence of a gene that predisposes young boys to violent behavior *if* they are maltreated during childhood. According to one scientist, "These findings may also partly explain why not all victims of maltreatment grow up to victimise [sic] others—some genes may actually promote resistance to stress and trauma." (*BBC News*, 8/2/02.)

Doctors at Oxford University researched the impact of inadequate diets on the behavior of young adult prisoners. In a study of 231 inmates, they discovered that aggressive and violent conduct was reduced by the addition of vitamins, minerals and essential fatty acids into the diet. (*British Journal of Psychiatry*, 7/02.)

## Punishment By Bread Alone

The obvious benefits of proper diet and treatment for inmates have not reached our state. There is a sliding scale of punishment meted out to inmates in New York State prisons—loss of privileges, solitary confinement and the Loaf. The Loaf is the last straw for prisoners already in the Box (solitary confinement) who are deemed to need further punishment. Comprised of "flour, milk, yeast, sugar and lesser amounts of margarine, salt and shredded carrots and potatoes," the Loaf is accompanied by a side of raw cabbage and water. The number of inmates on the Loaf rose to nearly 500 last year. According to one inmate, who endured the Loaf for 100 days, it was "hard, partially frozen, [and] served in a bag."

Other states and federal prisons do not discipline inmates by restricting their diets. A California prison spokesperson observed that "[w]e had the bread and water thing. But that was way back—19th century." The American Correctional Association "precludes the use of food as a disciplinary measure" in its standards. While lawsuits challenging New York's Loaf diet have failed, a judge in Elmira temporarily stopped the Loaf diet for one inmate. "His weight loss and deteriorating health is directly attributable to the lengthy imposition of the restricted diet." (*New York Times*, 8/4/02; *Albany Times Union*, 8/8/02.)

## The New Bedlam

While most people can distinguish a mental hospital from a jail, in some counties it is a distinction without a difference. The Erie County Holding Center has taken on the simulacrum of a psychiatric hospital, being home to an inordinate number of mentally ill people—100 beds are reserved for them. Other large counties have undergone similar transformations—in Onondaga, 20% of the inmates suffer from mental illness, in Monroe County 30%.

Erie County plans to create a Mental Health Court to divert some people with mental illness from the penal system into the treatment system. Still, if someone is arrested and has mental problems, there are few options. According to Monroe Undersheriff Daniel Greene, “Unfortunately, as the budgets get tighter, there are not as many places for people to go when they’re arrested and they have (mental health) problems.”

The State Office of Mental Health reported in 1998 that mentally ill inmates in county jails make up 5-15% of the total population. Local jails are required to provide their own psychiatric services and compared to the cost of hospitalization they have become financially desirable. “It’s a matter of economics. At the holding center, you can get three for the price of one when you compare it to the psychiatric center. It’s not about people, it’s about dollars.” stated Lynne Shuster, National Alliance for the Mentally Ill.

Arrest has become the surest method for getting treatment. “Families are so desperate to have a member, usually it’s a son, hospitalized that I will advise them to have him arrested,” Shuster said. “But every time I do that, I know what the risks are.” Beatings, assaults and even suicide are potentially part of the jail option, along with a criminal record.

Erie County has devoted more resources to accommodate Kendra’s Law orders for outpatient treatment, but help for the larger population of mentally ill people seems distant. (*Buffalo News*, 7/22/02.)

## **White Paper on New York’s Prison System**

The Correctional Association of New York has released a report entitled *State of the Prisons: Conditions of Confinement in 25 New York Correctional Facilities*. It is based on the work of the Correctional Association’s Prison Visiting Committee, which went to 25 New York State prisons between 1998 and 2001. It identifies important problems, offers suggestions for reforms, and reviews model programs. Among the specific areas addressed are program cuts, increased use of disciplinary confinement, growing number of inmates with mental illness in lock-down units, quality of medical care, and decline in parole for violent offenders. Recommendations include downsizing the prison system, expanding vocational and treatment programs (including for the mentally ill), and reconfiguring special housing units. (*Albany Times Union*, 6/28/02.)

## **Almost Ready for Trial Doesn’t Count**

Charging the defendant with menacing and criminal contempt, the prosecutor filed and served a corroborating affidavit of the complainant and a copy of an *ex parte* Order of Protection to convert the complaint. However,



E. Vincent Warren, 35th Annual Meeting and Conference

the supporting documentation applied only to the menacing count, they attached the wrong order of protection. The prosecution filed and served a “Statement for Partial Readiness for Trial” on the menacing count, but did not move to dismiss the contempt charge. Defense counsel moved to dismiss the entire complaint on speedy trial grounds (CPL 30.30), since the prosecutor did not completely convert it or dismiss the unconverted count. Accordingly, the complaint was jurisdictionally defective and made the prosecution’s statement of readiness meaningless. The court granted the motion and rejected the dicta of *People v Minor*, 144 Misc2d 846, 549 NYS2d 897 (Sup Ct App T 2nd Dept 1989), cited to support the prosecutor’s position. “[P]artial readiness goes against the logic of CPL §30.30. The statute sets the time by which the People must answer ready for trial and treats all counts in an action as a single entity.” *People v Peluso*, 2002 NY Misc Lexis 816 (NYC Crim Ct Kings County 7/12/02.)

## **Loan Forgiveness Included in Innocence Act**

A bill introduced in the US Senate would make DNA testing accessible to death row inmates with claims of innocence and provide grants to improve defense of capital cases. The Innocence Protection Act has been endorsed by the Senate Judiciary Committee and the bill is headed for the House Judiciary Committee. Bipartisan support exists and it is likely to be passed in some form.

A loan forgiveness section has been added under Title V of the bill. It would encompass full-time public defenders and provide at least some relief from both Stafford and Perkins types of student loans. An appropriations bill must be passed to fund the program. Senate Judiciary Committee Chairman Patrick Leahy (D-VT) noted that the

bill will “help State and local prosecutor and public defender offices to recruit and retain the most talented young lawyers.” (NLADA, 7/19/02; S 486; HR 912.). More information about the Innocence Protection Act is available on the Justice Project web site: <http://justice.policy.net/cjreform/ipa/>

### ***Race and Police Stops: More Than a Curious Statistic***

Rochester police have stopped more African-Americans for field interviews than whites according to a report by the Genesee Valley Chapter of the New York Civil Liberties Union (NYCLU). The report found “de facto discrimination” but not racial profiling. Most of the police interviews were done in areas with high crime rates or large minority populations. The NYCLU has requested the police to: “Make it clear that an officer can’t conduct a field interview unless there’s reasonable suspicion the individual has committed a crime, is in the process of criminal activity or about to commit a crime; train officers on what reasonable suspicion is; and require officers to describe their suspicions on the forms.” Concerns were also raised about archiving the field interview forms and potential use of the data. (Rochester *Chronicle and Democrat*, 7/31/02.) The National Association for the Advancement of Colored People (NAACP) has requested local police agencies to review their records for evidence of racial profiling. They found the NYCLU’s report inconclusive and want to investigate further. (*Democrat and Chronicle*, 8/7/02.)

An excessive amount of police citations for loitering have been given to African-Americans in Onondaga County. A local newspaper scrutinized 4000 police citations over a five-year period and found that 93.6% of people charged with loitering were African-American. “The numbers are quite disturbing,” said Donna Reese, President of the Syracuse-Onondaga Chapter of NAACP. “Just because you have a black or brown face in this city, and you’re hanging out on corners, that doesn’t make you a criminal.” The study has prompted questions about racial profiling and an investigation by the NYCLU. “These statistics are scandalous,” said NYCLU Director Donna Lieberman in New York City. “The Syracuse loitering law appears to be enforced in a manner that’s blatantly discriminatory. This is cause for an investigation by the city, the state attorney general and the Justice Department.” (*Post-Standard*, 7/18/02.)

Finally, a Wyoming County village justice has resigned to protest alleged racial profiling of Mexicans. The victim of a stabbing claimed that the two assailants were Mexican or Puerto Rican. According to Village Justice Blair True, the “officers entered a building housing Mexican residents near the stabbing location with pistols

and shotguns drawn, kicking down doors and subjecting Mexican workers to inhumane treatment.” Seven Mexicans were held for two hours without being questioned. Justice True resigned in protest over the police action. The police contacted the INS and arrangements for deporting the men have begun. (*Buffalo News*, 6/5/02.)

### ***INS Backlog Responsible for Unnecessary Deportations***

After Sept. 11th, Congress began an investigation into the backlog of records at the INS. A senior government official revealed that over two million documents, including change of address forms and applications for citizenship, have not been processed. Mountains of documentation forms are sitting in warehouses. This backlog might be responsible for peremptory deportations of people who were actually in compliance with the law. “It exposes one of the INS’ dirty secrets,” stated Lucas Guttentag, Director of the American Civil Liberties Union (ACLU) Immigration Rights Project. “The agency’s own record-keeping and information systems are completely inadequate, yet it so often turns around and punishes law-abiding immigrants when the agency’s own shoddy record keeping is at fault.” According to William Bernstein, an immigration attorney, “It’s outrageous. It at least raises the possibility that there could be innocent people who were deported on bogus charges.” (*Miami Herald*, 8/5/02.)



Alan Rosenthal, 35th Annual Meeting and Conference

## **US Supreme Court Keeps Doors Closed on Special Interest Cases**

The Supreme Court stayed a New Jersey federal judge's order to open "special interest" deportation hearings. The district court granted a preliminary injunction to halt enforcement of the Chief Immigration Judge's order to close "special interest" hearings. *North Jersey Media Group v Ashcroft*, No. 02-967 (DNJ 5/29/02). This decision has been put on hold until the 3rd Circuit can hear the government's appeal. Lee Gelernt, of the ACLU, believes that "[m]ore people will be tried in secret, and that's unfortunate. They're appearing all by themselves in front of a judge, facing a trained INS prosecutor in secret. There's no public scrutiny of the process." (*Associated Press*, 7/1/02.)

## **Dead Reckoning the Death Penalty**

The course of capital punishment has recently changed. Revelations about unreliable evidence, inadequate representation and DNA exonerations have sounded a clarion calling judges to protect the innocent and legislators to reconsider the efficacy of the death penalty.

The moratorium movement has gained new momentum. Recently, New York City added its name to the list of cities and towns calling for a moratorium on the death penalty. It joined the ranks of Buffalo, Rochester, Mt. Vernon and the towns of Greenburgh and Newcastle. (*New York Law Journal*, 6/27/02.)

The federal death penalty is also on the brink. A jurist in the Southern District of New York declared it unconstitutional. *United States v Quinones*, No. S3-00-CR-761 (SDNY 7/1/02). The "[c]ourt found that the best available evidence indicates that, on the one hand, innocent people are sentenced to death with materially greater frequency than was previously supposed and that, on the other hand, convincing proof of their innocence often does not emerge until long after their convictions. It is therefore fully foreseeable that in enforcing the death penalty a meaningful number of innocent people will be executed who otherwise would eventually be able to prove their innocence."

This term the US Supreme Court, in *Ring v Arizona* (\_\_\_US \_\_\_, 122 SCt 2428, 153 LED2d [2002]), held that juries, not judges, must make death sentence decisions. In *Atkins v Virginia* \_\_\_US \_\_\_, 122 SCt 2242, 153 LED2d 335 (2002), the court found executions of mentally retarded offenders violated the 8th Amendment. Commentators said that the court responded to concerns over the injustice of death penalty administration and narrowed its scope. (*American Lawyer*, 8/7/02.) Justice John Paul Stevens went further when he told attendees at the 9th Circuit's Annual Conference that "the United States is 'out of step' with the rest of the Western world on the use of the death penalty." (*Recorder*, 7/22/02.)



Thomas J. Eoannou, 35th Annual Meeting and Conference

Overseas, the Maginot Line surrounding capital punishment has fallen. "'Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings,' the European Council signed an amendment to the European Convention for the Protection of Human Rights abolishing the death penalty once and for all." (*DW-World*, 5/4/02.) More news about capital punishment can be found on NYSDA's NY Capital Defense page: [www.nysda.org](http://www.nysda.org).

## **High Courts Provide Little Defense Joy**

With the exception of the capital cases noted above, few recent decisions issued by the state and federal high courts brought relief to defendants. The Supreme Court did say that suspended sentences that may ultimately deprive defendants of their liberty may not be imposed in the absence of counsel (or waiver of counsel). *Alabama v Shelton*, 535 US \_\_\_, 122 SCt 1764, 152 LED2d 888 (2002).

Much bad news issued from the court in the final weeks of its term. One example is that sex offenders who refuse to participate in prison treatment programs that require them to admit guilt and past sex offenses may be sanctioned, gaining no relief under the 5th amendment. *McKune v Lile*, 536 US \_\_\_, 122 SCt 2017, 153 LED2d 47 (2002). Another is that a defendant may be forced to decide whether to accept a plea offer without first learning of impeachment evidence relating to government witnesses. *US v Ruiz*, 122 SCt 2450, 153 LED2d 586 (2002). Summaries of these and other Supreme Court cases begin at p. 15.



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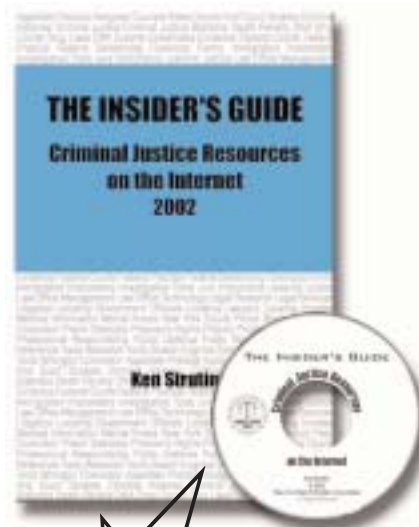
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## ***The Insider's Guide: Criminal Justice Resources on the Internet 2002*** **by Ken Strutin**

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As those who attended Ed Nowak's CLE session at the NYSDA summer meeting heard in detail, only small amounts of good news mixed with the bad in Court of Appeals decisions this year. Summaries of several decisions begin at p. 20.

One case held that in-court statements by initial counsel at pretrial hearings may be used to impeach a testifying defendant, although a withdrawn notice of alibi may not. *People v Brown*, Nos. 55, 56 (Ct Apps 5/2/02). Another found that a court that called a witness at a bench trial, over defense objection, abused its discretion, depriving the defendant of an opportunity to request a negative inference from the prosecution's failure to produce such witness. *People v Arnold*, No. 75 (Ct Apps 6/4/02). Yet another distinguished subpoenas in the possession of a court from subpoenas issued by a district attorney's office

and in the possession of the "FOILable" agency upon which they were served. The former are exempt from disclosure under the Freedom of Information Law while the latter must be disclosed absent some other exemption. *Matter of Newsday*, No. 76 (Ct Apps 6/13/02).

More recent decisions, including one reversing the first death sentence to reach the court since the current statute passed (*People v Darrel Harris*, No. 80, 7/9/02) will be summarized in future issues of the *REPORT*.

## ***Donated dtSearch Network Helps NYSDA Use 120,000 Documents***

Thanks to a generous donation from **dtSearch Corp**<sup>®</sup>, of Bethesda, MD, NYSDA staff can now do both simple



Lynne Stewart, 35th Annual Meeting and Conference

and complex text search requests of its computer files. Results are returned in lightning speed even on multiple-indexed file server folders. In daily use, almost all queries have taken no more than three seconds for the “hits” to be displayed in web browser format.

Early each morning, *dtSearch Network* automatically indexes 13+ gigabytes of MS Word, legacy WordPerfect, MS Excel, HTML pages, PDF and many other types of documents so it is ready for up-to-date searches that business day. Since indexing is done when network users are not at work, there is no degradation in performance.

In addition to complex Boolean searches, *dtSearch* allows each user to select which set of continually updated data to search. Multiple word query hits are highlighted in different colors to make perusing returned pages easy on the eyes. Concurrent indexing and searching using multiple shared index libraries are also built into the program’s many capabilities. A search history is kept, so that



Questions during CLE, 35th Annual Meeting and Conference

each user can go back to a previous search, be it yesterday or months ago.

Another great feature is that *dtSearch Network* can index and search NYSDA’s MS Outlook/Exchange email database files. Because the user can select individual indexes before searching, only the relevant data for that particular user are searched, making the process extremely fast. Since years of stored e-mail correspondence can add up to very large file sizes, the ability to choose which index to search is invaluable.

The user interface is intuitive and easy to work with. Backup Center staff members needed only a few minutes of orientation before the rollout and were up to speed the same day. Everyone agrees that using the program was simple to learn and is a great asset. NYSDA thanks *dtSearch Corp.* for its corporate support of the Association’s efforts to improve the quality of public defense services throughout the state. ⚡



CLE audience, 35th Annual Meeting and Conference



Arthur O. Eve and Richard Greenberg, 35th Annual Meeting and Conference

## Book Review

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### *Charges to the Jury and Request to Charge in a Criminal Case New York*

By Howard G. Leventhal

West Group, 1988, Revised ed. & Cum. Supp. 2001 (2 v.)

\$210.00 (10% discount for NYSDA members until Oct. 31\*)

By Ken Strutin<sup>†</sup>

Jury charges represent the last time a defense attorney speaks to the jury, albeit indirectly. Choosing appropriate instructions and carefully crafting language or objections to proffered charges from the court or prosecutor compose a lawyer's efforts to send one final message to the jury. There are few treatises that address New York criminal jury practice, and no currently updated alternatives to the official NY Criminal Jury Instructions (CJI). Fortunately, West's update of *Charges to the Jury* provides a much needed resource.

In two hefty volumes, Howard Leventhal expertly updates and expiates the groundbreaking work that he and Judge Budd G. Goodman created. This is the first update since the 1988 revised edition and it reflects the philosophy behind the original. "It continues to be the aim of the author and publisher to provide both the bench and bar with a useful, up-to-date tool to ensure that fair, adequate, comprehensible charges are given to the jury, and that errors are, to the extent possible, avoided or correctable." *Preface 2001 Cumulative Supplement*. The two volumes address essential elements of criminal jury practice, then focus on particular issues, such as voir dire and charging the jury. The bulk of the treatise is devoted to instructions for preliminary matters, defenses, treatment of witnesses and particular crimes, from adultery to weapons possession.

Both the original text and Supplement are heavily annotated, citing New York cases and statutes. Each chapter opens with an analysis and discussion of the specific practice issue or offense and moves on to sample instructions. The presence of sample jury instructions and model language makes this work a valuable tool for lawyers who want another New York source for jury charge language.

"Research Reference Sources" have been added to the beginning of each chapter in the Supplement, leading the reader to ALRs, statute citations, NY Jurisprudence and West Key Numbers. The Supplement is separately indexed for quick access to the new material. A "Table of New of Changed Section Titles" is very useful in identifying new model charges for different situations or offenses, e.g., *Aggravated Harassment by Inmate or Carjacking*.

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\* See box on page 2.

<sup>†</sup> **Ken Strutin** is a legal information consultant for NYSDA, and author of NYSDA's new publication, *The Insiders Guide: Criminal Justice Resources on the Internet 2002*.

Lastly, a "List of Index Topics" has been added to speed the reader to the appropriate section of this comprehensive work. ♪

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## Job Opportunities

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**ASSOCIATE** needed. Must be admitted in NY, have interest and one year experience in family law and/or criminal defense and be willing to work as an assistant public defender. Must consider moving to Washington County, NY (about 45 minutes north of Albany and 20 minutes south of Lake George). Salary: DOE. Send resumes to: Joseph H. Oswald, Esq., Oswald & McMorris, PO Box 328, Fort Edward, NY 12828; fax (518) 747-5664; web site: [www.oswaldmcmorris.net](http://www.oswaldmcmorris.net).

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**THE BRONX DEFENDERS**, an innovative community based public defender office in the South Bronx, seeks talented, creative and compassionate attorneys to serve as **Senior Trial Attorney or Team Leader**. Salary CWE.

Team Leaders supervise a team of lawyers, social workers, investigators and support staff in the representation of our clients in and out of the courtroom. Applicants for this position should have a passionate commitment to indigent defense, demonstrated ability to represent clients in complex legal cases, exceptional organizational skills and the ability to build a team with a shared vision of whole client representation and community involvement.

Senior Trial Attorneys litigate the office's most complex and serious cases. They are expected to be both compassionate and creative in their approach to litigation—filing creative motions, and mounting innovative defenses. Applicants for this position must have outstanding trial skills, exceptional client skills and extensive experience litigating complex felony cases,

To apply for either position, send a cover letter, resume and writing sample to Robin G. Steinberg, Executive Director, The Bronx Defenders, 860 Courtlandt Avenue, Bronx, NY 10451.

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The STATE OF OREGON'S Public Defense Services Commission is recruiting for the **Executive Director** of the Public Defense Services Commission. The Executive Director will be appointed by the Public Defense Services Commission, and will report directly to the Commission. The Executive Director will manage the Office of Public Defense Services, and will be responsible for completing the merger of the Office with the Indigent Defense Services Division, now part of the Oregon Judicial Department. The merger is currently scheduled to be completed on October 1, 2003. After the merger, the Executive Director will be responsible for managing the combined agencies. Salary \$5,763 to \$8,487 monthly. Contact: Paul S. Petterson, Multnomah Defenders, Inc., 522 SW Fifth Avenue, Suite 1500, Portland, OR 97204; tel: (503)721-2819; fax: (503)226-0107 ♪

# Conferences & Seminars

**Sponsor:** Appellate Division, Fourth Judicial Department and New York State Defenders Association

**Theme:** Assigned Counsel Criminal Appeals: Mandatory Eligibility Training

**Date:** September 14, 2002

**Place:** Rochester, NY

**Contact:** NYSDA: tel (518)465-3524; fax(518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)

**Sponsor:** National Legal Aid & Defender Association National Defender Leadership Institute

**Theme:** New Leadership 2002: A Defender Conference on Building Leadership and Political Outreach Skills

**Dates:** September 18-21, 2002

**Place:** Austin, TX

**Contact:** Cait Clarke, NDLI Director: tel (202)452-0620 xtn 226; fax (202)872-1031; e-mail [c.clark@nlada.org](mailto:c.clark@nlada.org);

**Sponsor:** United States District Court for the Northern District of New York and New York State Defenders Association

**Theme:** Courtroom Technology Seminar

**Date:** September 24, 2002

**Place:** Albany, NY

**Contact:** NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail [info@nysda.org](mailto:info@nysda.org); web site [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Weapons for the Firefight

**Dates & Places:** September 27, 2002 New York City  
October 19, 2002 Albany, NY

**Contact:** NYSACDL: tel (212) 532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** University of Rochester Medical Center Department of Psychiatry and Monroe County Office of Mental Health, with New York State Defenders Association and others

**Theme:** Bridges and Barriers: Integrating Community Mental Health and the Criminal Justice Systems for Adults with Severe Mental Illness

**Date:** September 27, 2002

**Place:** Rochester, NY

**Contact:** (585)275-6895 or (585) 275-9155

**Sponsor:** The Sentencing Project

**Theme:** National Symposium on Felony Disenfranchisement: Assessing Progress, Developing Strategies

**Dates:** September 30-October 1, 2002

**Place:** Washington, DC

**Contact:** The Sentencing Project: tel (202)628-0871; fax (202)628-1091; e-mail [Staff@Sentencingproject.org](mailto:Staff@Sentencingproject.org); web site [www.sentencingproject.org](http://www.sentencingproject.org)

**Sponsor:** National Institute for Trial Advocacy and the ABA Section of Litigation

**Theme:** Training the Lawyer to Represent the Whole Child

**Dates:** October 1-6, 2002

**Place:** Philadelphia, PA

**Contact:** NITA: tel (800)225-6482; fax (574)271-8375; e-mail [nita.1@nd.edu](mailto:nita.1@nd.edu); [www.nita.org](http://www.nita.org)

**Sponsor:** New York State Bar Association

**Theme:** The Basics of Local Criminal Court Practice

**Dates & Places:** October 9, 2002 Buffalo  
October 31, 2002 Uniondale, LI  
November 1, 2002 New York City  
November 20, 2002 Albany  
December 6, 2002 Syracuse

**Contact:** NYSBA: tel (800)582-2452; fax (518)487-5618; web site [www.nysba.org](http://www.nysba.org)

**Sponsor:** National Institute for Trial Advocacy

**Theme:** Representing the Accused in a Capital Trial

**Dates:** October 17-20, 2002

**Place:** Chapel Hill, NC

**Contact:** NITA: tel (800)225-6482; fax (574)271-8375; e-mail [nita.1@nd.edu](mailto:nita.1@nd.edu); [www.nita.org](http://www.nita.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Ethics for Criminal Defense Lawyers

**Date:** October 25, 2002

**Place:** Westchester, NY

**Contact:** NYSACDL: tel (212) 532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** Lorman Education Services

**Theme:** Conducting an Effective Cross-Examination in New York

**Date:** October 30, 2002

**Place:** Albany, NY

**Contact:** Lorman Education Services, PO Box 509, Eau Claire WI 54702-0509; (715) 833-3940; e-mail [customerservice@lorman.com](mailto:customerservice@lorman.com); web site [www.lorman.com](http://www.lorman.com)

**Sponsor:** New York State Association of Criminal Defense Lawyers

**Theme:** Mental Health Issues

**Date:** November 8, 2002

**Place:** New York City

**Contact:** NYSACDL: tel (212) 532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** National Legal Aid and Defender Association

**Theme:** Justice in Action: 2002 NLADA Annual Conference

**Dates:** November 13-16, 2002

**Place:** Milwaukee, WI

**Contact:** Aiyana Bullock: tel (202)452-0620 x207; fax (202)872-1031; e-mail [a.bullock@nlada.org](mailto:a.bullock@nlada.org); web site [www.nlada.org](http://www.nlada.org)

**Sponsor:** California Attorneys for Criminal Justice & California Public Defenders Association

**Theme:** Capital Case Defense Seminar

**Dates:** February 14-17, 2003

**Place:** Monterey, CA

**Contact:** CACJ: web site [www.cacj.org](http://www.cacj.org); CPDA: (916)362 1686; e-mail [cpda@cpda.org](mailto:cpda@cpda.org); web site [www.cpda.org](http://www.cpda.org) ♠

## Defense-Relevant Immigration News

Manuel D. Vargas and Saadia Aleem\*

### **2nd Circuit Says LPRs Convicted of Aggravated Felony Can't Apply for Family Hardship Discretionary Waiver of Deportation**

On May 29, 2002, the 2nd Circuit US Court of Appeals reversed a lower court decision that had held unconstitutional a 1996 amendment denying lawful permanent residents (LPRs) convicted of aggravated felonies a chance to apply for a family hardship waiver. See *Jankowski v INS*, 2002 US App. LEXIS 10035 (2nd Cir 2002).

A non-citizen who is the spouse, parent, or child of a United States citizen or LPR is eligible for a waiver from removal under the extreme family hardship provision (212[h]) of the Immigration and Nationality Act (INA). See 8 USC 1182(h). The 212(h) waiver is discretionary relief offered at the administrative level upon a showing that the US citizen, or LPR, relative will face extreme hardship if the person is deported. As part of the draconian 1996 amendments to the INA, Congress precluded 212(h) waivers for lawful permanent residents who, after lawful admittance, were convicted of an offense termed an "aggravated felony" and listed in INA 101(a)(43), 8 USC 1101(a)(43). However, Congress, did not preclude 212(h) relief for non-LPRs who had been similarly convicted of an aggravated felony. Some federal district courts, including the lower court in *Jankowski*, held that this violated equal protection. See *Roman v Ashcroft*, 181 FSupp2d 808 (ND Ohio 2002); *Song v INS*, 82 FSupp2d 1121 (CD Cal 2000); *Jankowski v INS*, 138 FSupp2d 269, 283 (D Conn 2001) ("the Court notes that the peculiarity of this result has led some courts and commentators to conclude that Congress must have erred in precluding only LPR aggravated felons from seeking discretionary relief under 8 USC 1182(h) relief.").

The 2nd Circuit found that the disparate treatment of LPRs and non-LPRs did not violate the Constitution. First, the Court held that LPRs and non-LPRs are consistently dealt with as two separate groups throughout the INA. Because two wholly different regimes are applied to LPRs and non-LPRs, members of the two groups cannot be "similarly situated." Rather, "Congress is . . . free to tweak what it considers a problem in one regime without worrying about the other." Moreover, the Court held that even if the equal protection rational basis test applied,

Congress could have rationally concluded to deny protections LPRs because of differences in recidivism, in opportunities to apply for other forms of discretionary relief, and in application rates.

Soon after *Jankowski*, the 3rd Circuit similarly rejected the equal protection argument, in *Leon-Reynoso v Ashcroft*, 2002 US App LEXIS 11381 (3rd Cir June 11, 2002). The 7th, 8th, and 11th Circuits have all also rejected the equal protection argument.<sup>1</sup>

**The Bottom Line:** Defense lawyers need to advise their lawful permanent resident immigrant clients that a conviction for one of the "aggravated felony" offenses enumerated in INA 101(a)(43) will now even more certainly lead to mandatory deportation. (Some relief may still be available if deportation will result in government-sanctioned torture or a threat to life or freedom.) To avoid mandatory deportation, lawyers must work to avoid pleas to offenses, or prison sentences, that will trigger "aggravated felony" deportability. For helpful tips, see Chapter 5 ("Strategies for Avoiding the Potential Negative Immigration Consequences of a New York Criminal Case") of the Project manual, *Representing Noncitizen Criminal Defendants in New York State*, available from NYSDA, or call the Project hotline.

### **NYSDA Submits Two Amicus Curiae Briefs in 2nd Circuit Cases Raising Issues Involving Interplay Between Criminal and Immigration Law**

- **NY manslaughter 2nd should not be a "crime of violence" for aggravated felony purposes**

On Apr. 24, 2002, NYSDA submitted an amicus curiae brief in support of the petitioner in *Jobson v Ashcroft*, No. 02-4019 (2d Cir. 2002), arguing that conviction of New York manslaughter, 2nd degree, should not be deemed a "crime of violence" for aggravated felony purposes. See INA 101(a)(43)(F), 8 USC 1101(a)(43)(F) (defining "aggravated felony" to include conviction of a "crime of violence" with a prison sentence of at least one year).

Conviction of an aggravated felony generally results in mandatory deportation. Under the immigration statute, which references a definition of "crime of violence" in the federal criminal code, "crime of violence" includes: (1) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (2) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property

\* **Manuel D. Vargas** is the Director of NYSDA's Immigrant Defense Project. **Saadia Aleem** is the Project's new Staff Attorney. The Project provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. For hotline assistance, call the Project on Tuesdays and Thursdays from 9:30 am to 4:30 pm at (212) 367-9104.

<sup>1</sup> In at least one district court opinion, *Beharry v Reno*, 183 FSupp2d 584 (EDNY 2002), the court held that treaty and international law requirements required LPRs be allowed a hearing to present evidence regarding the effect of deportation on citizen and LPR family members. The government is currently appealing to the 2nd Circuit.

of another may be used in the course of committing the offense. See 18 USC 16.

In the *Jobson* case, immigration authorities found that NY manslaughter 2nd is a crime of violence under the second prong of the 18 USC 16 definition. The NYSDA *amicus* brief argues, first, that this is incorrect because the language of the second prong requires a substantial risk that force will be intentionally used; a *mens rea* of reckless is insufficient. Secondly, NYSDA's brief argues that the conduct encompassed by NY manslaughter 2nd does not necessarily "by its nature" present "a substantial risk of physical force" being used because death of the victim may result from an act or failure to act that does not involve force. See *Dalton v Ashcroft*, 257 F.3d 200 (2d Cir 2001) (not all violations of the New York DWI statute in question are "by their nature" crimes of violence because risk of use of physical force is not a requisite element). In addition, NYSDA's brief argues that it is improper for the immigration judge in the case to rely on a presentence report to determine whether a conviction constitutes a crime of violence.

NYSDA's *amicus* brief was drafted and submitted by the law firm of Wilmer, Cutler & Pickering as *pro bono* counsel to NYSDA. It is available from NYSDA's web site at:

[http://www.nysda.org/NYSDA\\_Resources/Immigrant\\_Defense\\_Project/JobsonvAshcroft\\_2ndcir2002\\_.pdf](http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/JobsonvAshcroft_2ndcir2002_.pdf)

- ***The Supreme Court's invalidation of the government's retroactive application of a 1996 mandatory deportation provision should apply to immigrants convicted after trial as well as those convicted by guilty plea***

On Mar. 21, 2002, NYSDA submitted an *amicus curiae* brief in support of the petitioners in *Rankine/Lawrence v Reno*, No. 01-2135(L) (2d Cir 2002). It argues that the protections of a Supreme Court decision last year invalidating retroactive application of a 1996 mandatory deportation provision in cases in which the immigrant pled guilty to a deportable offense before the new law should be extended to immigrants convicted after trial.

Under pre-1996 law, most Lawful Permanent Residents in deportation proceedings were eligible to apply for a waiver of deportation as long as they had been lawfully domiciled in the US for at least seven years and had not served five years or more in prison for conviction of one or more aggravated felonies. See former INA 212(c). However, in 1996, Congress repealed INA 212(c) relief, making mandatory deportation for permanent residents convicted of many crimes. Nevertheless, the Supreme Court ruled last year that 212(c) relief remains available for permanent residents who agreed to plead guilty before the new laws and who would have been eligible for such relief at the time. See *Immigration and Naturalization Service*

*v St. Cyr*, 121 SCt 2271 (2001) (holding that AEDPA and IIRIRA 212(c) waiver bars could not be applied retroactively to pre-IIRIRA plea agreements absent a clear indication from Congress that it intended such a result). See the *Backup Center REPORT*, Vol. XVI, #4, at p. 14.

The NYSDA brief argues that the reasoning of *St. Cyr* extends to immigrants who were convicted after trial because such immigrants, like those who chose to plead guilty, may have similarly relied on the immigration consequences at the time they elected not to plead guilty.

This *amicus curiae* brief, which was filed on behalf of NYSDA, as well as the Legal Aid Society of the City of New York and the New York Association of Criminal Defense Lawyers, was also drafted and submitted by Wilmer, Cutler & Pickering. It is available from NYSDA's web site at:

[http://www.nysda.org/Publications/Amicus\\_Briefs/RankineAmicusBrief.pdf](http://www.nysda.org/Publications/Amicus_Briefs/RankineAmicusBrief.pdf)

### ***Updated Removal Defense Checklist in Criminal Charge Cases Available***

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past six months. The checklist provides a fairly exhaustive list of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing non-citizens in removal proceedings based on criminal charges. The checklist is also a useful tool for defense attorneys who are trying to weigh the risk of various plea agreements. To access or download this resource material (now updated through June 21, 2002) visit NYSDA's web site at [www.nysda.org](http://www.nysda.org) and click on Immigrant Defense Project Resources. ☞

### **NYSDA Case Digest System CD-ROM**

#### ***15 Years of NY Criminal Cases at Your Fingertips***

The Case Digest System (CDS) is a powerful, easy-to-use computer program that quickly searches and retrieves digests from the last 15 years of criminal case summaries. The summaries (over 7,000) are taken from NYSDA's monthly newsletter, the *Public Defense Backup Center REPORT*. The CDS also contains the New York City Assigned Counsel Expert Witness Directory, the New York State Chief Defender List (a statewide listing of defender office addresses and phone numbers), and NYSDA's Subject Matter Index. Format: CD-ROM; Win 95/98. To order a copy of the Case Digest System, contact NYSDA, (518) 465-3524.

*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

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

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

Alabama v Shelton, 535 US \_\_\_, 122 SCt 1764, 152 LE2d 888 (2002)

The defendant represented himself despite court warnings against doing so; he was never offered appointed counsel. He was convicted of a misdemeanor, sentenced to jail time (which was suspended), placed on probation, and ordered to pay fines and restitution. An appellate court held that a suspended sentence did not trigger the right to appointed counsel without evidence that the defendant had lost his liberty. The state's high court reversed in part, finding a suspended sentence was "a term of imprisonment" and required appointment of counsel. Only the suspended sentence was invalidated.

**Holding:** A suspended sentence that may "end up in the actual deprivation of a person's liberty" should not have been imposed without appointed counsel. The right to appointed counsel in *Gideon v Wainwright*, 372 US 335 (1963) was explicated in *Argersinger v Hamlin*, 407 US 25, 33 (1972) to include any misdemeanor case "that actually leads to imprisonment" and in *Scott v Illinois*, 440 US 367 (1979) to cases leading to or involving "actual imprisonment." Activation of a suspended sentence meant imprisonment for the underlying uncounseled conviction, prohibited by *Argersinger-Scott*. The absence of defense counsel made the reliability of the conviction dubious. Providing counsel post-conviction to test it would have been frustrated by an uncounseled trial record. Salvaging the conviction by separating the probation sentence from the prison term was not an option under state law. Judgment affirmed.

**Dissent:** [Scalia, J] Imposition of a suspended sentence did not deprive the defendant of his liberty and appointment of counsel was not required to make it valid. It was premature to consider the need for appointed counsel at this stage.

Accusatory Instruments (Sufficiency) ACI; 11(15)

Trial (Jurisdiction) TRI; 375(25)

United States v Cotton, 535 US \_\_\_, 122 SCt 1781, 152 LE2d 860 (2002)

The indictment charging the defendant with drug possession and distribution failed to include the threshold levels of drug quantity required for enhanced penalties under 21 USC 841(b). The trial court sentenced the defendant based on drug quantity data revealed through trial testimony, not the indictment. The defendant made no objection. *Apprendi v New Jersey*, 530 US 466 (2000) was decided while the case was on appeal. In light of that decision, the appellate court vacated the sentence, holding that the indictment was defective and deprived the trial court of jurisdiction to sentence the defendant.

**Holding:** The trial court did not lose jurisdiction to decide the case due to a defect in the indictment. *Lamar v United States*, 240 US 60 (1916). Since the defendant did not object to the defect, plain-error analysis was appropriate. Federal Rule of Criminal Procedure 52(b). While there was concededly plain error, the question of whether it "affected substantial rights" was not pertinent, since the error "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Johnson v United States*, 520 US 461, 469 (1997). "The real threat then to the 'fairness, integrity, and public reputation of judicial proceedings' would be if respondents, despite the overwhelming and uncontroverted evidence that they were involved in a vast drug conspiracy, were to receive a sentence prescribed for those committing less substantial drug offenses because of an error that was never objected to at trial." Judgment reversed and remanded.

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

Bell v Cone, 535 US \_\_\_, 122 SCt 1843, 152 LE2d 914 (2002)

During the defendant's death penalty hearing, defense counsel relied on trial evidence related to an insanity defense to argue for mitigation. Counsel waived final argument to preclude prosecution rebuttal. The defendant was sentenced to death and his appeals were denied. Post-conviction motions were filed, claiming defense counsel was ineffective by not presenting mitigation evidence or giving a closing argument. The state post-conviction court found counsel's performance sufficient under state case law with the same standard as *Strickland v Washington*, 466 US 668 (1984). On appeal from denial of a federal *habeas* petition, the Court of Appeals found counsel's conduct prejudicial under *United States v Cronin*, 466 US 648 (1984).

**Holding:** The ineffectiveness claim was properly decided by the state court applying the *Strickland* standard. *Strickland* required counsel's representation to fall below an objective standard of reasonableness and "a rea-

US Supreme Court *continued*

sonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cronic* presumed prejudice in three instances: 1) complete denial of counsel; 2) complete failure to subject the prosecution’s case to meaningful adversarial testing; and 3) conditions under which competent counsel could not perform adequately. The objection here is to failures at particular points, not an entire failure to perform throughout sentencing. This is similar to other specific attorney errors subject to *Strickland*. *Eg Darden v Wainwright*, 477 US 168, 184 (1986). The state court decision was not “contrary to” established law. Judgment reversed and remanded.

**Dissent:** [Stevens, J] Defense counsel’s failure to interview witnesses, introduce mitigating evidence and make a closing or plea for defendant’s life “entirely failed to subject the prosecution’s case to meaningful adversarial testing” under *Cronic*. A *Strickland* inquiry was stymied by counsel’s abdication of his role resulting in an incomplete trial record.

Civil Rights Actions (USC §1983 Actions)	CRA; 68(45)
Self-Incrimination (General)	SLF; 340(13)
Sex Offenses (General) (Sentencing)	SEX; 350(4) (25)

McKune v Lile, 536 US \_\_\_, 122 SCt 2017; 153 LEd2d 47 (2002)

The defendant denied charges of rape, testifying that the act was consensual. Convicted, he was sentenced to state prison. Before his release date, prison officials ordered him to join the Sexual Abuse Treatment Program (SATP), which required participants to admit guilt and reveal past sex offenses, without confidentiality. Refusal to join led to revocation of privileges and transfer to maximum security. The defendant did not join and filed a federal action under 42 USC 1983, claiming SATP violated the privilege against self-incrimination. Both trial and appeals courts agreed, finding the sanctions to be coercive.

**Holding:** SATP had a rational relation to a legitimate penological objective, rehabilitation. The consequences for not joining were related to program objectives and did not constitute “atypical and significant hardships in relation to the ordinary incidents of prison life.” *Sandin v Conner*, 515 US 472 (1995). Transferring non-participating inmates was justified by space limitations; deciding where to house prisoners is a core prison administrative function. *Meachum v Fano*, 427 US 215, 225 (1976). Restricting the defendant’s privileges was within the discretion of prison officials and an accepted method to encourage behavior. *Hewitt v Helms*, 459 US 460 (1983). While *Hewitt* involved due process, not self incrimination, there is “no indication that SATP is an elaborate attempt to avoid the

protections offered by the privilege against compelled self-incrimination.” The exercise of the 5th Amendment need not be cost free. *See eg Jenkins v Anderson*, 447 US 78, 84-85 (1970). Judgment reversed, case remanded.

**Concurring:** [O’Connor, J] The standard for compulsion is not the same as the *Sandin* due process standard, but the penalties assessed were not compulsive under any reasonable test.

**Dissent:** [Stevens, J] Never before has the Court held that persons who validly assert the privilege against self incrimination may be ordered to incriminate themselves and be sanctioned for disobeying. “No matter what the goal, inmates should not be compelled to forfeit the privilege against self-incrimination simply because the ends are legitimate or because they have been convicted of sex offenses.”

Local Government (General)	LOG; 243(10)
Religious Freedom (General)	RLG; 328(10)
Watchtower Bible & Tract Soc. of NY v Village of Stratton, 536 US ___, 122 SCt 2080; 153 LEd2d 205 (2002)	

The petitioners, Jehovah’s Witnesses, wanted to provide free religious literature door to door in the respondent’s community. A local ordinance made uninvited peddling and solicitation on private property a misdemeanor unless a solicitation permit was obtained. The permit’s purpose was “the prevention of fraud, the prevention of crime, and the protection of residents’ privacy.” The petitioners claimed that enforcement violated their 1st Amendment rights to free speech and the exercise of religion. The district court found the ordinance content-neutral and upheld most provisions. This decision was affirmed.

**Holding:** Ordinances requiring permits to conduct door-to-door canvassing abridge protected speech. The local regulation was overbroad and not tailored to meet its goals. It encompassed religious and political activities at the same time it sought to forestall commercial and criminal conduct. Requiring citizens to ask government permission to speak to their neighbors is offensive to the notion of a free society; forcing canvassers to surrender their anonymity was unconstitutional. *Buckley v American Constitutional Law Foundation*, 525 US 182 (1999). Judgment reversed and remanded.

**Concurring:** [Breyer, J] The crime prevention justification noted by the dissent is not a strong argument. There is no indication that the ordinance was passed for that reason, nor did the village rely on that rationale below.

**Concurring:** [Scalia, J] The licensing requirement is not invalidated by the fact that some crackpots would choose to forgo speech rather than get a license.



US Supreme Court *continued*

**Dissent:** [Rehnquist, J] The municipality had legitimate governmental interests to protect by enacting the ordinance, particularly crime prevention. *Martin v City of Struthers*, 319 US 141 (1943). A permit system with automatic, non-discretionary approval did not violate the 1st Amendment. *Hynes v Mayor and Council of Oradell*, 425 US 610 (1976).

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Statute of Limitations (Computation of Period) (Tolling of) SOL; 360(10) (20)

Carey v Saffold, 536 US \_\_\_, 122 Sct 2134; 153 LE2d 260 (2002)

The defendant's felony conviction became final before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), affording him one year from that date to file a federal *habeas* petition. One week before the deadline, he filed state *habeas* petitions in the trial and appellate courts, which were denied. More than four months later, he filed a petition in the California Supreme Court, which was denied as untimely and lacking in merit. Finally, he filed a federal *habeas* petition, also rejected as untimely. The district court did not toll the AEDPA time for the intervals between filings in the state courts. On appeal, that decision was reversed.

**Holding:** The one-year tolling provision of the AEDPA includes the time between pending original state applications for collateral review. AEDPA required *habeas* petitions to be filed within one year after the state conviction became final. 28 USC 2244(d)(1)(A). This time period did not include the interval when an application for state collateral review was "pending." 28 USC 2244(d)(2). Under the state's review process, the defendant's applications were pending or in the process of being completed during the intervals. This permitted the required exhaustion of state remedies. *Williams v Taylor*, 529 US 362 (2000). California's requirement of filing a new petition in a higher court, in lieu of an appeal, was the functional equivalent of direct appeals in other states. The key difference was the timeliness requirement, which was based on reasonableness as compared to precise time limits. Since the state's highest court dismissed "on the merits," it must be determined whether timeliness in that court was waived. Judgment vacated and remanded.

**Dissent:** [Kennedy, J] Once a state court denied the petitioner's *habeas* application, it was no longer pending and tolling did not apply.

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Search and Seizure (Consent [Advice of Rights]) SEA; 335(20[a])

United States v Drayton, No. 01-631, 536 US \_\_\_, 122 Sct 2105; 153 LE2d 242 (2002)

Three police officers in plain clothes boarded a bus to conduct drug and weapons interdiction. They carried concealed weapons and wore their badges visibly. Two officers were stationed at either end of the bus; the third moved from back to front questioning passengers. Defendants Brown and Drayton were seated together. Because they were wearing baggy clothes and heavy jackets on a warm day, the officer asked to search first one, and, after discovering drugs, the other. Suppression was denied. On appeal, the 11th Circuit reversed under cases holding that bus passengers do not feel free to refuse cooperation without being advised.

**Holding:** Police were not required to advise bus passengers of their right to refuse to cooperate in their investigation. The 4th Amendment permits limited law enforcement inquiries without any basis, including asking permission to search luggage. An objective test in light of all the circumstances is to be applied, *ie*, "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Florida v Bostick*, 501 US 429 (1991). The officers did not brandish their weapons, menace the defendants or block the aisles. They asked permission before acting. Knowledge of the right to refuse consent is only one factor, not the deciding one, in assessing a consent search. *Ohio v Robinette*, 519 US 33, 39-40 (1996). Requesting permission to search outweighed warning defendants of their right to refuse. Judgment reversed and remanded.

**Dissent:** [Souter, J] The "threatening presence of several officers" *United States v Mendenhall*, 446 US 544, 554 (1980) (opinion of Stewart, J) in the absence of the bus driver did not allow the passengers to tend to their own business until the officers were ready to let them do so.

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

Habeas Corpus (Federal) HAB; 182.5(15)

Retroactivity (General) RTR; 329(10)

Horn v Banks, 536 US \_\_\_, 122 Sct 2147; 153 LE2d 301 (2002)

In the penalty phase of the defendant's capital trial, the jury was instructed on unanimity requirements as to aggravating and mitigating factors. The jury returned a verdict of death. After the defendant's direct appeal was denied, *Mills v Maryland* (486 US 367 [1988]) was decided. *Mills* prohibited states from requiring jurors unanimously to agree that a particular mitigating circumstance existed before being allowed to consider that circumstance in their sentencing decision. The defendant's post-conviction *Mills* challenge was denied in state court. Federal district court denied his *habeas* petition on the merits based

US Supreme Court *continued*

on the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) standard of review and did not consider the retroactivity of *Mills*. On appeal, the 3rd Circuit reversed in part, vacating the death sentence without considering retroactivity.

**Holding:** The retroactivity analysis of *Teague v Lane* (489 US 288 [1989]), regarding the application by state courts of newly announced constitutional procedural rules, had to be considered when raised by the government despite being overlooked by the state court. *Caspari v Bohlen*, 510 US 383 (1994). The AEDPA analysis did not obviate the district court’s need to do a threshold *Teague* review. Judgment reversed and remanded.

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Death Penalty (Cruelty) DEP; 100(40) (120) (135)  
 (Penalty Phase)  
 (Religious Positions)

*Atkins v Virginia*, \_\_ US \_\_; 122 SCt 2242;  
 153 LEd2d 335 (2002)

The petitioner was convicted of several crimes including capital murder. At the first penalty phase, a defense expert said the petitioner was mildly mentally retarded. As a new penalty phase, a rebuttal witness said the petitioner was of at least average intelligence and had antisocial personality disorder. The state Supreme Court affirmed the death sentence.

**Holding:** In 1986, the first state passed legislation prohibiting the execution of the mentally retarded. *Penry v Lynaugh* (492 US 302 [1989]) rejected the proposition that executing persons with retardation was unconstitutional. In a consistent trend, several state legislatures have since precluded such executions. Where it is still allowed, the practice is uncommon. Since *Penry*, only five states have executed offenders with IQs under 70. This national (and, as a footnote, international) consensus “reflects widespread judgment about the relative culpability of mentally retarded offenders, and the relationship between mental retardation and the penological purposes served by the death penalty.” Characteristics of retardation apparently undermine procedural protections including those guarding against false confessions. The constitution restricts states’ power to take the life of a retarded offender. Executing the mentally retarded is excessive punishment. Judgment reversed, case remanded.

**Dissent:** [Scalia, J] This decision is based on a faulty count. Of the less than half the states that bar execution of the retarded, only seven bar all such executions. Others allowing execution of retarded offenders make exceptions, such as New York, which permits execution of a retarded person who commits murder in a correctional

facility. This ruling is another in the long list of requirements impeding imposition of the death penalty.

**Dissent:** [Rehnquist, J] The suggestion that foreign laws, views of professional and religious organizations, and opinion polls are relevant to the constitutional question is antithetical to considerations of federalism.

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Civil Practice (General) CVP; 67.3(10)  
 Constitutional Law (United States Generally) CON; 82(55)

*Christopher v Harbury*, \_\_ US \_\_, 122 SCt 2179;  
 153 LEd2d 413 (2002)

The respondent’s husband, a Guatemalan rebel leader, was detained, tortured and then executed by Guatemalan army forces trained and paid by, and acting as informants for, the CIA. The respondent brought a complaint claiming that US government officials had intentionally deceived her by concealing information about her husband, preventing her from bringing a lawsuit that might have saved her husband’s life. The respondent asserted 1st and 5th Amendment rights, asserting that government officials had unconstitutionally impeded her access to the courts. Dismissal by the district court was reversed by the Court of Appeals. Other claims remain or were abandoned.

**Holding:** Two categories of denial-of-access cases have emerged. One involves claims of systemic official actions that frustrate a plaintiff or plaintiff class in preparing and filing suits at the present time. The second deals with specific cases that cannot be tried as a result of past official action, no matter what official action maybe taken in the future. This case falls in the second category. Such a claim must allege both an underlying cause of action, whether anticipated or lost, and official acts that frustrated the litigation. The complaint must identify a remedy that can be awarded as recompense, not available in some suit yet to be brought. Care is needed in identifying the claim for relief, underscored here where the governmental action complained of “was apparently taken in the conduct of foreign relations,” raising concerns that judicial enquiry would involve separation of powers issues. See *Department of Navy v Egan*, 484 US 518, 529 (1988). The respondent failed to identify a cause of action, compromised by the alleged deception, for which relief could be granted. Judgment reversed and remanded.

**Concurrence:** [Thomas, J] No constitutional basis is found for a right of access to the courts that imposes a duty on government officials to report or divulge matters relating to national security or in response to informal requests.

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

US Supreme Court *continued*Sentencing (Aggravated Penalties)  
(Enhancement) SEN; 345(5) (32)

Harris v United States, \_\_ US \_\_, 122 SCt 2406;  
153 LEd2d 524 (2002)

The defendant was convicted in federal court of knowingly carrying a gun during and in relation to a drug sale. 18 USC 942(c)(1)(A). After conviction, he was sentenced in accordance with subsection (ii) of the statute, making the minimum sentence “not less than 7 years” (instead of 5 years) if the gun was brandished. He objected that, as a matter of statutory interpretation, brandishing is an element of a separate crime for which he was not indicted or tried. On appeal he added that if brandishing was a sentencing factor, it violated *Apprendi v New Jersey* (530 US 466 [2000]). The Court of Appeals affirmed.

**Holding:** Brandishing is a sentencing factor, not an element, based on the statute’s structure, analyzed under, *inter alia*, *Jones v US* (526 US 227 [1999]). Basing a 2-year increase in the minimum on a judicial finding of brandishing does not evade the requirements of the 5th and 6th amendments. Questions about the wisdom of mandatory minimums are left to Congress, the states, and the democratic process. Judgment affirmed.

**Plurality:** [Kennedy, J] *Apprendi* held that facts (other than prior convictions) increasing penalties for crimes beyond statutory maximums had to be submitted to juries. It did not negate *McMillan v Pennsylvania* (477 US 79 [1986]), which sustained a statute increasing the minimum (but not maximum) penalty for a crime when the defendant had also possessed a weapon. Those facts that set the outer limits of a sentence and of the court’s power to impose a sentence are elements.

**Concurrence:** [O’Connor, J] *Jones* and *Apprendi* were wrongly decided, but even if they are valid the petitioner’s arguments are unavailing.

**Concurrence in Part, Dissent in Part:** [Breyer, J] *Apprendi* is not easily distinguishable from this case, and applying it would have adverse practical as well as legal consequences. This does not suggest approval of mandatory minimums as a matter of policy.

**Dissent:** [Thomas, J] *McMillan* conflicts with *Apprendi*.

Constitutional Law (United States  
Generally) CON; 82(55)Sentencing (Aggravated Penalties)  
(Enhancement) SEN; 345(5) (32)

Ring v Arizona, \_\_ US \_\_, 122 SCt 2428;  
153 LEd2d 556 (2002)

After the petitioner was convicted of felony murder, a sentencing hearing was held. A codefendant testified at

that hearing that the robbery had been pre-planned. He said the petitioner laid out all the tactics and shot the decedent, and that later the petitioner had complained because the co-defendants did not congratulate him on his shot. The petitioner was sentenced to death by the judge based on this testimony. The state supreme court recognized that *Apprendi v New Jersey*, 530 US 466 (2000), raised questions about the validity of Arizona’s capital system. But, as *Apprendi* had said that *Walton v Arizona* [497 US 639 [1990]], upholding Arizona’s system, was still good law, the court affirmed.

**Holding:** *Walton* upheld Arizona’s capital sentencing scheme by saying that added facts found by sentencing courts were not elements of capital murder. Its holding being irreconcilable with *Apprendi*, *Walton* is overruled in relevant part. “Capital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.” Judgment reversed, case remanded.

**Concurrence:** [Scalia, J] Whether or not the states have been wrongly coerced into the adoption of aggravating factors by decisions such as *Furman v Georgia*, 408 US 238 (1972), where such factors are required they must be found by a jury beyond a reasonable doubt.

**Concurrence:** [Kennedy, J] While wrongly decided, *Apprendi* is the law and must be implemented in a principled way. *Walton* and *Apprendi* cannot stand together.

**Concurrence:** [Breyer, J] *Apprendi* was wrongly decided. Reversal is required here because the 8th amendment mandates jury sentencing.

**Dissent:** [O’Connor, J] *Apprendi* had a destabilizing effect on the criminal justice system. It, not *Walton*, should be overruled.

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

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

United States v Ruiz, 122 SCt 2450;  
153 LEd2d 586 (2002)

After marijuana was found in the respondent’s luggage, federal prosecutors offered her a “fast track” plea bargain requiring her to waive indictment, trial and appeal rights in exchange for a shorter sentence recommendation, and to waive the right to obtain “impeachment information relating to any informants or other witnesses.” The offer was withdrawn when the respondent refused to agree. She pled guilty and at sentencing asked the judge to consider granting her the two-level departure that would have been recommended had she accepted the plea. The court imposed a standard guideline sentence. The 9th Circuit vacated the sentencing determination, stating that the constitution requires certain impeachment

US Supreme Court *continued*

information be provided to the defendant before trial, and concluded this applies to plea agreements.

**Holding:** The constitution does not require the government to divulge impeachment evidence before entry of a guilty plea. Impeachment information is critical in relation to the fairness of trial but not to whether a plea is voluntary. Due process considerations that led to the recognition of trial-related rights as to impeachment information argue against the existence of such rights associated with pretrial pleas. An obligation to reveal impeachment information during plea bargaining could sincerely hinder the government’s interest in securing guilty pleas that are factually acceptable, wanted by the defendants and help secure an well-organized administration of justice. There is little constitutional benefit to be gained by a holding that would warrant so radical a change in the criminal justice process. Judgment reversed.

**Concurrence:** [Thomas, J] The distinction drawn by the court suggesting that the constitutional analysis is affected by the “degree of help” the information would provide to the defendant at the plea stage was neither necessary nor accurate.

New York State Court of Appeals

New York State Agencies (Law, Department of) NYA; 266.5(165)

Prosecutors (General) PSC; 310(20)

People v Gilmour, No. 49, 5/2/02

After the New York State Police arrested the defendant, state police counsel wrote the Attorney General [AG] requesting that office prosecute the defendant. The AG agreed. The defendant moved to dismiss the indictment, claiming that the letter did not comply with Executive Law 63(3). The motion was dismissed and the defendant was found guilty. On appeal, the Appellate Division reversed the conviction and vacated the indictment.

**Holding:** Since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General. See *People v DiFalco*, 44 NY2d 482, 486. The AG only has prosecutorial power when specifically authorized by statute. See *People v Romero*, 91 NY2d 750, 754. Executive Law 63(3) allows the head of a department or other delineated state entity to activate the AG’s prosecutorial powers. L 1969, ch 814 (emphasis added). The State bears the burden of showing that an agency head has asked for the prosecutorial participation of the AG’s office. The request by counsel to the state police, not the police superintend-

ent, failed to meet the plainly expressed requirements of 63(3). The argument that the counsel’s duties included the authority to make such a request is rejected. The superintendent could have delegated his authority but did not do so. See *People v Liebowitz*, 112 AD2d 383, 384 *lv den* 65 NY2d 928. Order reversed, indictment dismissed.

Alibi (Discovery) ALI; 20(20)

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

People v Brown, Nos. 55, 56, 5/2/02

In each of these trials, the court allowed the prosecution to use pre-trial statements by defense attorneys to impeach the defendants; the Appellate Division affirmed. In *Brown*, seeking an *in limine* ruling at a *Sandoval* hearing, counsel said he expected the defendant to testify that he was present to buy, not to sell, cocaine and to own up to past cocaine purchases. The defendant did not claim any misrepresentation. When his trial testimony was inconsistent with his former counsel’s pre-trial representations, the prosecution used defense counsel’s statements to impeach him. In *Burgos-Santos*, defense counsel initially filed a CPL 250.20 notice of alibi but withdrew it before trial. The defendant then testified that he was at the scene and was attacked by the complainants. The prosecution impeached the defendant with the withdrawn alibi notice.

**Holding:** In *Brown*, the defendant was the sole source of the statements about his proposed trial testimony. Counsel made the statements as the defendant’s authorized agent, in court proceedings in the defendant’s presence, seeking a favorable pre-trial ruling. The statements were properly used for impeachment. See *People v Rivera*, 58 AD2d 147 *affd on opn below* 45 NY2d 989.

*Rivera* does not control in *Burgos-Santos*. Statements contained in a notice of alibi, withdrawn before trial, are fundamentally different from an attorney’s statements at a pre-trial hearing. The Federal Rules of Criminal Procedure and certain States’ statutes explicitly provide that evidence of intention to use an alibi defense which is later withdrawn is not admissible against the defendant. Fed Rules Crim Pro 12.1(f); see also Conn Super Ct R 40-25; Mass R Crim P 14(b)(1)(f); see also *Williams v Florida* 399 US 78 (1970). Such statements may not, as a matter of state common law, be treated as informal judicial admissions that can be used to impeach. However, the defendant did not object on constitutional grounds, and the error is harmless. Orders affirmed.

**Dissent:** [Smith, J] The defendant in *Brown* should not have been impeached with former counsel’s statement.

Bribery (General) BRI; 63(10)

Federal Law (Crimes) FDL; 166(10)

## NY Court of Appeals *continued*

### People v Wolf, No. 19, 5/7/02

The defendant attorney paid kickbacks to insurance company adjusters out of his contingent fees to expedite settlement of personal injury claims. He was convicted of first-degree commercial bribing under PL 180.08. An essential element of this offense is that the bribe recipient's employer suffer economic harm in excess of \$250 as a result. The Appellate Division affirmed, holding that payment of a kickback is sufficient to establish the economic harm element.

**Holding:** The kickback/bribery cases under the Federal mail fraud statute (18 USC 1341, *et seq*) are analogous to first-degree commercial bribery cases, and hold payment of a bribe alone insufficient to satisfy the economic loss element of mail fraud. *Eg McNally v United States*, 483 US 350 (1987). Here, the prosecution's theory was that the defendant's payment of the kickback evinced his willingness to take less in a *bona fide* settlement. The issue is whether the corrupt arrangement deprived the insurance companies of the opportunity to take advantage of that willingness at the time of the settlement.

The evidence showed that the kickback to adjusters for one company was paid before the completion of normal investigation and verification necessary to assess a claim's value and conduct meaningful settlement discussion. That company did not have sufficient information at the time of the bribe to take advantage of the defendant's willingness to settle low. That conviction must be reduced to a misdemeanor.

As to the other company, the file was originally assigned to an adjuster not party to the kickback scheme. Due to the promised kickback, a senior adjuster negotiated with the claimant. The "post-bribe" settlement was approved by the original adjuster without knowledge of the kickback. A trier of fact could reasonably find that absent the kickback, at the moment the case was resolved, a reduced fee arrangement would have been accepted by the original adjuster. It could be inferred that the kickback arrangement deprived this company of the opportunity to achieve a disposition for the amount of the actual settlement reduced by the sum of the kickback, showing the economic loss element. Judgment modified, case remitted.

Accusatory Instruments (Sufficiency)	ACI; 11(15)
Appeals and Writs (Prosecution, Appeals by)	APP; 25(70)

### People v Hernandez, No. 40, 5/7/02

The court dismissed the complaint pursuant to CPL 140.45 finding that the accusatory instrument was facially

insufficient and that it was impossible to draw and file a sufficient accusatory instrument based on the available facts and evidence. The Appellate Term reversed.

**Holding:** CPL 450.20(1) only authorizes the prosecution to appeal from dismissal of an accusatory instrument entered pursuant to section 170.30, 170.50, or 210.20. No appeal lies from a determination made in a criminal proceeding unless specifically statutorily authorized. *See People v Stevens*, 91 NY2d 270, 277. The Legislature has not provided the prosecution with any right of appeal from CPL 140.45 dismissals. The Appellate Term had no jurisdiction to entertain the prosecution's appeal. Order reversed.

Article 78 Proceedings (General)	ART; 41(10)
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Defense Systems (Compensation Systems [Attorney Fees])	DFS; 104(25[b])
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### Mahoney v Pataki, No. 42, 5/7/02

In 1998, the Court of Appeals approved fee schedules for necessary legal and paralegal assistance to capital counsel pursuant to Judiciary Law 35-b(5)(a). The Division of the Budget [DOB] determined that Judiciary Law 35-b did not cover expenses of such assistance. The plaintiffs brought this action in Supreme Court, Genesee County, seeking a declaration that the statute authorized the promulgation and approval of such fees. The action was converted to an article 78 proceeding and transferred to Albany County where the complaint was dismissed as untimely. The Appellate Division reversed the order converting the action and returned the matter to Genesee County, where the complaint was reinstated. Supreme Court found that Judiciary Law 35-b(5)(a) authorized the expenses in question. The Appellate Division affirmed and certified the question to the Court of Appeals.

**Holding:** Judiciary Law 35-b conferred on the plaintiffs a right to be adequately compensated for services, vesting them with a pecuniary interest. Attorneys who provide the services necessary to an adequate defense, as well as capital defendants, are within the statute's zone of interest. *See Society of the Plastics Industry Inc. v County of Suffolk*, 77 NY2d 761, 772-773. Proceeding under article 78 was not proper because there had been no final agency "determination" by DOB.

Judiciary Law 35-b does not limit the power to create and approve a schedule of fees which includes necessary services in addition to assigned counsel. The Legislature left it to the statutorily created screening panels and the Court of Appeals to create an efficient and cost effective plan. The statute does not reflect that legal and paralegal assistance costs should be "subsumed" within lead counsel fees. To make lead counsel responsible for all aspects of a capital defense would be a waste of resources. Order affirmed.

**NY Court of Appeals** *continued*

Appeals and Writs (General) APP; 25(35)

Evidence (Destruction) EVI; 155(49)

**People v Yavru-Sakuk, No. 72, 6/4/02**

At a bench trial, the prosecution introduced a recording in which the complainant confronted the defendant. The defendant testified that he had not denied her allegations in that call, but told her that “there is a misunderstanding; there is a mistake . . . it was not my intent.” The court found the defendant guilty and at sentencing noted that his taped statement was “the icing on the cake of this case.” The court emphasized that the complainant was “immeasurably more truthful and sincere than the defendant.” Before the appeal, the tape was lost. The Appellate Term *sua sponte* determined that this made review impossible. The defendant having completed probation, the accusatory instrument was dismissed.

**Holding:** An appellate court must determine whether a lost exhibit has “substantial importance” to the issues raised on appeal. If so, the court must determine whether the record otherwise accurately reflects the information contained within the exhibit. If so, loss of the exhibit will not prevent review. *People v Strollo*, 191 NY 42. If the information is important and not in the record, the court must order a reconstruction hearing unless the defendant establishes such a hearing would be futile. *People v Glass*, 43 NY2d 283. It is not clear this exhibit was needed to review the legal sufficiency of the conviction, which might be resolved purely on the complainant’s testimony. The record does not definitively reflect a conflict over the contents of the tape. The court failed to inquire whether the contents of the tape could be reconstructed. The parties should brief and argue necessary issues below. Order reversed, case remitted.

Judges (Powers) JGS; 215(10)

Witnesses (General) WIT; 390(22)

**People v Arnold, No. 75, 6/4/02**

Narcotics officers requested assistance from the Emergency Services Unit [ESU] to gain entry to an apartment under a search warrant. ESU officers “secured” the premises by handcuffing those present, including the defendant. Narcotics officers then entered. The defendant was charged with criminal possession of a weapon and drugs. At a bench trial, he argued that if those items were on his person as the narcotics officers claimed, the ESU officers would have discovered them. Two narcotics officers testified that they did not think ESU had searched the occupants and that he believed that ESU, when securing

a premises, did not ordinarily frisk or search individuals. No ESU officers were called before both sides rested and a motion to dismiss and summation were discussed. The court, over defense objection, then called an ESU sergeant as a court witness who testified that ESU did not always frisk or search people before handcuffing them. The Appellate Division affirmed the defendant’s conviction.

**Holding:** Trial judges have wide discretion in directing the presentation of evidence but must exercise that discretion without prejudice to the parties. *See* CPL 260.30. Trial courts must sometimes take an active role in order to clarify a confusing issue or to avoid misleading the trier of fact. *See People v Moulton*, 43 NY2d 944, 945. The court crosses the line of indiscretion when the judge takes on either the function or appearance of an advocate at trial. *See Yut Wai Tom*, 53 NY2d 44, 58. If a trial court feels compelled to call its own witnesses over objection, it should explain and invite comment from the parties. Here, the court abused its discretion as a matter of law, depriving the defendant of the opportunity to request that the trier of fact draw a negative inference from the prosecution’s failure to produce an ESU officer. Loss of this inference, combined with the damaging testimony from the court’s witness, creates a significant probability that the verdict was affected. Order reversed.

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

**People v Roche, No. 78, 6/4/02**

At retrial after a reversal of the defendant’s second-degree murder conviction, the defense was that the police had the wrong person. At a charge conference, the defendant requested a lesser included offense charge on extreme emotional disturbance manslaughter. The request, based on his belief that the prosecution’s summation would include arguments that he committed the murder after being provoked into a fit of rage, was denied. The appellate court reversed the murder conviction that followed.

**Holding:** The defendant’s pursuit of a defense at trial inconsistent with extreme emotional disturbance, and his failure to provide psychiatric testimony as to his emotional distress, do not bar a manslaughter charge. These circumstances do impact whether sufficient evidence exists to support extreme emotional disturbance. *People v White*, 79 NY2d 900, 903. Absent requisite proof of extreme emotional distress, such a charge should not be given. *People v Walker*, 64 NY2d 741, 743. The record is devoid of evidence that the defendant suffered from a mental infirmity at the time of the stabbing. His statements to police and other witnesses, combined with his behavior, fail to indicate the presence of emotional disturbance. The brutal nature of the killing by itself is not enough from which to infer an extreme emotional disturbance. *People v Moye*, 66 NY2d

## NY Court of Appeals *continued*

887, 890. That the decedent argued with the defendant and sent him out on several errands up and down five flights of stairs is not enough to establish a tumultuous relationship meeting the objective explanation component. No reasonable jury could conclude that a resulting loss of control by the defendant constituted an extreme emotional disturbance worthy of a charge-down. Order reversed.

Arrest (Probable Cause)(Vehicle and Traffic Law) ARR; 35(35)(50)

Search and Seizure (Automobiles [Probable Cause]) SEA; 335(10[g])

### People v Wright, No. 82, 6/4/02

When a state trooper received a tip from an unidentified complainant that a red Suzuki with top down was being driven recklessly, he began looking for it. He observed a matching vehicle driven by the defendant and stopped it after ascertaining that it had a faulty muffler. See Vehicle and Traffic Law 375(31). The trooper then arrested the defendant for driving while intoxicated, based upon the trooper's observations, the defendant's failure to pass sobriety tests, and his admission to drinking. The Appellate Division reversed the defendant's conviction for driving while intoxicated.

**Holding:** Provided that a traffic stop is supported by probable cause, "neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant." *People v Robinson*, 97 NY2d 341 (2001). Since there is evidence that the trooper had probable cause to believe that the defendant had committed a muffler violation, the stop was lawful. The anonymity of the original complainant no longer had any bearing on probable cause once the trooper obtained this independent Vehicle and Traffic Law ground for probable cause. Order reversed.

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

### People v William "II", Nos. 67; 81, 6/6/02

In *William "II"*, an anonymous tipster said one "Will" was involved in a shooting, described him, said he was with two Caucasian males, and cautioned that Will had a gun. An officer saw someone named Will, matching the description but not dressed to conceal a weapon, accompanied by the defendant and another. The defendant was apprehended in flight. Suppression of the marijuana and

drug paraphernalia found on him was denied, and his plea affirmed.

In *Rodriguez*, police received a report about a male Hispanic wearing a black-and-white checkered shirt and carrying a gun. Two hours later, officers saw the defendant, who matched the description, in front of a grocery store. He got into a car, drove away, and was pulled over by police. As they approached, they saw the defendant drop a gun. The appellate court reversed the conviction.

**Holding:** Whether a search and seizure is reasonable depends on whether police action was justified at its inception, and was reasonably related in scope to the circumstances which justified the interference. *Terry v Ohio*, 392 US 1, 20 (1967); *People v De Bour*, 40 NY2d 210, 215. To create reasonable suspicion, an anonymous tip must be reliable. Reliability is demonstrated only if the suspect engages in actions, preferably suggestive of criminal activity, which the tip predicted in detail. Reliability is required in the assertion of illegality, not just in the tendency to identify a person. *Florida v J.L.*, 529 US 266 (2000). The *William "II"* tip lacked predictive information, and was directly contradicted by observations that Will could not conceal a weapon. The tip did not identify the defendant or connect him with criminal activity or the gun.

In *Rodriguez*, that the defendant matched the description was not enough. The record supports a finding that the gun cannot be deemed abandoned. *People v Ramirez-Portoreal*, 88 NY2d 99, 110. *William "II"* order reversed, suppression granted, indictment dismissed; *Rodriguez* order affirmed.

Evidence (Hearsay) EVI; 155(75)

Trial (Summations) TRI; 375(55)

### People v Tosca, No. 96, 6/6/02

**Holding:** "The trial court did not abuse its discretion in admitting the police officers' testimony concerning an unidentified cab driver's report of a recent encounter with the armed defendant. The testimony was admitted not for its truth, but to provide background information as to how and why the police pursued and confronted defendant (see *People v Till*, 87 NY2d 835, 837). Further, the trial court twice explicitly instructed the jury on the limited use it could make of the testimony and that the testimony was not to be considered proof of the uncharged crime.

Finally, defendant was not unduly prejudiced by the prosecution's questionable remarks during summation, given the trial court's prompt curative instructions (cf. *People v Ashwal*, 39 NY2d 105, 111." Order affirmed.

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

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

NY Court of Appeals *continued*

People v Arroyo, No. 64, 6/11/02

During trial, the defendant, dissatisfied with his attorney’s efforts, sought to proceed *pro se*. The court inquired whether the defendant “really wanted” to represent himself, then noted, “you have a right to do it because I don’t think there’s anything wrong with you. A person has the right to represent himself, but it is usually not a good idea . . . I don’t have to ask you any questions to know that you’re sensible to some extent and have a right to represent yourself. I have to make sure that you’re of sound mind and the rest of it and I’m convinced of that.” The court permitted the defendant to represent himself but had defense counsel stand by. The defendant’s conviction was affirmed.

**Holding:** Allowing a defendant to proceed *pro se* requires a knowing, voluntary and intelligent waiver of the right to counsel. See *People v Slaughter*, 78 NY2d 485, 491. Aware of the need for a “searching inquiry” to determine the validity of such a waiver (*Faretta v California*, 422 US 806 [1975]) the court failed to adequately evaluate the defendant’s competency to waive counsel. The court did not warn him of the risks inherent in representing himself nor appraise him of the “‘importance of the lawyer in the adversarial system of adjudication’ ([*People v*] *Smith*, 92 NY2d [516], at 520).” The court did not test the defendant’s understanding of choosing self-representation nor obtain appropriate record evidence for appellate review. See *People v Allen*, 39 NY2d 916, 917. Order reversed, new trial ordered.

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

Sentencing (Presence of Defendant and/or Counsel) SEN; 345(59.5)

People v Lineberger, No. 65, 6/11/02

“During pretrial and trial proceedings, defendant successfully requested on two occasions that assigned counsel be relieved based on allegations of misfeasance or nonfeasance. After the unfavorable jury verdict, he adamantly refused the continued services of his third assigned attorney for sentencing . . . At a subsequent sentencing hearing, defendant obstinately refused to enter the courtroom after asserting that he had fired his attorney. . . . Defendant had been informed in unequivocal terms that the Trial Judge intended to sentence him that day.”

**Holding:** “[T]he sentencing court was presented with an impossible choice. Defendant refused to appear in court but was equally adamant through word and deed of his desire to rid himself of his third assigned attorney and

represent himself. Had the court permitted counsel to continue to represent defendant against his wishes, it might have run afoul of the proscriptions of *Faretta v California* (422 US 806, 817) and *People v Smith* (68 NY2d 737, 739, cert denied 479 US 953). Defendant cannot now rely upon the court’s inability to conduct a searching inquiry of defendant on the implications of self-representation at sentencing as a basis for vacating his sentence (see *People v Arroyo*, \_\_ NY2d \_\_ [decided herewith]).” Order affirmed.

Defenses (Justification) DEF; 105(37)

Homicide (Murder [Defenses] HMC; 185(40[a] [m])  
[Instructions])

People v Hernandez, No. 61, 6/13/02

The defendant and the decedent got into an altercation in the lobby and stairwell of the defendant’s apartment building. The defendant’s shotgun discharged, killing the decedent. In light of the defendant’s testimony that he had been attacked, the court gave a justification defense instruction but refused a “no duty to retreat” instruction. The Appellate Division affirmed the defendant’s conviction.

**Holding:** Penal Law 35.15 allows the use of deadly force if a person reasonably believes that another person is using or about to use deadly force. Even then a person has a duty to retreat if he knows he can avoid the use of force by retreating to complete safety. The one exception to this duty is for persons in their “dwelling” who are not the initial aggressor. The statute does not define, and the court has never interpreted, the term “dwelling” with regard to this defense. Penal Law 35.20, which describes when a person may use force to prevent a burglary, incorporates the definition of “dwelling” from Penal Law article 140.00. However, the interests underlying article 140.00 are not implicated when a defendant raises a 35.15 defense, which is available even when the person subjected to force was lawfully present. “Dwelling” as found in article 140 does not determine its meaning in 35.15. For 35.15 purposes, whether a location is a part of the defendant’s dwelling depends on the extent to which the defendant exercises exclusive possession and control over the area. The lobby and stairwell of the building were not under the defendant’s exclusive possession and control and were therefore not part of his “dwelling.” Order affirmed.

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

Records (Access) REC; 327(5)

Matter of Newsday, No. 76, 6/13/02

Newsday brought this petition under the Freedom of Information Law (Public Officers Law [POL] art 6, §§84-



## NY Court of Appeals *continued*

90) (FOIL), against Empire State Development Corporation [ESDC] seeking to compel ESDC to release copies of subpoenas *duces tecum* in its possession which had been served by the New York County District Attorney's Office while investigating ESDC. The court ruled that the subpoenas were not immune from disclosure since they were issued by the DA's office, an agency subject to FOIL. The Appellate Division reversed, concluding that a subpoena falls into the judiciary exemption to FOIL.

**Holding:** The purpose of FOIL is to ensure open government. See POL 84. This requires giving FOIL disclosure provisions an expansive interpretation. See *Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 274. The ESDC is a state public corporation and is subject to FOIL. The burden falls on the agency to show that the requested material falls into a FOIL exception. *Matter of Fink v Lefkowitz*, 47 NY2d 567, 571. Had the subpoenas remained in the exclusive possession of the court, they would have been immune from disclosure, as the judiciary and state legislature are expressly excluded from the agency definition. In the hands of ESDC, the subpoenas are agency records which are required to be turned over subsequent to a valid FOIL request absent a showing that an exemption applies. See also *Matter of Capital Newspapers v Whalen*, 69 NY2d 246. Order reversed.

Discovery (Procedure[Enforcement]) DSC; 110(30[a])  
Evidence (Prejudicial) EVI; 155(106)

*People v Jenkins, No. 77, 6/13/02*

The defendant was charged with murder. The defense was misidentification of him as the shooter in what had been a gunfight with multiple shooters. The prosecution disclosed the existence of a ballistics report before trial. The defendant specifically requested its production. After cross-examining several prosecution witnesses, the defense urged the court to preclude introduction of the report pursuant to CPL 240.70 because the defense had not received the ballistics report and was prejudiced by the delay. The prosecution maintained it had turned over the report before trial, but provided a copy. The trial court found that even if the prosecution failed to timely disclose the report, the defendant had not been prejudiced by the late disclosure. The appellate court affirmed.

**Holding:** If a party fails to comply with the discovery mandates, the court "may . . . prohibit the introduction of certain evidence" (emphasis added). Criminal Procedure Law 240.70. Preclusion should be employed only if belatedly disclosed evidence completely refutes the defendant's defense, and potential prejudice arising from the

delay cannot be cured by a lesser sanction. The defendant knew that a ballistics report existed but proceeded without it. While the report saying that all shell casings from the scene came from the same gun completely undermined the multiple shooter defense, the expert who compiled it could not conclude that the recovered bullet and fragment were fired from the same gun as the casings. The defendant could still pursue his defense. Compare with *People v Thompson*, 71 NY2d 918. Order affirmed.

**Dissent:** (Kaye, CJ) The defendant was blind sided, mid-trial, by scientific proof undermining his defense and was therefore unduly prejudiced.

Accusatory Instruments (General) ACI; 11(10)

Appeals and Writs (Prosecution, Appeals by) APP; 25(70)

Double Jeopardy (Dismissal) DBJ; 125(5)

*People v Schaum, No. 99, 6/13/02*

The defendant was charged with violating a noise ordinance. At a bench trial the court granted his motion to dismiss, holding that the defendant was immune from prosecution as he was acting within the scope of his duties as a firefighter. The court did not rule on the underlying facts of the charged offense. The prosecution's appeal was dismissed by the Appellate Term, which characterized the dismissal as a "verdict of acquittal."

**Holding:** It was error to dismiss the prosecution's appeal. When a criminal court dismisses an accusatory instrument on the ground there is a legal impediment to conviction, the prosecution may appeal as of right. See CPL 450.20(1); 170.30(1)(f). " 'So long as the dismissal does not constitute an adjudication on the facts going to guilt or innocence,' such a dismissal is not a bar to further proceedings (*People v Key*, 45 NY2d 111, 117. . .)." In dismissing because the defendant was found to be immune from prosecution, the court did not decide whether the defendant committed the violation. The prosecution's right to appeal remains. Order reversed, case remitted.

## First Department

Identification (Eyewitness) (In-court) IDE; 190(10)(24)

Trial (Public Trial) TRI; 375(50)

*People v Frost, 289 AD2d 23, 734 NYS2d 18 (1st Dept 2001)*

**Holding:** The court properly permitted a witness whose lineup identification had been suppressed to identify the defendant in court. Included in the totality of circumstances was a two-hour period of the witness and the defendant playing basketball together; the prosecution

**First Department** *continued*

met their burden of demonstrating by clear and convincing evidence (*see People v Chipp*, 75 NY2d 327, 335 *cert den* 498 US 833) that the in-court identification had an independent source. *See People v Williams*, 222 AD2d 149 *lv den* 88 NY2d 1072.

The court properly exercised its discretion in closing the courtroom during the testimony of witnesses who expressed fears for their safety; the prosecution established an overriding interest in doing so. *See Waller v Georgia*, 467 US 39. That the closure hearing was conducted *ex parte* for “legitimate and exceptional security reasons” does not require reversal, as it did not deprive the defendant of any constitutional right. The proceeding did not involve his guilt or innocence and his ability to defend himself was not impaired. *See People v Castillo*, 80 NY2d 578, 582-583, *cert den* 507 US 1033. Moreover, the information revealed to the court at the closure hearing was similar to information previously relayed to it. The defendant was not entitled to be personally present at the hearing. *People v Chan*, 230 AD2d 165, 170-172 *affd* 91 NY2d 913. Judgment affirmed. (Supreme Ct, New York Co [White, J])

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

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

*People v Jones*, 289 AD2d 47, 734 NYS2d 125 (1st Dept 2001)

**Holding:** The court properly admitted reports prepared by the undercover detective as prior consistent statements to rebut claims of recent fabrication. *See People v McDaniel*, 81 NY2d 10, 18. The reports predated particular motives to falsify asserted by the defense; there was no requirement that the reports predate all motives to falsify. *See People v McClean*, 69 NY2d 426, 430. The court properly exercised its discretion in placing reasonable limits on the defendant’s cross-examination of police witnesses, as he received sufficient latitude to impeach the officers’ credibility. The defendant’s right to confront witnesses and present a defense was not impaired. *See Delaware v Van Arsdall*, 475 US 673, 678-679 (1986). The court’s responses to notes from the jury did not deprive the defendant of a fair trial. *See People v Almodovar*, 62 NY2d 126. The conviction of third-degree criminal sale of a controlled substance is vacated as a non-inclusory concurrent count of criminal sale of a controlled substance in or near school grounds. *See People v Ross*, 284 AD2d 233. Judgment modified and as modified, affirmed. (Supreme Ct, New York Co [Tejada, J])

Forensics (General) FRN; 173(10)

Witnesses (Experts) WIT; 390(20)

*People v Whitaker*, 289 AD2d 84, 734 NYS2d 149 (1st Dept 2001)

**Holding:** The court properly exercised its discretion in admitting the testimony of a blood spatter expert, who testified that his analysis was not based solely on common sense, but also on professional or technical knowledge beyond the typical juror’s knowledge. *See People v Miller*, 91 NY2d 372, 379-380. The defendant contends that admission was improper because blood spatter analysis has not gained general acceptance in the scientific community. The procedures used do not involve novel scientific techniques and there was no issue as to the validity of the techniques utilized. No *Frye* hearing (*Frye v United States*, 293 F 1013) was necessary. *See People v Abdul*, 244 AD2d 237 *lv den* 91 NY2d 939, *cert den* 525 US 880. In accordance with the 4th Department and other jurisdictions, blood spatter evidence is found scientifically reliable. *See People v Barnes*, 267 AD2d 1020 *lv den* 95 NY2d 832. Judgment affirmed. (Supreme Ct, New York Co [Allen, J])

Evidence (Sufficiency) EVI; 155 (130)

*Re Frank B.*, 289 AD2d 150, 734 NYS2d 437 (1st Dept 2001)

The appellant was adjudicated a juvenile delinquent upon findings that he committed acts that, if committed by an adult, would constitute the crimes of attempted first-degree robbery, petit larceny, fifth-degree criminal possession of stolen property, and attempted third-degree assault.

**Holding:** The complainant’s credible testimony that the appellant held what appeared to be a firearm to the complainant’s neck clearly established the appellant’s guilt. The evidence warranted the inference that when the appellant struck the complainant, he intended to cause physical injury. However, there was insufficient evidence that the appellant participated in his companions’ theft of candy from the complainant’s newsstand in a separate incident. Therefore, the petit larceny and criminal possession of stolen property counts must be dismissed. Order modified, and as modified, affirmed. (Family Ct, New York Co [Bednar, J])

Evidence (Sufficiency) EVI; 155 (130)

*People v Chatman*, 289 AD2d 132, 734 NYS2d 444 (1st Dept 2001)

**Holding:** The defendant was convicted of reckless assault. Penal Law 120.00(2). He failed to preserve his claim that the evidence was insufficient to prove that he acted recklessly. Even under his version of the incident,

**First Department** *continued*

the act of striking his dog with great force, while in close proximity to his infant son, constituted conscious disregard of a substantial and unjustifiable risk that injury to the baby would occur, thus establishing reckless conduct. Penal Law 15.05[3]; see *Matter of Robert W.*, 212 AD2d 1005, 1006 *lv den* 86 NY2d 702. Judgment affirmed. (Supreme Ct, Bronx Co [Cerbone, J])

Judges (Powers) JGS; 215(10)

Motions (Suppression) MOT; 255(40)

*People v Davis*, 289 AD2d 134, 734 NYS2d 447  
(1st Dept 2001)

**Holding:** The court properly denied without a hearing the defendant's motion to suppress identification testimony. The information presented clearly established that the observing officer's viewing of the defendant in this observation sale case was a confirmatory identification; no *Wade* hearing was required. See *People v Wharton*, 74 NY2d 921. The court properly exercised its discretion to advise the prosecutor to ask particular questions, after determining that the inexperience of the prosecutor was undermining the orderly presentation of evidence and truth-seeking function of the trial. See *People v Moulton*, 43 AD2d 944. The court raised the matters with counsel outside the hearing of the jury, rather than asking the questions itself, to avoid any appearance of bias. The record does not support the defendant's claim that he was prejudiced by the court's facial expressions. Judgment affirmed. (Supreme Ct, Bronx Co [Iacovetta, J on motion; Sheindlin, J at trial and sentence])

Domestic Violence (General) DVL; 123(10)

Juveniles (Abuse) (Neglect) JUV; 230(3) (80)

*In re Alisa V.*, 289 AD2d 160, 735 NYS2d 56  
(1st Dept 2001)

**Holding:** The finding of neglect made after a fact-finding hearing under Family Court Act Article 10 is reversed and the neglect petition dismissed. The Administration for Children Services (ACS) did not prove by a preponderance of the evidence (See *Matter of Tammie Z.*, 66 NY2d 1) that the appellant inflicted excessive corporal punishment on his daughter and placed her in imminent risk of harm by engaging in domestic violence. FCA 1012(f)(B). He was not shown to have a mental illness making him a threat to his children. The claims that appellant hit his wife and daughter were based solely on his initial statements to his family nurse practitioner and to a psychologist. His family all denied that he had beaten his

daughter or wife. Others who had dealings with the family stated that they never saw evidence of abuse. The appellant later denied the content of his statements, saying first that he made them so request for help to quit smoking would not be denied. He later testified that it happened in "a vivid nightmare," as a side effect of nicotine patches. The appellant's psychiatric experts found this denial and delusion plausible. ACS's psychiatric experts could not say the appellant was not delusional. In light of the family's denial of abuse, the lack of evidence of abuse, and the experts' testimony, the petitioner did not sustain its burden as to the appellant or the derivative allegations that the mother failed to protect the children and that the son was also at risk of being abused. Orders reversed. (Family Ct, New York Co [Adams, J])

Counsel (Competence) COU; 95(15)

Ethics (General) ETH; 150(7)

*Matter of Hubbert*, 290 AD2d 122, 735 NYS2d 118  
(1st Dept 2002)

The respondent, a former Legal Aid attorney currently in solo practice, was retained in 1998 to obtain a divorce and was paid a retainer. He filed the divorce action, but lost the case file during relocation of his office and took no further action. He did not return numerous phone calls from his client.

**Holding:** The respondent was admitted to the practice of law on July 31, 1985. In January 2001, he was served with charges alleging the violation of various Disciplinary Rules: DR 1-102(A)(4), falsely representing to a client that he had filed a judgment of divorce; DR 2-110(A)(3), failing to promptly return the unearned portion of a fee; DR 6-101(A)(3), neglecting matters entrusted to him; DR 1-102(A)(5), engaging in prejudicial conduct by failing to cooperate with the Departmental Disciplinary Committee; and DR 1-102(A)(7), engaging in conduct that adversely reflects on an attorney's fitness to practice law. The hearing Referee sustained five of six charges, as admitted by the respondent, and recommended a three-month suspension. A Hearing Panel increased the sanction recommendation to a six-month suspension and required that the reinstatement papers contain an assurance as to office reforms the respondent will undertake to insure that similar misconduct is not repeated. Both the Referee and the Hearing Panel expressed concern, based on these charges and others, about the respondent's cavalier attitude toward his professional responsibilities to his clients and toward official inquiries. Hearing Panel Determination confirmed.

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

**First Department** *continued*

**Application of Levenson v Lippman, 290 AD2d 211, 735 NYS2d 754 (1st Dept 2002)**

**Holding:** Petitioners sought review under article 78 of the Civil Practice Law and Rules of orders which modified the compensation they received for services rendered as assigned counsel, by reducing it, in each case, to the statutory limits set forth in County Law § 722-b.

“Petitioners’ challenges to the reduction of their compensation pursuant to administrative orders of the Supreme Court are not justiciable (see, *Matter of Director of Assigned Counsel Plan of City of New York [Bodek]*, 87 NY2d 191, 194; see also, *Matter of Werfel v Agresta*, 36 NY2d 624; *Matter of Gilman v Golfinopoulous*, 284 AD2d 224, 726 NYS2d 271). To the extent that petitioners seek a declaration as to the validity of respondent Chief Administrator’s rule (22 NYCRR 127.2[b]), as amended, effective April 16, 2001), allowing administrative review of trial court determinations as to the propriety of fee awards in excess of the limits prescribed in County Law § 722-b, the matter is not, in the first instance, properly before us (*Donaldson v State of New York*, 156 AD2d 290, 292, *lv denied* 75 NY2d 1003).” Leave to file *amici curiae* briefs granted, petitions denied, proceedings dismissed. (Supreme Ct, New York Co [Scherer, J])

**Second Department**

**Trial (Public Trial) TRI; 375(50)**

**People v Brann, 290 AD2d 455, 736 NYS2d 107 (2nd Dept 2002)**

**Holding:** The trial court improperly denied the defendant’s aunt and her two sons entrance into the courtroom while an undercover officer gave his testimony. There was no proof that the defendant’s relatives, who had no criminal history and lived outside the area where the defendant was arrested, posed a risk to the officer’s safety. See *People v Serrano*, 274 AD2d 594. Their exclusion from the courtroom was “‘broader than constitutionally tolerable’ (*People v Gutierrez*, 86 NY2d 817, 818).” Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Harkavy, J])

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

**People v Campos, 290 AD2d 456, 736 NYS2d 108 (2nd Dept 2002)**

The defendant was convicted of second-degree murder.

**Holding:** The defense raised *Batson* challenges (*Batson v Kentucky*, 476 US 79 [1986]) to two of seven pros-

ecution peremptory challenges of black prospective jurors. The court accepted the prosecutor’s statements that he did not want social workers on the jury and that teachers tended to be biased against the prosecution. The peremptory challenges based upon employment were improper because the employment was not related to the case or the jurors’ qualifications to serve on the case. *People v Smith*, 266 AD2d 570, 571. The prosecutor did not relate the employment status of the prospective jurors to the facts of the case, nor is such a relationship apparent from the record. The defendant having timely objected before the end of jury selection, the pretextual explanations warrant reversal. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Buchter, J])

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

**Corson v City of New York, 290 AD2d 408, 736 NYS2d 71 (2nd Dept 2002)**

After reporting an illegally parked car to the police, the plaintiff was called out of his house by one of the officers who responded and ticketed the car. The parties dispute what occurred next, but the plaintiff was ultimately arrested, handcuffed, and taken in a police car to the station, placed in a holding cell, and charged with obstruction of governmental administration, disorderly conduct and harassment. The plaintiff sued the City of New York and the New York Police Department for false arrest. The jury returned a verdict for the plaintiff, but the court granted the defendants’ motion to dismiss for failure to establish a prima facie case that the officers were acting within the scope of employment.

**Holding:** The trial court erred in finding, as a matter of law, that the officers were not acting within the scope of employment. Under the doctrine of *respondeat superior*, an employer may be liable for an employee’s tortious conduct if such conduct is generally foreseeable and a “‘natural incident of the employment’ (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933. . . .)” This issue should have been presented to a jury. *Riviello v Waldron*, 47 NY2d 297, 303. Judgment reversed, verdict reinstated, matter remitted for trial on damages. (Supreme Ct, Richmond Co [Ponterio, J])

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

**Narcotics (Paraphernalia) NAR; 265(50) (57)**  
**(Possession)**

**People v Jones, 290 AD2d 514, 736 NYS2d 406 (2nd Dept 2002)**

**Holding:** The defendant was convicted of third-degree criminal possession of a controlled substance and second-degree use of drug paraphernalia. The statutory

## Second Department *continued*

presumption in Penal Law 220.25(2) cannot be applied to the crime of using drug paraphernalia. *See People v Santos*, 210 AD2d 129. The evidence was legally sufficient but the conviction was against the weight of the evidence. The court improperly allowed a police officer to testify that he recognized the defendant, suggesting that the defendant had previously committed a crime or bad act, but the error was harmless. Judgment modified by vacating and dismissing the using drug paraphernalia conviction, and as modified, affirmed. (County Ct, Rockland Co [Meehan, J])

Accusatory Instruments (General)	ACI; 11(10)
Gambling (General)	GAM; 178(17)
Organized Crime (General)	OGC; 272(10)

*People v Conigliaro*, 290 AD2d 87, 737 NYS2d 96  
(2nd Dept 2002)

**Holding:** A pattern of illegal gambling activity can support enterprise corruption. *See People v Iadarola*, 222 AD2d 454 *lv den* 87 NY2d 903 *cert den* 517 US 1209. Specialization in one particular criminal area does not prevent prosecution for criminal enterprise. For example, participation in a defrauding scheme for an organized crime family can be so prosecuted. *People v Barone* 221 AD2d 553. The indictment here alleged both a structured criminal entity, the Conigliaro Gambling Organization, and a structure that would continue in the absence of the appellant. *See* Penal Law 460.10(3). The nature of the crime and the underlying acts are considered to determine whether the separate acts were part of the same criminal transaction and therefore not a “pattern of criminal activity” under the statute. *People v Griffin*, 137 AD2d 558. The indictment asserts various criminal offenses taking place on different dates, and each of the crimes committed by the organization were separate criminal transactions and thus establish a pattern of criminal activity. Judgment affirmed. (Supreme Ct, Queens Co [Rosengarten, J])

**Concurrence in Part, Dissent in Part:** [Friedmann, J] The acts alleged were so closely related in criminal purpose as to be integral parts of a single venture. *See People v Nappo*, 261 AD2d 558 *rvrd other gnds* 94 NY2d 564.

Counsel ( <i>Anders</i> Brief)	COU; 95(7)
Juveniles (Parental Rights)	JUV; 230(90)

*Matter of Tiffany L.*, 290 AD2d 523, 736 NYS2d 277  
(2nd Dept 2002)

Assigned counsel for the mother in a termination of parental rights action submitted an *Anders* brief (*Anders v*

*California*, 386 US 738 [1967]) seeking to be relieved of the assignment.

**Holding:** The mother failed to appear at the fact-finding hearing but did ultimately appear at the dispositional hearing. Nonfrivolous issues exist pertaining to whether the Family Court improvidently used its discretion in failing to start the hearing over, warranting assignment of new counsel. *Cf People v Gonzalez*, 47 NY2d 606. Motion granted, new appellate counsel assigned, current counsel to turn over a copy of the transcript to the new counsel. (Family Ct, Kings Co [Pearce, J])

Sentencing (Persistent Violent Felony Offender)	SEN; 345(59)
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Prior Convictions (Sentencing)	PRC; 295(25)
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*People v Williams*, 290 AD2d 570, 736 NYS2d 633  
(2nd Dept 2002)

The defendant was convicted of first-degree and second-degree murder, second-degree possession of a weapon, two counts of third-degree possession of a weapon, two counts of first-degree attempted robbery, and fifth-degree possession of stolen property.

**Holding:** The defendant was erroneously sentenced as a persistent violent felony offender under Penal Law 70.02(1)(d). Attempted third-degree criminal possession of a weapon is a violent felony when it is a lesser-included offense of another crime charged. *See People v Dickerson*, 85 NY2d 870. The defendant had previously pled guilty to a sole charge of attempted third-degree criminal possession of a weapon which does not qualify as a violent felony. The sentences for weapons possession and attempted robbery must be vacated. Judgment modified and as modified, affirmed, matter remitted for resentencing. (County Ct, Nassau Co [Boklan, J])

Defenses (Justification)	DEF; 105(37)
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Instructions To Jury (Theories of Defense)	ISJ; 205(50)
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*People v Morgan*, 290 AD2d 566, 737 NYS2d 108  
(2nd Dept 2002)

**Holding:** The defense to charges of murder and related offenses was that the defendant responded to the use of deadly force by a third man and in the struggle for the gun it accidentally fired. The trial court refused to instruct the jury that the defendant was justified in shooting the decedent if the defendant reasonably believed a third man (acting in concert with the decedent) was about to use deadly force against him. A reasonable view of the evidence supported the requested charge. The trial court erred in not instructing the jury on justification arising from the threat of deadly force by the third man. *See People v Morris*, 109 AD2d 413. This was not harmless error.

**Second Department** *continued*

Judgment modified on the law and as modified, affirmed and remitted. (Supreme Ct, Kings Co [Goldberg, J])

**Third Department**

Guilty Pleas (Withdrawal) GYP; 181(65)

Sentencing (Determinate Sentencing) SEN; 345(30)

*People v Gross*, 286 AD2d 180, 733 NYS2d 310 (3rd Dept 2001)

The defendant entered a guilty plea, with the understanding he would be sentenced as a second felony offender with a term of 12 years, and waived his right to appeal. Before sentencing, he sought to withdraw his guilty plea because he had not been advised that by statute his incarceration would be automatically followed by five years of post-release supervision. See Penal Law 70.45[1], [2]. The court denied the motion, finding that he had entered into the plea knowingly, voluntarily, and intelligently.

**Holding:** Waiver of the right to appeal does not preclude a review of the denial of the motion to withdraw the plea. It is the trial court’s responsibility to ensure that the defendant has a full understanding of the plea and its direct consequences. See *People v Ford*, 86 NY2d 397, 402-403. For the guilty plea to be deemed knowing and voluntary, the defendant had to be informed of each essential component of the sentence. No state appellate court has decided if the post-release supervision requirement must be revealed to a defendant before a guilty plea is accepted. Post-release supervision is a direct consequence of a guilty plea. Since the defendant was not advised about it before pleading guilty, he should have been permitted to withdraw the plea. The error was not harmless. Judgment reversed and matter remitted. (County Ct, Montgomery Co [Catena, J])

Counsel (Conflict of Interest) COU; 95(10)(15)  
(Competence/ Effective Assistance/ Adequacy)

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

*People v Bolden*, 289 AD2d 607, 733 NYS2d 775 (3rd Dept 2001)

Following hearings, the court determined that pretrial identification procedures were not unduly suggestive and that the prosecution could cross examine the defendant about prior convictions if he testified. The defendant then changed his plea to guilty. The defendant appeared before the court with a different assistant public defender

at sentencing, and filed a *pro se* motion to withdraw his plea alleging incompetence on the part of his former lawyer. The court refused to relieve the public defender’s office and denied the motion to withdraw the plea.

**Holding:** It is the trial court’s decision whether to allow a defendant to withdraw a guilty plea. “[O]nly in rare instances will a hearing be granted.” *People v Yell*, 250 AD2d 869 *lv den* 92 NY2d 863. The record as a whole fails to support the claims that defense counsel was ineffective at either the plea or pre-plea stage. The court did not err in denying the *pro se* motion to relieve the public defender’s office and appoint new counsel. Because the former lawyer was no longer affiliated with the defender’s office, the replacement assistant public defender had no conflict of interest in representing the defendant on the motion to withdraw. See *eg People v Conyers*, 285 AD2d 825; *cf People v Rhodes*, 245 AD2d 844. That new counsel did not join the *pro se* motion to withdraw did not require counsel’s replacement or constitute ineffective assistance. Judgment affirmed. (County Ct, Columbia Co [Czajka, J])

Instructions To Jury (Missing Witnesses) ISJ; 205(46)

Misconduct (Prosecution) MIS; 250(15)

Witnesses (Credibility) WIT; 390(10)

*People v Neil*, 289 AD2D 611, 733 NYS2d 528 (3rd Dept 2001)

The defendant’s conviction on six of 12 counts of sex-related offenses submitted to the jury (out of an initial 20) rested primarily on the testimony of the complainants.

**Holding:** The witnesses’ testimony was not incredible as a matter of law despite the serious undermining of their credibility on cross-examination; believability is for the jury. While errors did occur as to certain counts, and the complainant on those counts was successfully impeached, reversal is unwarranted. Failure to give a missing witness charge as to people that one complainant claimed to have told about the incidents was harmless, as the defendant was acquitted on those counts. The defendant did not show how testimony of a missing teacher would have been relevant to a *material* issue. See *People v Bennett*, 169 AD2d 369, 374-375 *affd* 79 NY2d 464. During closing statements, the defendant addressed the absence and arguable nonexistence of that witness. From this record it cannot be determined whether prosecutorial misconduct occurred warranting reversal on two counts. The defense did not demand that an assistant district attorney be questioned about her mid-testimony discussion with a complainant. See *gen People v Branch*, 83 NY2d 663. Counsel cross-examined the complainant about her altered testimony, though the jury did not know of her conversation with the ADA. Compare *People v Thanh Giap*, 273 AD2d 54 *lv den* 95 NY2d 872. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, J])

**Third Department** *continued*

Appeals and Writs (Judgments and Orders Appealable) APP; 24(45)

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

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

*People v Zeh*, 289 AD2d 692, 734 NYS2d 306 (3rd Dept 2001)

**Holding:** Sufficient issues have been raised about the representation provided to the defendant by his retained trial lawyer to warrant CPL article 440 review. The record confirms the defendant's claim that counsel never sought to suppress oral statements made by the defendant in the absence of a warrant and *Miranda* warnings. Counsel made no pretrial motions or discovery requests, never requested suppression hearings or requested *Brady* material, and rejected the court's offer of a *Huntley* charge to the jury. Given the critical nature of the defendant's statements and the seized evidence, counsel's failure to make any pretrial motions is troubling. *See eg People v Gugino*, 132 AD2d 989. To prevail on the ineffective assistance claim, the defendant must demonstrate the absence of strategic or legitimate reason for counsel's failure to request a particular hearing. Absent such a showing, counsel is presumed to have acted in a competent manner. *See People v Rivera*, 71 NY2d 705, 709. The issue of ineffective assistance of counsel is raised here on direct appeal. Many of the claims require resort to supposition. Prudence says the issue of ineffective assistance should be raised in a post-trial application, which would allow for an exhaustive evaluation of each claim based on the complete record. Judgment affirmed. (County Ct, Ulster Co [Sirkin, JJ])

Confessions (Corroboration) CNF; 70(22)

Witnesses (Child)(Competency) WIT; 390(3)(5)

*People v Snyder*, 289 AD2d 695, 733 NYS2d 806 (3rd Dept 2001)

**Holding:** Following his indictment, suppression of the defendant's written confession to state police was denied. A written confession will be redacted if it includes evidence of uncharged crimes or prior bad acts that the prosecution may use to show the defendant's propensity to commit such crimes. *See People v Chaffee*, 42 AD2d 172, 174. Neither of the two incidents mentioned in the statement here (one in which the defendant was abused, and one in which he thought about touching a minor in a sexual way) were prior bad acts or uncharged crimes. Failing to redact portions of the written statement was not error.

The child complainant demonstrated that she possessed the capacity to testify, as she could discern the difference between a truth and a lie. The determination of her competency was not erroneous. While a defendant may not be convicted solely on the unsworn evidence of a child, the complainant's testimony, once properly admitted, can be used as sufficient corroboration of a signed confession. *Cf People v Guillery*, 260 AD2d 661 *lv den* 93 NY2d 971. The defendant's written confession was properly corroborated and there was legally sufficient evidence to support the verdict. Judgment affirmed. (County Ct, Greene Co [Pulver Jr., JJ])

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

Homicide (Causation) HMC; 185(10)

*People v Lapan Jr.*, 289 AD2d 698, 734 NYS2d 648 (3rd Dept 2001)

After the defendant and his accomplices broke into a home, the homeowner suffered an intracerebral hemorrhage and died. The defendant faced burglary as well as manslaughter and murder charges.

**Holding:** "For an act to be a 'sufficiently direct cause of death' warranting criminal sanctions, it is 'not necessary that the ultimate harm be intended by the [defendant]' (*People v Kibbe*, 35 NY2d 407, 412, *affd* 431 US 145)." That the eventual harm could have been foreseen as being reasonably related to the acts of the defendant must be proven beyond a reasonable doubt. The defendant's actions need not be the sole cause of death. Where the causal link is established, a decedent's preexisting condition will not relieve the defendant of liability. The prosecution made the required showing, particularly through the use of an expert witness who said that, to a reasonable degree of medical certainty, the decedent's death was caused by the stress of the burglary. That the death was a foreseeable consequence of the burglary was established through the expert's testimony and information that one of the accomplices knew of the decedent's condition in advance. Judgment affirmed. (County Ct, Fulton Co [Giardino, JJ])

Sentencing (Excessiveness) SEN; 345(33)

*People v Crespo*, 289 AD2d 702, 734 NYS2d 316 (3rd Dept 2001)

Based on three drug-related convictions in less than 1 year, including one for acts committed after less than 3 months of probation, the court revoked the defendant's probation and imposed the maximum prison term of 5 to fifteen years. This was made consecutive to sentences imposed for other convictions.

**Holding:** The imposition of the maximum prison term can be justified based on the defendant's record. The

Third Department *continued*

decision to run the sentences consecutively is excessive. The defendant does not have an extensive criminal record over a long period of time. There is no evidence that his criminal activity was anything but recent and short term. Nothing on the record about the nature of the crimes warrants consecutive sentencing; no violence or weapons were involved, and the defendant's involvement in sale of drugs was at the lowest level. The prison sentence imposed on the defendant should be served concurrently with any sentence previously imposed by any other court. Judgment modified, and as modified affirmed. (County Ct, Sullivan Co [La Buda, J])

Sex Offenses (Corroboration) SEX; 350(2)

Witnesses (Child)(Competency) WIT; 390(3)(5)

People v Lowe, 289 AD2d 705, 733 NYS2d 555  
(3rd Dept 2001)

**Holding:** The court was not in error by allowing the 4-year-old complainant to provide unsworn testimony pursuant to CPL 60.20(2). The court conducted extensive *voir dire* of the witness and allowed the prosecution and defense to question her. The court found that the witness, who maintained attention on objective details when questioned, knew her age, and was able to relate some concept of a higher being and of the difference between truth and falsehood, had demonstrated sufficient intelligence. Her testimony was corroborated by evidence that tended to establish the crime and linked the defendant to its commission. See *People v Groff*, 71 NY2d 101, 104. Examination by a physician revealed symptoms consistent with sexual abuse. Significant evidence connected the defendant to the abuse, including the complainant being alone with the defendant at the time of the alleged abuse. Almost immediately after a phone conversation between the complainant and her mother, the defendant stopped visitation and moved quickly out of state. The requirements of CPL 60.20(3) do not require that unsworn testimony "be strictly corroborated by evidence extending to every material element" of the crime charged. The implicit conclusion that medical evidence of one type of sexual abuse is sufficiently corroborative of unsworn testimony about another type of sexual abuse committed as part of the same transaction is approved. Judgment affirmed. (County Ct, Otsego Co [Coccoma, J])

Speedy Trial (Prosecutor's Readiness for Trial) SPX; 355(32)

People v Brennan, 290 Ad2d 574, 736 NYS2d 436  
(3rd Dept 2002)

**Holding:** The attorney general prosecuted the case against the defendant, who asserts he was denied a speedy trial. The district attorney filed statements of readiness for the attorney general within the required 6-month period. Additional statements were filed by the attorney general after that date. The argument that only the actual prosecutor of the case, here the attorney general, can file statements of readiness is too technical and unpersuasive. It ignores the agency relationship between the two prosecuting entities and the basic objective of notice, *ie* to inform the court that the prosecution is ready to proceed. The defendant's conviction is supported by legally sufficient evidence, including interview answers the defendant gave that could be inferred by a jury to show the defendant had the intent to defraud the agency. See *People v Contes*, 60 NY2d 620, 621. Concerning the *Sandoval* ruling permitting cross examination of the defendant about a prior conviction, the conviction bore directly on credibility and the jury was instructed to use the evidence only for that purpose. There was no abuse of discretion even though the prior conviction was similar to the current charge. See *People v Walker*, 83 NY2d 455, 459-460. Judgment affirmed. (County Ct, Broome Co [Mathews, J])

Due Process (General) DUP; 135(7)

Sex Offenses (General) (Sentencing) SEX; 350(4) (25)

People v Willette, 290 AD2d 576, 735 NYS2d 645  
(3rd Dept 2002)

The defendant was designated a level three offender under the Sexual Offender Registration Act. He was required to register annually, report any change of residence, and verify his residence with local police every ninety days. He allegedly failed to list his correct residence on five separate filings, thus offering a false instrument, and was also charged with failing to properly register.

**Holding:** The defendant asserts that failure to afford him due process in his designation as a level three sex offender rendered the designation a nullity, voiding the indictment underlying his convictions. The constitutional infirmity (*see People v David*, 95 NY2d 130) did not affect the validity of the convictions under review. The defendant was not prosecuted for failure to report as a level three sex offender, but for failure to report his change of residence (which he would have had to do even as a level-one sex offender) and for filing false instruments. Based on testimony that the defendant had lived with someone



**Third Department** *continued*

other than his father, the jury properly concluded the defendant had failed to report a change of address to local authorities as required by Corrections Law 168-f(4). The evidence also supported a finding that the defendant's actions fell within the prohibition on offering a false statement for filing. Whether the defendant was required to file such an instrument is irrelevant to whether the instrument filed was false. Judgment affirmed. (County Ct, Clinton Co [McGill, J])

Confessions (Counsel) CNF; 70(23)

Counsel (Waiver) COU; 95(40)

**People v Pitts, 290 AD2d 580, 734 NYS2d 738  
(3rd Dept 2002)**

After his arrest for a drug sale, the defendant agreed in a separate case to participate in a drug court program. He was released after pleading guilty. At a court appearance on the sale case, for which he had not been sentenced, he left before his case was called. A bench warrant was issued. Following a shooting, police wanted to question the defendant, and he was picked up on outstanding warrants. After receiving *Miranda* warnings and waiving the right to counsel, he signed a written inculpatory statement and made oral admissions. The police testified they knew he had counsel on the previous charges, but were unaware that an attorney still represented him when he was arrested.

**Holding:** When a prior charge has been disposed of, the indelible right to counsel disappears. A defendant is capable of waiving counsel on the new charge. *See People v Bing, 76 NY2d 331, 334.* A conviction had been entered in the defendant's cases. He had further attenuated the attorney-client relationship by failing to appear in court on the prior matter. He made a knowing, intelligent, and voluntary waiver of counsel. *See People v Lovell, 267 AD2d 476 lv den 95 NY2d 799.*

The defendant made gratuitous references to his "run-ins" with the police as a youth during his direct testimony. This opened the door to cross examination about his adjudications as a youth despite a pretrial ruling prohibiting such cross examination. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, J])

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

Guilty Pleas (Errors Waived By) GYP; 181(15) (55)  
(Vacatur)

**People v Hoeltzel, 290 AD2d 587, 735 NYS2d 259  
(3rd Dept 2002)**

The defendant pled guilty and waived his right to appeal in exchange for the prosecutor's recommendation of 6 months in jail and 5 years probation. At sentencing, the prosecutor did not adhere to the agreement because of information in the pre-sentence investigation report. The defendant declined a chance to withdraw his plea and was sentenced to four years in prison.

**Holding:** The defendant's waiver of appeal did not include his right to challenge the sentencing that followed the prosecutorial violation of the agreement. *See People v Seaberg, 74 NY2d 1, 11-12.* The defendant did not knowingly waive his right to appeal the prosecution's unanticipated change in position and comments at the sentencing, which occurred subsequent to the agreement. "A prosecutor must honor a promise with respect to a sentencing recommendation made during plea negotiations" *see People v Oakes, 252 AD2d 661, 663.* When the prosecution violates a plea-inducing promise to recommend a certain sentence, the defendant is entitled to vacatur of that sentence, remittal before a different judge in order to avoid any prejudice, and an order telling the prosecutor to abide by the promise. *See People v Torres, 67 NY2d 659.* The defendant need not withdraw the plea to benefit from the negotiated bargain. Judgment modified, sentence vacated, matter remitted for resentencing before a different judge. (County Ct, Essex Co [Halloran, J])

**Fourth Department**

Appeals and Writs (General) APP; 25(35)

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

**People v Rodriquez, 286 AD2d 1003, 733 NYS2d 659  
(4th Dept 2001)**

**Holding:** The defendant claimed ineffective assistance of appellate counsel because his appellate attorney failed to raise on direct appeal the issue of whether the defendant's challenge for cause of a prospective juror was erroneously denied. If successful, the issue would have resulted in reversal. Review of the trial court proceedings shows that the issue might have merit. The matter is to be considered *de novo*. *See People v Vasquez, 70 NY2d 1 rearg den 70 NY2d 748.* Motion for writ of error *coram nobis* granted, order of Feb. 4, 1998 vacated.

Prisoners (Correspondence) PRS I; 300(6)(13)  
(Disciplinary Infractions and/or Proceedings)

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Matter of Izquierdo v Goord, 286 AD2d 986,  
730 NYS2d 909 (4th Dept 2001)

After a Tier III hearing, the petitioner was determined to have not followed facility correspondence procedures (Inmate Rule 180.11 [7 NYCRR 270.2 (B)(26)(ii)]) and have provided unauthorized legal assistance to a fellow inmate (Inmate Rule 180.17 [7 NYCRR 270.2 (B)(26)(vii)]). An article 78 proceeding was transferred.

**Holding:** The letter in question was properly designated third-party mail, opened, and read. The petitioner was unable to prove that the hearing officer was biased and that the judgment was an outcome of the alleged bias. See *Matter of Hooper v Goord*, 247 AD2d 865. The hearing officer was inconsistent in finding the petitioner not guilty of unauthorized solicitation of goods or services (Inmate Rule 103.20 [7 NYCRR 270.2 (B)(4)(2)]) but guilty as to Inmate Rule 180.11, on which the rule 103.20 charge was based. The weight of the evidence established his guilt as to Inmate Rule 180.17. “‘Because one penalty was imposed and the record fails to specify any relation between the violations and the penalty’ (*Matter of Anderson v Goord*, 270 AD2d 836),” the determination is modified by annulling the finding as to Rule 180.11, vacating the penalty imposed, and remitting for imposition of an appropriate penalty on the remaining violation. Determination modified, as modified confirmed, and remitted for further proceedings. (Supreme Ct, Oneida Co [Murad, J])

Habeas Corpus (General) HAB; 182.5(20)

Parole (Release [Conditions]) PRL; 276(35[a])

People v Hodges, 286 AD2d 936, 731 NYS2d 416  
(4th Dept 2001)

**Holding:** The petitioner failed to secure housing approved by the Division of Parole prior to his conditional release date and, although he became eligible for release, was not freed. The Division of Parole has the discretion to impose a special condition as to housing, even when it must be met before release can be granted. *Matter of Monroe v Travis*, 280 AD2d 675, 676 *lv den* 96 NY2d 714. It is not required to file the special condition with the Secretary of State. See *People ex rel Prince v Meloni*, 166 AD2d 926, 927 *lv den* 76 NY2d 714. Since the petitioner is not entitled to immediate release, *habeas corpus* relief does not apply. It is not appropriate in this instance to convert the *habeas* petition to a CPLR article 78 petition. Judgment affirmed. (Supreme Ct, Erie Co [Fahey, J])

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

People v Nicholas, 286 AD2d 861, 731 NYS2d 99  
(4th Dept 2001)

**Holding:** During *voir dire*, prospective jurors indicated that they would have a tendency to believe a police officer’s account just because he or she is a police officer. Furthermore, they would be more likely to accept the testimony of a police officer over that of a non-police officer. The defendant exercised peremptory challenges to exclude the jurors and exhausted his peremptory challenges before the end of jury selection. The defendant correctly claimed that the court erred in denying the defendant’s challenges for cause with respect to three prospective jurors. See CPL 270.20 [2]; *People v White*, 275 AD2d 913, 914. The record established that certain prospective jurors were biased in favor of police officers, revealing a state of mind likely to preclude impartial service. The court failed to question those prospective jurors individually to ensure that they could be impartial. See *People v Arnold*, 96 NY2d 358. Some form of assurance that such jurors can set aside any bias and render an impartial verdict based on evidence is required. *People v Johnson*, 94 NY2d 600, 614. A new trial is required. *People v Blyden*, 55 NY2d 73, 78-79. Judgment reversed.

**Dissent:** [Hayes, J] A group answer by a panel of prospective jurors is insufficient to make a showing of bias by any one particular juror.

Evidence (Photographs and Photography) EVI; 155(100)

Identification (General) IDE; 190(17) (30) (50)  
(Lineups) (Suggestive Procedures)

People v Gee, 286 AD2d 62, 730 NYS2d 810  
(4th Dept 2001)

**Holding:** A witness viewed the store security videotape the day after the robbery. She identified as the defendant one of five photos included in a one-sheet composite of stills taken from the videotape five days after the robbery, picked the defendant out of a lineup several weeks later, and reviewed the video and stills in preparation for trial. The prosecution did not to give notice, under CPL 710.30, of the first and last viewings. Statutory notice gives a defendant the opportunity before trial to test the propriety and reliability of pretrial identification evidence. The statute focuses on in-court identifications predicated on earlier police-arranged confrontations between a defendant and an eyewitness. The viewing of the surveillance video was not subject to the notice requirement. The witness was shown depictions of the robbery itself and merely confirmed where on the video-

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tape the crime and perpetrators had been captured. Showing the clerk a video of a crime that she had herself recently experienced, without attempts by police to link the photographs to a particular suspect, did not constitute an unnecessarily suggestive identification procedure. See *George v State*, 512 So2d 1287, 1289 (Miss). *But see People v Mallory*, 126 AD2d 750. The viewing of the stills was an investigation measure rather than an identification procedure and was not unnecessarily suggestive, so it did not taint the lineup. Judgment affirmed. (County Ct, Monroe Co [Marks, J])

Counsel (Conflict of Interest) COU; 95(19) (15)  
(Competence/Effective Assistance/Adequacy)

*People v Lewis*, 286 AD2d 934, 731 NYS2d 305  
(4th Dept 2001)

**Holding:** Neither the defendant nor the court addressed a waiver of the right to appeal during the defendant's guilty plea proceedings. Therefore, even though the prosecutor and defense counsel acknowledged that such a waiver was to be part of the bargain, this record does not reflect that the waiver was voluntary and intelligent, as required. See *People v Allen*, 82 NY2d 761, 763. Before sentencing, the defendant moved *pro se* to withdraw the plea based on ineffective assistance of counsel. His lawyer told the court that the lawyer thought he had done an "appropriate job" and that it was "fairly clear" that the defendant had been involved in the charged robbery, given that he was shown on a videotape and the police shot him at the scene. Counsel then asked the court to sentence the defendant according to the bargain. Counsel became a witness against his client, depriving the defendant of effective assistance. *People v Santana*, 156 AD2d 736, 737. There must be assignment of new counsel and a *de novo* determination of the motion to withdraw the plea. See *People v Betsch*, \_\_ AD2d \_\_ (decided herewith). Case held, decision reserved, matter remitted. (County Ct, Monroe Co [Connell, J])

Evidence (Sufficiency) EVI; 155(130)

Sex Offenses (General) (Sodomy) SEX; 350(4) (30) (25)  
(Sentencing)

*People v Castro*, 286 AD2d 989, 730 NYS2d 653  
(4th Dept 2001)

**Holding:** The defendant was convicted of several counts of sodomy and sexual abuse. He failed to preserve for review his claim that the evidence was insufficient to establish his age as being over 21 at the time of the crime,

an element of third-degree sodomy. Penal Law 130.40(2). The issue is reviewed as a matter of discretion in the interest of justice; the verdict is against the weight of the evidence. While a jury may draw an inference from an individual's appearance, there must have been some competent proof of the person's age. See *People v Perryman*, 178 AD2d 916, 918 *lv den* 79 NY2d 1005. The circumstantial evidence relied on by the prosecution does not establish that the defendant was over 21 at the time of the crime. *Cf People v Rosio*, 220 AD2d 851, 852 *lv den* 86 NY2d 875.

The sentence imposed for third-degree sexual abuse is reduced from six months to three months, the maximum permissible sentence on that class B misdemeanor. See Penal Law 70.15(2); 130.55; see also *People v Coleman*, 278 AD2d 891 *lv den* 96 NY2d 798. Judgment modified and as modified affirmed. (County Ct, Monroe Co [Dattilo, Jr., J])

Burglary (Elements) BUR; 65(15)

Trial (Verdicts [Inconsistent Verdicts]) TRI; 375(70[b])

*People v Jackson*, 286 AD2d 912, 731 NYS2d 124  
(4th Dept 2001)

**Holding:** The defendant was found guilty of two counts of first-degree burglary (Penal Law 140.30 [1], [2]). He did not preserve the argument that the court committed reversible error by failing to charge the jury on the issue of accomplice liability. The prosecution was allowed to include in the burglary charge the phrase "or another participant in the crime." Liability as a principal or an accomplice is not an element of the crime. See *People v Rivera*, 84 NY2d 766, 769. The prosecution may charge a defendant as a principal but establish the defendant's guilt as an accomplice. *People v Guidice*, 83 NY2d 630, 637. A review of the evidence, law, and circumstances of the case in totality shows that the defendant was afforded competent representation. While the defendant did not preserve for review an issue of inconsistent verdicts, as a matter of discretion in the interest of justice, inconsistent verdicts are found. The defendant's acquittal of assault negated a necessary element of one first-degree burglary count. See *gen People v Hicks*, 134 AD2d 909 *lv den* 70 NY2d 956 *lv dismissed* 70 NY2d 1007. Judgment modified, conviction under count three reversed, count dismissed. (County Ct, Ontario Co [Henry, Jr., J])

Accusatory Instruments (General) ACI; 11(10) (20)  
(Variance of Proof)

Evidence (Sufficiency) EVI; 155(130)

*People v Shaughnessy*, 286 AD2d 856, 730  
NYS2d 467 (4th Dept 2001)

**Holding:** The defendant was convicted of four counts of second-degree rape, incest, and second-degree sexual

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abuse, and one count of endangering the welfare of a child. The court did not abuse its power by denying the defendant's request for a mistrial based on direct and indirect references to his mental health. *See gen People v Ortiz*, 54 NY2d 288, 292. Testimony regarding his silence during questioning by the police and his request for counsel did not deny him a fair trial. The court "gave an appropriate curative instruction" and thereby removed any prejudice. *People v Clark*, 281 AD2d 947, 948. Counts seven through 15 of the indictment must be reversed. Counts seven through 18, charging four acts each of rape, incest, and sexual abuse in January 1998, "'were never linked sequentially or otherwise to the proof' (*People v Ball*, 231 AD2d 853, 854, *lv denied* 89 NY2d 1032)," and the complainant testified to more than 4 instances of sexual contact that month. The jury may have convicted the defendant of acts for which he was not indicted. *People v George*, 255 AD2d 881. Also, it is difficult to tell if different jurors convicted the defendant based on the same acts. Further, the jury acquitted defendant of one count each of rape, incest, and sexual abuse, "'making meaningful appellate review of the legal or factual sufficiency of the evidence . . . impossible without implicating the prohibition against double jeopardy.'" (*People v Ball, supra*, at 854)." Judgment modified and as modified, affirmed. (County Ct, Onondaga Co [Fahey, J])

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

*People v Betsch*, 286 AD2d 887, 730 NYS2d 645 (4th Dept 2001)

**Holding:** The defendant was convicted of first-degree robbery, third-degree criminal possession of a weapon and second-degree menacing. Before sentencing, the defendant sought *pro se* to set aside the verdict, claiming newly discovered evidence, ineffective assistance of counsel, and prosecutorial misconduct. The defendant did not receive effective representation where counsel took a position adverse to that of the defendant during argument of defendant's *pro se* CPL article 330 motion. *People v Burton*, 251 AD2d 1020. While counsel had no duty to support the *pro se* motion, he could not take an adverse position. *Cf People v Viscomi*, 286 A.D.2d 886; *People v Jones*, 261 AD2d 920 *lv den* 93 NY2d 972. The court should have assigned different counsel before deciding the motion. Case held, decision reserved, matter remitted for *de novo* determination of the motion. (County Ct, Erie Co [Rogowski, J])

Confessions (Evidence) (*Huntley* Hearing) (*Miranda* Advice) CNF; 70(30) (33) (45)

Sentencing (Presence of Defendant and/or Counsel) SEN; 345(59.5)

*People v Curtis*, 286 AD2d 900, 731 NYS2d 828 (4th Dept 2001)

**Holding:** A *Huntley* hearing was held on the false statement allegedly made by the defendant to police. The court concluded that it had been obtained in violation of his *Miranda* rights, and ruled that it was not admissible as evidence in chief on the burglary and larceny charges but could be used as evidence on the false statement charge. The statement should not have been admitted as evidence in chief of a punishable false written statement. *See Harris v New York*, 401 US 222 (1971). However, the court's limiting instruction to the jury alleviated any prejudice as to the burglary and larceny charges. *See People v Davis*, 58 NY2d 1102, 1103-1104. The conviction for making a punishable false written statement is reversed. The defendant was properly sentenced *in absentia* as a second felony offender after being removed from the courtroom for highly disruptive conduct. *See People v Hooper*, 133 AD2d 347, 348. Judgment modified and as modified affirmed. (County Ct, Livingston Co [Cicoria, J])

Sex Offenses (Sentencing) SEX; 350(25)

*People v McLeod*, 286 AD2d 959, 730 NYS2d 921 (4th Dept 2001)

**Holding:** The court did not err in determining the defendant to be a persistent violent felony offender nor was the verdict against the weight of the evidence. However, the one-year imprisonment term imposed on the conviction of third-degree sexual abuse, a class B misdemeanor, was illegal. *See Penal Law 70.15(2)*. The sentence is reduced on that count to three months. Judgment modified. (County Ct, Onondaga Co [Fahey, J])

Sentencing (Concurrent/Consecutive) (Interruption of Sentence) SEN; 345(10) (47)

Sex Offenses (Sentencing) (Sodomy) SEX; 350(25)(30)

*People v Curley*, 285 AD2d 274, 730 NYS2d 625 (4th Dept 2001)

**Holding:** The defendant claimed he had completed in 1992 his sentence for a first-degree sodomy conviction, making inapplicable the Sex Offender Registration Act (SORA) (Correction Law 168-n [2]) enacted in 1996. He was sentenced in 1977 to an indeterminate imprisonment term of seven and a half to 15 years, and paroled in 1985. While on parole, he was charged in connection with a homicide. A declaration of delinquency was issued. The

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sentence for sodomy was interrupted until the defendant was sentenced in the homicide to a term ordered to run consecutively to the sodomy sentence. The minimums are added to arrive at an aggregate minimum, and the maximum terms are added to arrive at an aggregate maximum term. Penal Law 70.30(1) (b); *see Matter of Roballo v Smith*, 63 NY2d 485, 487). Adding the time remaining on the sodomy to the maximum term for the manslaughter conviction yields an aggregate maximum term of 20 years, 4 months, and 17 days. The defendant is subject to both sentences until he reaches the maximum expiration date, which extends beyond the effective date of SORA, and so is subject to the requirements of SORA. Order affirmed. (County Ct, Monroe Co [Connell, J])

Discovery (General) DSC; 110(12)

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

Sentencing (General) (Pronouncement) SEN; 345(37) (70)

*People v Fuller*, 286 AD2d 910, 731 NYS2d 132 (4th Dept 2001)

**Holding:** The untimely disclosure to the defense of a medical report about one of the complainants was not a complete failure to provide *Rosario* material, only a delay. *See People v Guilbault*, 256 AD2d 632, 633 *lv den* 93 NY2d 853. The defendant failed to show that he had been substantially prejudiced. The court erred in denying the defendant's request to charge second-degree robbery (Penal Law 160.10[2][a]) as a lesser-included offense of first-degree robbery (Penal Law 160.15[1]). A doctor said that the complainant to whom this charge related suffered physical injury but not serious physical injury. *See CPL 300.50(1)*. No similar error occurred as to another count, there being no dispute that a dangerous instrument was used. The defendant did not join codefendants' requests for additional charge-downs; the failure to charge other lesser-included offenses is not preserved for review. *See People v Buckley*, 75 NY2d 843, 846.

The seven and a half to 15 year sentence for second-degree assault is illegal. At the time of the crime, the maximum allowable term was seven years and the minimum term to be one half the maximum. Penal Law 70.00(2)(d); 70.02 [former (2)(b); and 70.00[former (3)(b)]. The court improperly imposed a term of four to 20 years on the fifth and sixth counts, but a legal sentence of 10 to 20 years is set out in the certificate. Judgment modified, matter remitted for further proceedings. (Supreme Ct, Monroe Co [Mark, J])

Sex Offenses (Sentencing)

SEX; 350(25)

*People v Wroten*, 286 AD2d 189, 732 NYS2d 513 (4th Dept 2001)

The defendant, convicted of third-degree rape, was classified before his release as a level two risk under the Sexual Offender Registration Act (SORA). The prosecution then asked the court to reconsider. The court remanded the defendant for a re-evaluation, "reconfigured" the risk assessment document, and determined him to be a level three sex offender.

**Holding:** The court had statutory and inherent authority to reconsider or correct its determination of the defendant's risk level based on errors and on additional information that he had a prior South Carolina conviction for second-degree burglary, a violent felony offense. *See People v Harris* 178 Misc2d 858, 861-863. Correction Law 168-o does not apply to these facts and cannot be said to restrict the authority of the court under these circumstances. The prosecution had valid grounds for seeking reargument based on Civil Procedure Law and Rules 2221 and properly invoked the inherent authority of the court. The purpose of providing both parties the right to an appeal under SORA was to ensure correction of any erroneous risk level determination. There was no prejudice from the more expeditious correction by the court of its own error. Amended order affirmed. (County Ct, Genesee Co [Noonan, J])

Appeal and Writs (Preservation of Error for Review)

APP; 25(63)

Sentencing (Re-sentencing)

SEN; 345(70.5)

*People v Sinkler*, 288 AD2d 844, 732 NYS2d 608 (4th Dept 2001)

**Holding:** The defendant asserted that the prosecution improperly strengthened the complainant's testimony through evidence of prior consistent statements. The contention was unpreserved for review (*see People v Love*, 57 NY2d 1023, 1025) and will not be reviewed as a matter of discretion in the interest of justice. *See CPL 470.15[6][a]*. While not raised by the defendant, the sentence imposed on second-degree kidnapping must be vacated. A discrepancy exists between the transcript and the certificate of conviction concerning whether that sentence was to be served consecutively with the sentence for attempted murder or also consecutive to the sentence for robbery. Judgment modified, kidnapping sentence vacated, matter remitted for re-sentencing. (Supreme Ct, Monroe Co [Galloway, J])

Fourth Department *continued*

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

Counsel (Choice of Counsel) (Conflict of Interest) COU; 95(9.5) (10)

*People v White*, 288 AD2d 839, 732 NYS2d 316 (4th Dept 2001)

**Holding:** The evidence presented was legally sufficient to support the defendant’s burglary conviction. Of the instances of alleged misconduct that were preserved for review, some were fair comment on the evidence. See *People v Erwin*, 236 AD2d 787 *lv den* 89 NY2d 1011. The rest were not so egregious as to deprive the defendant of a fair trial (see *People v Lewis*, 277 AD2d 1022, 1023 *lv den* 96 NY2d 802). The court did err in denying the defendant’s request for substitution of counsel at sentencing. Defense counsel told the court that due to a “disintegration of the attorney-client relationship” he had been unable to communicate with the defendant about possible challenges to the defendant’s record. Based on these comments, the court should have granted the request for substitution of counsel. Cf *People v Medina*, 44 NY2d 199, 207-209. Judgment modified, sentence vacated, matter remitted for re-sentencing after appointment of new counsel. (County Ct, Erie Co [Rogowski, J])

Appeals and Writs (Judgments and Orders Appealable) (Preservation of Error for Review) APP; 25(45) (63)

*People v Balkum*, 288 AD2d 910, 733 NYS2d 670 (4th Dept 2001)

**Holding:** Although the defendant waived his right to appeal, his challenge concerning the legality of the minimum period of the indeterminate sentence of imprisonment survived. See *People v Seaburg* 74 NY2d 1, 9. The challenge was rendered moot by the defendant’s conditional release. See *People v Meli*, 142 AD2d 938, 939 *lv den* 72 NY2d 921). Appeal dismissed. (County Ct, Monroe Co [Bristol, J])

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

Guilty Pleas (Withdrawal) GYP; 181(65)

Sentencing (Enhancement) SEN; 345(32)

*People v Hicks*, 288 AD2d 882, 732 NYS2d 613 (4th Dept 2001)

**Holding:** As part of a plea agreement, the defendant was to receive consecutive indeterminate prison terms of three to six years. The court imposed an enhanced sentence based on the defendant’s failure to provide truthful responses to a probation officer during the preparation of the presentence investigation report. Post-plea conduct does survive the defendant’s waiver of the right to appeal. See *People v Parker*, 271 AD2d 63, 68 *lv den* 95 NY2d 967. The enhancement of the defendant’s sentence was improper. Judgment modified to impose the bargained-for sentence and as modified affirmed. (County Ct, Monroe Co [Bristol, J])

[Ed. note: NYSDA filed an *amicus* brief in this matter in the Court of Appeals; a summary of the decision reversing this opinion will appear in a future issue of the REPORT.]

Admissions (Voluntariness) ADM; 15(35)

Motions (Suppression) MOT; 255(40)

Search and Seizure (“Poisoned Fruit” Doctrine) (Search Warrants [Suppression]) SEA; 335(55) (65[p])

*People v Powers*, 288 AD2d 861, 732 NYS2d 779 (4th Dept 2001)

**Holding:** Police searched the defendant’s apartment under a search warrant later held invalid. After being taken to the police station, the defendant waived his *Miranda* rights. He gave an exculpatory statement, then an oral admission that was later put into writing. The causal connection between the statement and the illegal search was “so attenuated as to dissipate the taint.” *Nardone v US*, 308 US 338 (1939). Considering the length of time between the illegality and the statements, the intervening circumstances, and “the purpose and flagrancy of the official misconduct” the statements are found not to have been obtained as a result of exploitation from the illegal search. Judgment affirmed. (County Ct, Ontario Co [Harvey, J])

**Dissent:** [Green, J] The defendant’s statements to police flowed directly from the detention and arrest based on the illegal search. The prosecution did not prove attenuation. See *People v Finger*, 208 AD2d 645, 646-647.

Admissions (Evidence) (*Miranda* Advice) (Voluntariness) ADM; 15(15) (25) (35)

Discovery (Preservation of Materials) DSC; 110(25)

Sentencing (Fines) (General) SEN; 345(36) (37)

**Fourth Department** *continued*

**People v John**, 288 AD2d 848, 732 NYS2d 505  
(4th Dept 2001)

**Holding:** The trial court erred in refusing to sanction the prosecution for failing to preserve the vehicle that the defendant was allegedly driving when arrested, preservation being a necessary corollary of the duty to disclose. *People v Kelly*, 62 NY2d 516, 520. The vehicle was discoverable as “property obtained from the defendant.” CPL 240.20(1)(f). It was important, where the defense alleged that its windows were tinted to such a degree that the police could not see who was driving. The defendant could not prove the degree of tint where the prosecution auctioned off the car before he was indicted. However, the error was harmless.

*Miranda* warnings need not be recited verbatim, but must reasonably apprise defendants of their rights. The defendant waived his rights where he nodded during the *Miranda* recitation and had had numerous encounters with the criminal justice system. *People v Rooney*, 82 AD2d 840, 841. The court did not abuse its power in admitting the standard issue *Miranda* card as opposed to the card that was actually used.

The court did not realize it had discretion about whether to impose a fine, describing the fine imposed as the “minimum mandatory.” That portion of the sentence must be vacated and a resentencing scheduled. Judgment modified, affirmed as modified, and matter remitted. (County Ct, Erie Co [Drury, JJ])

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

**People v Miles**, 288 AD2d 877, 732 NYS2d 765  
(4th Dept 2001)

**Holding:** The defendant was convicted of first-degree manslaughter as a lesser included offense of second-degree murder, second-degree criminal possession of a weapon and third-degree criminal possession of a weapon. The court should not have directed that the sentence imposed for second-degree criminal possession of a weapon run consecutively to the sentence imposed for the lesser included offense of first-degree manslaughter. There was no evidence of intent to intimidate the decedent separate from the intent to shoot him. *Cf People v Salcedo*, 92 NY2d 1019, 1021-1022. All sentences must run concurrently. Judgment modified, and as modified, affirmed. (Supreme Ct, Monroe Co [Ark, JJ])

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Guilty Pleas (Vacatur) GYP; 181(55)  
Plea Bargaining (General) PLE; 284(10)

**People v Fazar**, 288 AD2d 862, 732 NYS2d 190  
(4th Dept 2001)

**Holding:** The defendant appeals from a plea-based judgment convicting him of two counts of criminal possession of fourth-degree stolen property and one count of fourth-degree grand larceny. A plea agreement called for the defendant to plead guilty to counts one and four. Counts two and three were to be dismissed, and he would serve a prison term of 3½ to 7 years. After he pled guilty to count one, the court began a colloquy regarding count three. Defense counsel interrupted to explain that the plea bargain called for a plea to counts one and four, and a plea to count four was taken. At sentencing the court imposed a sentence of 1½ to three years on count three to run consecutively with the sentence of 2 to 4 years imposed on count one, creating a total term of 3½ to 7 years. The prosecution conceded that the court erred in imposing sentence on count 3 of the superior court information. The prosecution does not agree to the sentence of 2 to 4 years that would result from merely vacating the improper sentence. and thus the judgment is modified by vacating the sentence imposed on that count. If the prosecution is disposed to move to vacate the plea, the court should entertain the motion and set aside the conviction in its entirety. *People v Irwin*, 166 AD2d 924, 925. Judgment modified, and as modified, affirmed. (County Ct, Ontario Co [Harvey, JJ])

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Sentencing (Concurrent/Consecutive) SEN; 345(10) (37)  
(General)

**People v Brooks**, 288 AD2d 838, 732 NYS2d 922  
(4th Dept 2001)

**Holding:** The defendant pled guilty to two counts of second-degree criminal sale of a controlled substance (Penal Law 220.41[1]) in satisfaction of an 11-count indictment. Under the plea bargain, the defendant was to be sentenced to consecutive prison terms. The sentencing minutes showed that the court “directed that ‘the sentences are not consecutive to one another.’” The certificate of conviction indicates that the sentences are consecutive. Because there was a discrepancy between the minutes and the certificate, the judgment must be modified by vacating the sentence and remitting for resentencing. *See People v Shand*, 280 AD2d 943, 944 *lv den* 96 NY2d 834. Judgment modified, matter remitted. (Supreme Ct, Monroe Co [Cornelius, JJ])

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Search and Seizure (Entries and SEA; 335(35) (80)  
Trespasses) (Warrantless Searches)

**People v Molnar**, 288 AD2d 911, 732 NYS2d 788  
(4th Dept 2001)

**Holding:** The court properly found that the warrantless entrance by police into the defendant’s apartment in

Fourth Department *continued*

response to a foul smell was justified under the emergency exception to the search warrant requirement. See *People v Mitchell*, 39 NY2d 173, 177-178 cert den 426 US 953. When the police officers arrived, they smelled an odor they were unfamiliar with, learned that the tenant of the apartment had not been seen, and that the odor had been pervasive for at least two days. They put on charcoal masks, entered the apartment, and discovered a decomposing body. The “very uncertainty created by the totality of circumstances created a justification and need for the police to take immediate action” (*People v McGee*, 140 Ill App 3d 677, 681, 489 NE2d 439, 442).” The officers’ actions were consistent with the perception of an emergency. There is no indication that they were motivated by an intent to arrest the tenant or to seize evidence. The motion to suppress was properly denied. Judgment affirmed. (Supreme Ct, Erie Co [Buscaglia, J])

**Dissent:** [Green, J] No emergency or immediate need for assistance to protect life or property existed. *People v Mitchell*, 39 NY2d 173, 177 cert den 426 US 953. An unidentified foul odor did not support a reasonable belief that immediate action was needed. See *People v Pereydo*, NYLJ, 9/24/93, at 22, col 6 (Sup Ct, NY Co)

Sentencing (Restitution) SEN; 345(71)  
*People v Wright*, 288 AD2d 899, 732 NYS2d 760 (4th Dept 2001)

**Holding:** The defendant pled guilty to three counts of attempted second-degree burglary. By failing to move to vacate the judgment of conviction or withdraw the plea, he failed to preserve for review his assertion that the plea was not entered knowingly, voluntarily and intelligently. *People v Lopez*, 71 NY2d 662, 665. The waiver of the right to appeal encompasses the contention about the severity of the sentence. The defendant agreed to pay restitution. However, the court erred in determining, without a hearing, the amount to be paid. Because the amount is not set forth in the record, the waiver of the right to appeal does not include a challenge to the amount ordered. In plea cases, evidence to support the restitution amount generally can only be found in the agreement itself or the minutes of the defendant’s plea allocution. *People v Consalvo*, 89 NY2d 140, 144. This defendant made no statement at the plea proceeding or at sentencing to support the amount imposed by the court, which improperly relied on unsworn victim impact statements. See *People v White*, 266 AD2d 831, 832. Judgment modified, restitution award vacated, matter remitted for a hearing to determine the amount of restitution. (County Ct, Steuben Co [Latham, JJ])

Counsel (Anders Brief) COU; 95(7)  
 Guilty Pleas (General) GYP; 181(25)  
*People v Pitts*, 288 AD2d 958, 737 NYS2d 312 (4th Dept 2001)

**Holding:** The defendant pled guilty to second-degree assault and was sentenced to an indeterminate term of 12 years to life as a persistent violent felony offender. His appellate lawyer moved to be relieved from the assignment pursuant to *People v Crawford* (71 AD2d 38), submitting a brief concluding that there are no nonfrivolous issues meriting the court’s consideration. That the defendant pled guilty to second-degree assault as a lesser included offense under count 19 of the indictment raises the issues of whether the defendant’s plea conflicts with the express plea constraints set forth in CPL 220.10 (4). See *People v Johnson*, 89 NY2d 905, 907. Counsel is relieved and new counsel is assigned to brief that issue and any others that review of the record may disclose. Case held, decision reserved, motion granted. (Supreme Ct, Erie Co [Wolfgang, J])

Evidence (Exclusionary Rule) EVI; 155(53)  
 Habeas Corpus (General) HAB; 182.5(20)  
 Parole (Revocation Hearings [General]) PRL; 276(45[d])  
*People ex rel. Victory v Travis*, 288 AD2d 932, 734 NYS2d 749 (4th Dept 2001)

**Holding:** The petitioner commenced a *habeas corpus* proceeding after a preliminary parole revocation hearing, claiming that the probable cause determination rested on illegally obtained evidence. The exclusionary rule applies to all stages of the parole revocation process, even the preliminary parole revocation hearing. However, the petition was properly dismissed. Under Executive Law 259-i (5), actions by hearing officers are a judicial function not reviewable if done in accordance with the law. Hearing officers have no authority to rule on suppression issues. See *Matter of Finn’s Liq. Shop v State Liq. Auth.*, 24 NY2d 647, 657 n 2 cert den 396 US 840. Without a prior judicial determination that the evidence had been illegally obtained, the hearing officer could consider the evidence on the issue of probable cause. A subsequent judicial determination suppressing the evidence would not undermine the hearing officer’s probable cause decision. A parolee can litigate the prospective use of such evidence at a final parole revocation hearing. See *Monseratte v Upper Ct. St. Book Store*, 49 NY2d 306, 309-310. The court properly determined that the evidence was not illegally obtained; it may be used at the final parole revocation hearing. The claim of selective prosecution is made for the first time on appeal and is not properly before the



**Fourth Department** *continued*

court. Judgment affirmed. (Supreme Ct, Onondaga Co [Brunetti, J])

Grand Jury (Procedure)	GRJ; 180(5)
Witnesses (Experts)	WIT; 390(20)

*People v Beckwith*, 289 AD2d 956, 734 NYS2d 770 (4th Dept 2001)

**Holding:** During grand jury proceedings, a caseworker from the County Department of Social Services (DSS) was present in the courtroom. This did not render the proceedings defective, since an oath of secrecy was administered and the caseworker was present to afford emotional support to the child testifying. It was not error for the prosecutor to reveal the complainant's testimony at the grand jury proceeding to an investigator involved in the case. Further, there was no possibility of prejudice. The prosecution need not seek leave before resubmitting the case to another grand jury. Where no evidence was presented against the defendant, withdrawal of the case from the grand jury is not a dismissal requiring the prosecution to seek judicial approval before resubmitting the charge. See *People v Gelman*, 93 NY2d 314, 317. The court erred in allowing a medical expert to testify regarding a study that was not introduced into evidence. The testimony was hearsay as it was presented as proof of the facts contained in the study. See *Rosario v NYC Health & Hosps. Corp.*, 87 AD2d 211, 214. The error is harmless as the proof of guilt is overwhelming. See *People v Crimmins*, 36 NY2d 230, 241-242. The expert properly testified that the physical findings of the complainant's medical examination were consistent with sexual abuse; the physical findings were not within the range of ordinary intelligence or training. See *People v Cronin*, 60 NY2d 430, 432. Judgment affirmed. (County Ct, Oneida Co [Dwyer, J])

Appeals and Writs (Preservation of Error for Review)	APP; 25(63)
Sentencing (Enhancement)	SEN; 345(32)

*People v Jackson*, 289 AD2d 1049, 735 NYS2d 296 (4th Dept 2001)

**Holding:** The defendant pled guilty to grand larceny and was sentenced as a second felony offender. The court erred in enhancing the sentence based on its subjective determination that the defendant failed to comply with the plea condition that she respond truthfully and consistently to all questions of the probation department. See *People v Parker*, 271 AD2d 63, 70 *lv den* 95 NY2d 967. Though the defendant did not preserve this issue for

review, it is considered in the interest of justice. The sentence is vacated and the bargained-for sentence of an indeterminate term of two to four years is instated. Judgment modified and as modified affirmed. (County Ct, Monroe Co [Bristol, J])

Discovery ( <i>Brady</i> Material and Exculpatory Information)	DSC; 110(7)
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Evidence (Sufficiency)	EVI; 155(130)
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*People v Smith*, 289 AD2d 1056, 735 NYS2d 693 (4th Dept 2001)

**Holding:** Based on errors made during the presentation to the grand jury, the defendant sought dismissal of the indictment. Several technical failures to adhere to CPL 190.32 did not require dismissal. The failure to preserve a hat and coat did not create an otherwise non-existent reasonable doubt, so there was no denial of the constitutional right to confront witnesses based on failure to preserve *Brady* material. *People v Baxley*, 84 NY2d 208, 214 *rearg dismsd* 86 NY2d 886. The court's adverse interest charge alleviated any prejudice. The error in not suppressing identification evidence from a second showup was harmless.

The defendant correctly asserted that the evidence was not legally sufficient to support the conviction of third-degree grand larceny. The owner of the vehicle's estimate lacked any factual basis to establish the value of the van. See *People v Sweeney*, 125 AD2d 978 *lv den* 69 NY2d 834. A basis of knowledge for a statement of value is required before it can be accepted as legally sufficient evidence. See *People v Lopez*, 79 NY2d 402, 404. The record shows that the defendant is guilty of larceny, even in the absence of proof of value of the stolen property. The third-degree grand larceny conviction must be reduced to the lesser included offense of petit larceny. Judgment modified and as modified affirmed and remitted. (County Ct, Erie Co [Drury, J])

Forfeiture (General)	FFT; 174(10)
Sentencing (General)	SEN; 345(37)

*People v Sanders*, 289 AD2d 1019, 735 NYS2d 302 (4th Dept 2001)

**Holding:** The defendant was sentenced for an attempted drug sale as a second felony offender to a term of three to six months and to pay restitution. He was further ordered to forfeit the \$900 he had when he was arrested. The authority to order forfeiture based on a drug conviction is derived from Penal Law article 480. Forfeiture cannot be ordered without compliance with specified procedures found in Penal Law 480.10. Lack of compliance with these procedures here renders illegal the forfeiture portion of the

**Fourth Department** *continued*

sentence. In spite of the defendant having waived his right to appeal, that portion of the sentence must be vacated. *See gen People v Seaberg*, 74 NY2d 1, 9. Judgment modified and as modified affirmed. (Supreme Ct, Erie Co [Rossetti, J])

Confessions (Counsel) CNF; 70(23)

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

*People v Perkins*, 289 AD2d 940, 735 NYS2d 273 (4th Dept 2001)

**Holding:** The defendant was convicted by a jury of robbery and possession of a weapon. He was sentenced as a second violent felony offender to concurrent prison terms, the longest of which is a determinate term of 20 years. The court erred in admitting the grand jury testimony of the store owner in place of her live testimony at trial, where the defendant and his accomplices were said to have entered a grocery store and held the owner at gunpoint. The prosecution failed to show that the “witness’s unavailability was procured by the defendant.” All the threats warning the store owner not to testify were made by a suspected accomplice, not the defendant. *People v Geraci*, 85 NY2d 359, 369. The defendant sought to suppress his written statement, made to the police eight hours after he had invoked his right to remain silent. A subsequent inquiry is permissible only where a significant period of time has passed since the right to remain silent was invoked and where police have reiterated the requisite warnings. *People v Brown*, 266 AD2d 838 *lv den* 94 NY2d 860. Here, the police only “reminded” the defendant that he had been read his rights earlier. His written statement should have been suppressed. However, these errors were harmless. The defendant’s oral admission of guilt was admissible, and an officer saw him inside the store. (Supreme Ct, Monroe Co [Mark, J])

**Dissent:** [Pine, JP and Scudder, J] The improperly admitted evidence was the only evidence, aside from the defendant’s oral admission in response to a leading question, showing that a robbery occurred.

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

Search and Seizure (General) SEA; 335(42)

*People v Acosta*, 289 AD2d 975, 735 NYS2d 272 (4th Dept 2001)

**Holding:** The defendant was convicted of third-degree criminal possession of a weapon for having a knife. He sought to suppress the knife because the police seized it following an unlawful pursuit. The court ruled that even if the

seizure was unlawful, any resulting taint was dissipated. “The defendant’s weapon was not revealed as a direct result from any claimed unlawful police conduct’ (*People v Wider*, 172 AD2d 573, 574. . .).” The court’s supplemental instruction to the jury on the issue of the “unlawful use” of the knife improperly changed the theory of prosecution. *See People v Kaminski*, 58 NY2d 886, 887. While the prosecution’s bill of particulars specified that unlawful use was based upon the defendant’s “attempt to stab” the officer, the court instructed the jury that the defendant could be found guilty if he attempted to stab the officer or merely threatened to inflict injury with the knife. Judgment reversed, new trial granted on count two. (County Ct, Erie Co [D’Amico, J])

Appeals and Writs (Counsel) APP; 25(30)

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

*People v Crisler, Jr.*, 289 AD2d 1097, 738 NYS2d 259 (4th Dept 2001)

**Holding:** The defendant was denied effective assistance of appellate counsel where counsel submitted to the prosecution a copy of the brief together with the proposed stipulation to the record, and then revised the brief based upon comments from the prosecution. The orders of Dec. 27, 2000, are vacated, and the appeal is to be heard *de novo*. *See People v LeFrois*, 151 AD2d 1046; *see also People v Vasquez*, 70 NY2d 1, 4 *rearg den* 70 NY2d 748. Motion for writ of error *coram nobis* granted.

Grand Jury (General) GRJ; 180(3)

Prosecutors (Special Prosecutors) PSC; 310(45)

*People v Cummings*, 289 AD2d 992, 735 NYS2d 314 (4th Dept 2001)

The defendant was indicted for a rape occurring in a county hospital. After the complainant began a civil action against the county, a special prosecutor was appointed in the criminal action. The indictment was dismissed with leave to re-present. The special prosecutor instructed the grand jury that first-degree rape and sexual misconduct have essentially the same elements, but differ as to punishments, which were described. The grand jury was told it could indict on either, both, or neither crime. It indicted on both. The court required the special prosecutor to chose between the counts. The defendant was convicted of rape.

**Holding:** The court did not err in denying the defendant’s motion to dismiss the indictment based on prosecutorial misconduct before the grand jury. Dismissal should be limited to wrongdoing, fraudulent conduct, or errors which could potentially prejudice the grand jury’s ultimate decision. The likelihood of prejudice turns on

**Fourth Department** *continued*

facts, including the weight and nature of the admissible proof adduced and the degree of inappropriate prosecutorial influence or bias. *People v Huston*, 88 NY2d 400, 409. No likelihood of prejudice was demonstrated. While the issue of punishment is usually beyond the grand jury's purview, the prosecutor was not attempting to prejudice the defendant but to distinguish crimes with otherwise virtually indistinguishable elements. The prosecutor's instruction did not impair the integrity of the grand jury, deny the defendant due process, or violate equal protection. Judgment affirmed. (County Ct, Wyoming Co [Dadd, J])

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Informants (General) INF; 197(20)

Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) (Motions to Suppress [CPL Article 710]) SEA; 335(15[p]) (45)

*People v Walker*, 289 AD2d 1074, 735 NYS2d 903 (4th Dept 2001)

Learning from an informant that the defendant was at a hotel and possessed crack cocaine, police arranged a call from the informant to the defendant, who told the informant to take care of a drug deal the informant suggested. A search of the hotel yielded no drugs. Learning from a hotel clerk that the defendant left in a taxi, the police stopped and searched the cab, finding crack cocaine.

**Holding:** The court erred in denying suppression of evidence seized in the taxi. The automobile exception to the warrant requirement does not dispense with the requirement that there be probable cause to search the vehicle. *People v Blasich*, 73 NY2d 673, 678. The information that the informant provided was insufficient to establish probable cause. The prosecution failed to satisfy either prong of the *Aguilar-Spinelli* test. *Aguilar v Texas*, 378 US 108 (1964); *Spinelli v United States*, 393 US 410 (1969). The informant was of no known reliability and there was no evidence that his personal knowledge or observation was the basis of his information. See *People v Bigelow*, 66 NY2d 417, 424. The telephone conversation in which the defendant expressed a general willingness to arrange a future drug deal was insufficient. See *People v Gomcin*, 265 AD2d 493, 495 *lv gntd* 94 NY2d 903, *app dismd* 95 NY2d 821. The defendant's actions in leaving the hotel in a cab are susceptible of innocent interpretation. Judgment reversed, motion granted, indictment dismissed. (County Ct, Steuben Co [Latham, J])

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Sentencing (Concurrent/Consecutive) (Determinate Sentencing) SEN; 345(10) (30)

*People v Sutton*, 289 AD2d 1069, 735 NYS2d 461 (4th Dept 2001)

**Holding:** The court erred in directing that a definite sentence of incarceration for probation violation be consecutive to indeterminate terms of incarceration previously imposed. Because the offense underlying the definite sentence was committed before the indeterminate sentences were imposed, the sentences must run concurrently. See Penal Law 70.35; *People v Graham*, 255 AD2d 932 *lv den* 93 NY2d 873. Judgment modified.

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Speedy Trial (Cause for Delay) (Due Process) SPX; 355(12) (25)

*People v Wheeler*, 289 AD2d 959, 737 NYS2d 711 (4th Dept 2001)

**Holding:** The court should have dismissed the indictment where delay of over 22 months from the defendant's alleged commission of perjury to the filing of the indictment deprived the defendant of his due process right to a prompt prosecution. At the time of the defendant's testimony, the prosecution possessed all the information necessary to charge him with perjury, and indicated that they intended to prosecute him for that crime. See *People v Singer*, 44 NY2d 241, 253. This case was not complex, and there were no unique theories involved. *People v Brown*, [appeal No. 2], 117 AD2d 978, 979. Inadvertence, neglect, or trifling is not justification or permissible. See *People v Gallup*, 224 AD2d 838, 840. That the defendant was incarcerated for another crime during the time in question does not excuse the delay, which could have prolonged his incarceration by foreclosing the possibility of a concurrent sentence and by depriving him of any meaningful opportunity for rehabilitation. See *People v Santiago*, 209 AD2d 885, 888. Judgment reversed, indictment dismissed, and matter remitted. (County Ct, Steuben Co [Furfure, J])

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

*People v Hooper*, 289 AD2d 1097, 738 NYS2d 258 (4th Dept 2001)

**Holding:** The defendant contends that he was denied effective assistance of appellate counsel because counsel failed to raise an issue that would have resulted in reversal. The issue, whether the first-degree manslaughter conviction should be reversed because it was inextricably intertwined with the attempted possession of a weapon conviction, may have merit. The order is vacated and the appeal is to be reviewed *de novo*. See *People v LeFrois*, 151 AD2d 1046. Motion for writ of error *coram nobis* granted, order of Dec. 31, 1997 vacated. ♀♂

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