



# Public Defense Backup Center **REPORT**

Volume XVII Number 2

March-April 2002

A PUBLICATION OF THE DEFENDER INSTITUTE

## Defender News

### Public Defense Budgets Past and Future

Only in March, weeks before the start of the 2002 fiscal year, did several public defense programs in New York State learn what state funding they would be receiving for FY 2001. Even in a state well known for late budgets, this overlapping of budget years and the concomitant inability to allocate funds for ongoing work, plan events, hire (or retain) staff, etc. was unprecedented. In addition to the reductions in staff suffered by the Backup Center as a result (detailed in the last issue of the *REPORT*), NYSDA was forced to cancel the 2002 Defender Institute Basic Trial Skills Program.

Other programs have suffered similar losses. For example, Prisoners' Legal Services of New York, Inc. (PLS) closed its Poughkeepsie office, and only recently began the process of once again rebuilding staff in other offices (see pg. 10).

### New Struggles Underway

NYSDA received state and federal funding for 2001 in the amount of \$1,221,153. For 2002, the Backup Center seeks restoration to the \$1.5 million received in 2000. However, restoring individual programs to prior funding levels is but a part of needed public defense reforms in New York State.

### Gideon Day 2002

Representing the Gideon Coalition, which advocates for important reforms in public defense services, 60 people came to Albany on March 19. During this annual commemoration of the landmark right to counsel case, they urged legislators to restore—yet again—the funding for public defense that was cut from the Executive Budget. They also urged an increase in assigned counsel fees.

The Gideon Coalition has grown to 80 organizational members. The Coalition held a press conference and set up a public education exhibit in the Concourse of the Empire State Plaza. An information table featured a wealth of material, including fact sheets about the public defense programs that have traditionally received state funding and the need for a hike in assigned counsel fees. The table was surrounded by investigative journalist Scott Christianson's documentary display, "INNOCENT: Inside Wrongful Conviction Cases in New York." This exhibit graphically illustrates how justice goes awry without a strong defense component.

### Assigned Counsel Rates and Public Defense Reform

A month before Gideon Day, NYSDA's Executive Director Jonathan E. Gradess presented testimony to a Joint Legislative Fiscal Committee hearing on this year's judiciary budget about the grave situation facing public defense. He let lawmakers know that the "assigned counsel fee crisis [threatens] to remove lawyers for the poor from every courtroom in this state." Moreover, he added, an Independent Public Defense Commission is needed to "fix a system that is badly broken."

**NYSDA's  
35th Annual  
Meeting and Conference**

**July 25-27, 2002  
Niagara Falls, NY**

Minutes from the Falls, Canada, & much more.

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Other leaders from the defense bar and the judiciary raised their concerns over the need to increase assigned counsel rates. Chief Administrative Judge Jonathan Lippman underscored the day-to-day impact that under-resourced assigned counsel panels were having in the courts. "People have been bending over backwards and doing somersaults to try to cover cases, but it is an impossible situation. We have to, at the very least, put a Band-Aid on this problem . . . and stop the bleeding. It is far worse than last year and going totally in the wrong direction, and is not something that should be tolerated." Amidst discussions about raising rates, \$75-per-hour for felonies and \$60 for misdemeanors, the question of funding remains uncertain. At this point, no allocation in the executive or court budgets has been made. (*New York Law Journal*, 2/25/02; *Times Union* [Albany], 2/26/02.)

### **Legislation Introduced to Raise AC Rates and Create Independent Public Defense Commission**

Both the Senate and Assembly now have bills to raise assigned counsel rates to \$75 an hour and create a statewide Public Defense Commission.

Both include provisions to keep the commission independent. These provisions track those contained in the proposal put forward last year by the Committee for an Independent Public Defense Commission. Among those provisions are a nominating committee of organizations committed to justice; the committee would establish a pool of candidates from which members would be appointed by political authorities. Prosecutors and judges would not be eligible to sit on the commission under either bill. Dale Volker, a well-respected Senator committed to equal justice, introduced S.06789. Assembly member Martin Luster introduced A.10075-A, which has at least 65 co-sponsors.

On Gideon Day, discussed above, the League of Women Voters (which has made an independent public defense commission a legislative priority this year) and representatives of most Gideon Coalition member groups, asked lawmakers to sign onto and support such legislation. Michael Whiteman, Chair of the Committee for an Independent Public Defense Commission, spoke at the press conference.

### **Administrative Judge Approves Fees Above Limit**

For the first time, an administrative judge has approved a fee increase under the new OCA rules. District Administrative Judge Oshrin of Suffolk County, exercising his review power under 22 NYCRR 127.2[b], approved vouchers for a family court assignment above the statutory rate. Family Court Judge Pach found that "[I]t is simply not reasonable for the Court to expect Mr. Gallo [assigned counsel] to provide the kind of compre-

hensive, high-quality legal representation he provided in this extremely complicated case and then compensate him at the rate of \$25 per hour for . . . out-of-court work, and \$45 [sic] an hour for . . . in-court work." Judge Oshrin found no abuse of discretion by the trial judge and approved the finding of extraordinary circumstances awarding Gallo a rate of \$75 per hour for both in and out of court work. *AA v MA*, MA, N-845-00 (Suffolk Co Sup Ct 3/6/02.). (*New York Law Journal*, 3/4/02.)

In a move opposing approval of higher fees, the Broome County Attorney sought a preliminary injunction to prevent judges from making assigned counsel fee awards above the statutory rates. The suit claimed that award decisions of \$75 per hour across-the-board violate the County Law and the separation-of-powers doctrine. While conceding that the current rate structure was "ludicrous," the County Attorney acted to control the financial implications of the judges' decisions and shift the responsibility for rate increases from the courts to the legislature. (*New York Law Journal*, 3/4/02.)

As the *REPORT* went to press, Supreme Court Justice Patrick D. Monserrate issued a decision saying that the award of extraordinary fees was not improper. In an opinion described in by the *Press & Sun-Bulletin* as "by turns stern and sarcastic," Monserrate said:

*"The County's argument seems to [be] that it is violative of the County's right to due process of law for a (mere) judge to be given the awesome power to raise—in a relatively minuscule number of cases—the compensation level of a lawyer (!) from \$40/\$25 an hour to some stratospheric a sum as \$75, and all the County can do about it is to complain (gasp!) to another judge! The County's position is untenable."*

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The decision is available on the web at [www.press-connects.com/charts/decision.pdf](http://www.press-connects.com/charts/decision.pdf) or from the Backup Center. The lawyers in the case were represented by Mlynarski and Cawley (Joseph F. Cawley, Jr., of Counsel). An *amicus* brief by Malvina Nathanson was filed on behalf of the New York Association of Criminal Defense Lawyers.

Meanwhile, criminal and family court judges continue to find justifications for rate increases in an effort to stem the tide of attorney departures from local assigned counsel panels. In Clinton County, a family court judge increased assigned counsel rates based on the due process rationale of *In re Nicholson* (see the last issue of the *REPORT*). *In re Cody* "KK," No. NN-2006/2007-2001 (Clinton Co Fam Ct 2/5/02). In Suffolk County, Judge Weber ordered assigned counsel in a complex murder case to be compensated at a rate of \$75 per hour. *People v Anthony McGhee*, NYLJ, 2/4/02 (Suffolk Co Ct). The court extolled the value of keeping experienced attorneys on the panel. "Expert legal services in and of themselves can provide significant savings to the Court. Seasoned counsel are able to identify those legal issues which are more likely to bear fruit and thus avoid doing unnecessary legal research." For the most current developments, visit the Assigned Counsel Rates page of the "Hot Topics" section of the NYSDA web site, [www.nysda.org](http://www.nysda.org).

### **Economy and Caseloads Entangled**

The economy affects public defense lawyers in more ways than in the continuation of low fees and salaries:

*"... [Public defenders across the country] could very well see an increase in caseload disproportionate to population growth [as a result of the economic downturn that began in 2001]. Further, given the long-term familial and sociological implications, the increase could extend into the future through subsequent generations whose members are raised in a heightened cycle of poverty and hopelessness."*

So concludes a detailed article reporting social science studies linking crime and economic factors such as unemployment and low wages appearing in the March issue of *The Advocate*, the magazine of the Kentucky Department of Public Advocacy (DPA). The author asserts that current signs of mild economic recovery do not appear sufficient to reverse the prognosis. Rather, Bryce H. Amburgey asserts, the question is not whether caseloads will increase, but how could caseloads *not* increase. "The Economy-Crime Rate Connection and Its Effect on DPA Caseloads: Does Crime Pay When the Market Doesn't?" is available on the DPA web site, <http://dpa.state.ky.us>.

### **Kaye Notes Growing, Unmet Needs**

Delivering the Marden Lecture at the Association of the Bar of the City of New York on March 5, 2002, Chief Judge Judith Kaye also addressed economic issues as she set out the growing need for legal services in the wake of 9/11. While focusing on the need for *pro bono* civil legal services, she made many points that are equally applicable to public defense services in the criminal arena. It could not be, she said, that the legal profession would offer services to help keep a 9/11 victim from homelessness or deportation but deny similar assistance to others in need. She recognized the need for holistic services, for "bringing together *all* necessary resources for a needy population..." She noted *pro bono* lawyers' need for backup assistance, training, and mentoring. (At that point, she explicitly referred to public criminal defense, acknowledging that when she had joined the federal assigned counsel panel as a commercial litigation partner at a midtown Manhattan law firm, she relied on Tom Concannon of The Legal Aid Society's Federal Defender Unit to show her the ropes.)

Kaye did briefly address the assigned counsel fee crisis head on. She has seen judges "send emissaries, floor by floor, through the courthouse corridors to find attorneys to represent parents in Family Court, and then adjourn cases before them because the quest was fruitless." Asking, "Is this America?" Kaye then stated the obvious—"The rates must be raised now."

### **Attorney Lynne Stewart Arrested**

New York City defense attorney Lynne Stewart, a lawyer for Sheikh Omar Abdel-Rahman, was indicted on Apr. 9 and charged with, among other things, "facilitating communications among Islamic Group members and providing financing for their activities." The Egyptian-based Islamic Group is designated a terrorist organization by the U.S. government. Stewart's client was convicted of conspiring to assassinate Egypt's president and destroy New York City landmarks in the 1990's.

Attorney General Ashcroft said that the Justice Department has invoked, for the first time, the post-Sept. 11 authority to monitor communications between attorneys and clients suspected of facilitating terrorist acts. However, the charges include actions from well before that time.

One is that Stewart allowed an interpreter to read to Stewart's client, during a May 2000 visit, letters from an Islamic Group member about whether the group should continue to comply with a cease-fire in terrorist activities against Egyptian authorities. This is said to have violated a Special Administrative Measures imposed on her client, and therefore her visits with him, regarding no communication other than legal material. Stewart is alleged to have taken affirmative steps to conceal the conversation from

prison guards by making extraneous comments in English to mask the Arabic conversation. She is said to have later announced to the news media that her client had withdrawn his support for the cease-fire. The interpreter and two others have also been charged. ([Findlaw.com](http://findlaw.com) and *Associated Press*, 4/9/02.)

Lawyers, including NYSDA's Executive Director, have publicly expressed concern about Stewart's arrest. Zealous advocacy and the attorney-client relationship are threatened by such action and the related search of Stewart's office. The FBI reportedly left "carrying two computers, a box filled with sealed envelopes and a large sealed evidence bag." (*New York Times*, 4/10/02; see also *Newsday* and *Los Angeles Daily Journal*, 4/10/02; *New York Times*, 4/11/02.)

The indictment has been posted on the Internet at <http://news.findlaw.com/hdocs/docs/terrorism/ussattar040902ind.pdf>. Stewart is represented by NYSDA member Susan Tipograph.

## **Other Post-9/11 Rights and Wrongs**

### **Speedy Trial Issues Raised**

In the wake of the attacks of Sept. 11, Governor Pataki issued a flurry of Executive Orders that temporarily suspended statutory speedy trial in criminal cases. (Executive Order Nos. 113.7, 113.28, 113.42, 113.43A.) In cases affected by the suspension period, defense lawyers have been wrestling with the appropriate application of the CPL 30.30 readiness rule. (*New York Law Journal*, 2/22/02.) Exceptional circumstances have been found in cases with critical time lapses during the post-9/11 period. *People v Santana*, NYLJ, 3/25/02 (Bronx Sup Co) (speedy trial motion denied); *United States v Correa*, NYLJ 10/3/01 (SDNY) (9/11 related continuances excluded from federal speedy trial statute).

The Governor's Executive Orders are available on the web: [www.state.ny.us/sept11/wtc\\_exeorders.html](http://www.state.ny.us/sept11/wtc_exeorders.html). The latest developments can be found on the NYSDA Terrorism Law page: [www.nysda.org](http://www.nysda.org).

### **Immigrants Targeted for Further Questioning**

Arab citizens in the United States will face another round of questioning by the Justice Department. The government plans to question nearly 3,000 men, in addition to the original 4,800 targeted last year. According to Attorney General Ashcroft, "The individuals to be interviewed are not suspected of any criminal activity." Apparently, they were selected based on a profile of people who might possess information about terrorist activities. This questioning has been criticized by civil liberties groups as a form of racial profiling. (*New York Times*, 2/21/02.)

### **Immigrant Defense Project Receives Grant**

The work of NYSDA's Immigrant Defense Project became more important than ever post-9/11, at the same time that NYSDA's state funding problems intensified, jeopardizing the Project's future. The Project's value was recognized by a recent \$65,000 grant from the New York Foundation. The funding was made possible by the Foundation's receipt of money from the Nathan Cummings Foundation "for meeting emergency needs of vital non-profits" in New York City. The grant is designed to enable the Project "to respond to the individual needs of immigrants and the increased requests from defense lawyers and advocates for training in defendants' legal, constitutional, and human rights in New York State's criminal justice system."

The New York Foundation "supports groups in New York City that are working on problems of urgent concern to residents of disadvantaged communities and neighborhoods." Its full mission statement and other information are on the web at [www.nyf.org](http://www.nyf.org).

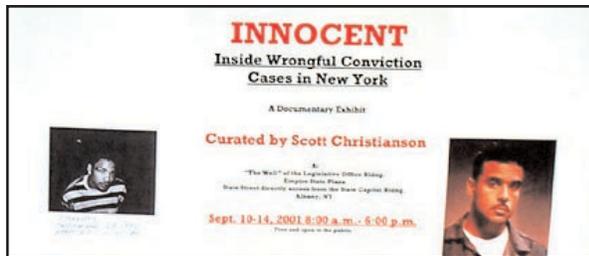
### **NYSDA Receives Bar Foundation Grant**

The New York Bar Foundation has approved a \$10,000 grant for NYSDA's Public Defense Backup Center for use in 2002. The grant will help the Backup Center continue providing training, publications, research, and other support to public defense lawyers. With NYSDA once again eliminated from the Executive Budget, requiring yet another effort to have funding restored by the Legislature, this assistance is as needed as it is appreciated.

### **Justice Disfunction in Death Penalty Noted**

Two years ago, Professor James Leibman of Columbia Law School and other researchers published a study revealing serious flaws in the administration of the death penalty. The report, entitled *Broken System: Error Rates in Capital Cases, 1973-1995*, examined reversible errors committed in capital cases over a 23-year period. Now, a follow-up study takes those findings a step further, *Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It*. This time they explored the most common reasons for reversals in death cases, such as ineffective assistance of counsel and government misconduct. Then they considered the reasons for the high number of mistakes occurring in death penalty cases and possible resolutions.

Recently, the conduct of attorneys and the role of judges in death cases have been called into question. The 9th Circuit Court of Appeals overturned a death sentence due to ineffectiveness of counsel in *Mayfield v Calderon*, No. 97-99031 (9th Cir. 11/7/01). Inadequate preparation,



insufficient investigation, one substantive meeting with the client and general failure to present a case for mitigation left defendant without adequate representation at the most critical juncture. (*Recorder*, 11/9/01.)

Meanwhile, the United States Supreme Court has decided to hear a challenge to Arizona's law permitting judges to impose death sentences, *Ring v Arizona*, No. 01-488 (US 2/11/02), which could have a broad impact in many death penalty states. (*Legal Times*, 2/6/02.) It will also be another opportunity for the Court to clarify the judge's role in sentencing under *Apprendi v New Jersey*, 530 US 466 (2000).

## Apprendi Update

The New York Court of Appeals has also revisited the *Apprendi* ruling recently. In *Apprendi*, the Supreme Court held that any fact that increases a sentence beyond the statutory maximum, other than a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. Last year, the New York high court rejected an *Apprendi* challenge to the persistent felony offender statute in *People v Rosen*, 96 NY2d 329, 728 NYS2d 407 (2001). In its latest decision, the Court of Appeals refused to extend *Apprendi* to restitution orders. *People v Horne*, No. 24 (NY 3/14/02). In *Horne*, the court held that the trial court's factual determination of restitution did not enlarge the maximum penalty for the offense. Still, *Apprendi* may find new life as the Supreme Court prepares to decide a case on the requirements for mandatory minimum sentences, *Harris v United States*, No. 00-10666 (US 3/25/02). (Digests of these decisions will appear in a future issue of the *REPORT*.)

## Drug Courts Multiplying

The growth of New York's drug courts continues unabated. New courts have opened in Putnam, Orange, and Seneca Counties. (*Journal News*, 2/17/02; *Times-Herald-Record*, 1/22/02; *Finger Lake Times*, 12/1/01.) Graduations held in Canandaigua and Monroe County highlighted the positive impact that treatment alternatives to prison have had on drug offenders. (*Finger Lake Times*, 2/9/02; *Rochester Democrat and Chronicle*, 12/13/01.) Recently, Rockland County added 10 more graduates to its list, for a total of 39 since its drug court

opened in 1998. At a recent graduation ceremony, Haverstraw Justice Apotheker observed that "[I]n Rockland County, it takes a whole community to support a drug court." (*Journal News*, 12/7/01.)

A new report documenting the first-year of the Office of Court Drug Treatment Programs (OCDTP), created in October 2000 by Chief Judge Kaye, has been issued by Deputy Chief Administrative Judge Joseph J. Traficanti, Jr., Director of OCDTP. It contains information on existing drug courts in New York and their operation, as well as plans for expansion of these courts across the state. It is available on the web, through the NYSDA web site or on the Court's web site at [www.courts.state.ny.us/1styrdc.pdf](http://www.courts.state.ny.us/1styrdc.pdf).

As the number of drug courts increases, the defense role in court development and protecting clients' rights remains crucial—and too often unaddressed. The American Council of Chief Defenders has recognized that the defense bar was a critical part of drug court planning and operation. Its *Ten Tenets of Fair and Effective Problem Solving Courts* provide guidance on the role of counsel in this setting and notes: "Nothing in the problem solving court policies or procedures should compromise counsel's ethical responsibility to zealously advocate for his or her client . . ." The *Ten Tenets* are posted on NYSDA's web site, [www.nysda.org](http://www.nysda.org), under Defense Standards on the Defense Services page. See also the "Drug Courts" page of the "Hot Topics" area of the site. Public defense lawyers with information about drug court developments in their area are encouraged to share it; please call or e-mail Mardi Crawford at the Backup Center.

## Issues Arise Around Attorney-Client Relationship

The core of the attorney-client relationship is trust. The consequences when an attorney betrays that trust can be severe.

### Abusing the Attorney-Client Relationship

New York City attorney George Edelstein was disbarred by the Appellate Division First Department for allegedly offering to sell information about a client in a case assigned under the federal Criminal Justice Act (CJA). His client was accused of operating a drug ring and charged with murder and kidnapping among other counts. He later fled the country. Edelstein reportedly denied knowing his client's location when asked by federal law enforcement but later told a former client, also a known informant, that he would reveal the client's whereabouts for money. Edelstein was said to have demanded that the informant pay him \$100,000, which the informant would receive from the government for the information. (*New York Law Journal*, 2/7/02.) The Grievance Committee

Panel of the Southern District of New York found that Edelstein violated DR 1-102 (A)(5) “by engaging in conduct prejudicial to the administration of justice.” The State Hearing Panel found him unfit to practice law. They said “that he lacked even the most basic understanding of the nature and function of law, showed no remorse, acknowledged no wrong-doing, showed a cavalier and disrespectful attitude toward the law, professional ethics and the disciplinary process . . . and gave the Panel no reason not to disbar him.” *In re Edelstein*, No. M-4515 (1st Dept 2/5/02).

Another CJA attorney in the Southern District, Gino Josh Singer, was suspended for soliciting private additional payments from his assigned client for better representation. “For a CJA attorney to take advantage of his client’s vulnerable position to solicit private retention, or even to acquiesce in secret private payments from his client, is antithetical both to the letter of the plan and to the fiduciary duties it imposes.” During his representation, Singer convinced his client to pay him thousands of dollars in cash. Again, the panel found him to have engaged in “conduct that is prejudicial to the administration of justice,” as well as violating the rules prohibiting the collection of money from assigned clients. Rule 2-106(C)(3); 18 USC 3006(A) §VIII(E). (*New York Law Journal*, 2/6/02.)

Perhaps even more egregiously, another attorney—newly admitted to the bar—converted to his own use money intended for the client’s bail. The attorney was disbarred. *Matter of Bernstein*, 285 AD2d 233 (2nd Dept 2001) (see digest pg. 29).

Meanwhile, an attorney has been disbarred for paying attention of the wrong kind to a client firm’s business. After the INS began investigating fraudulent visa applications submitted on behalf of hairdressers brought to the country to staff the client’s salons, the attorney replaced inculpatory file documents with exculpatory ones. After being convicted of federal witness tampering, he was disbarred. *Matter of Deutsch*, 286 AD2d 91 (1st Dept 2001) (see digest pg. 18).

### **Letters of Engagement and Work Product Addressed**

The attorney work product shield against divulging client communications has been reexamined by the 2nd Circuit. In a grand jury investigation where an attorney had been subpoenaed to report on client statements made to government investigators, the court clarified the scope of work product protection under *Hickman v Taylor*, 329 US 495 (1947) and FRCP 26(b)(3). Witnessing the commission of a crime, such as making false statements to public officials, provided less protection than if the statements were aimed at charges for which the attorney was representing the client, such as fraud and tax evasion. *In re*

*Grand Jury Subpoena*, No. 01-6250 (2nd Cir. 2/21/02). The court added that work product can include facts as well as opinions and strategies, thus encompassing the work of investigators. (*New York Law Journal*, 3/7/02; 2/25/02.)

New York retained lawyers are now required to provide their clients with a “Written Letter of Engagement.” Starting Mar. 4, 2002, a new rule has gone into effect (22 NYCRR 1215) that requires “an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation. . . .” According to Professor Connor of Albany Law School, the new rule applies to civil and criminal attorneys. (*New York Law Journal*, 3/4/02.)

### **DNA and Fingerprinting**

As of this year, over 100 people convicted of crimes have been exonerated by DNA testing, including death row inmates, according to the Innocence Project at Cardozo Law School. (*USA Today*, 1/19/02; [www.innocenceproject.org/](http://www.innocenceproject.org/).) Nevertheless, federal funding originally intended to allow prisoners with innocence claims to seek DNA testing has been eliminated for this purpose. The DNA plan was initiated by the Justice Department under Janet Reno and finalized last August by Attorney General John Ashcroft. The money would have allowed local prosecutors to reexamine convictions obtained before the widespread use of DNA testing and address claims of false identification and wrongful conviction. Independently, prosecutor’s offices like the one in San Diego have funded their own DNA testing. According to one prosecutor, “We try our hardest to get it right. [But] if there are innocent persons in prison, we want to do everything possible to get them out.” (*USA Today*, 12/26/01.)

That innocent persons remain imprisoned, and in some cases in danger of being executed before their innocence can be proven, seems irrefutable. As the *REPORT* went to press, the 100th death row inmate to be exonerated—yet another freed by DNA evidence showing another person was the perpetrator—was released in Arizona. (*USA Today*, 4/10/02.)

When forensic DNA testing first emerged, it was labeled “DNA fingerprinting,” borrowing strength and legitimacy from a familiar, established technique. Ironically, as DNA’s forensic use increases, the reliability of fingerprint identification is increasingly under attack. In federal and state courtrooms, defense lawyers and forensic experts are challenging this century-old method that relies heavily on interpretation and not on the rigors of scientific inquiry. Scheck and Neufeld of the Innocence Project pointed out in a recent article that “[f]ingerprint experts had conceded that the process they use . . . is ultimately subjective and bedeviled by inconsistent stan-

dards." The number of point matchings required lacks consistency among law enforcement agencies. Scheck and Neufeld suggested that more research and independent verification was required before forensic evidence, such as fingerprinting, should be considered reliable. (*New York Times*, 3/9/02.)

The Pennsylvania federal judge who cast serious doubt on the admissibility of fingerprint evidence, as noted in the last issue of the *REPORT*, has reversed his decision. He found on reconsideration that fingerprint examination fell outside the realm of scientific evidence, and was only technical in nature. (*Legal Intelligencer*, 3/14/02; *United States v Plaza*, 2002 USDist LEXIS 4032, vacating 179 FSupp2d 492.)

### ***NYSDA and Law Schools Discuss Upstate Innocence Project***

Planning for an upstate New York branch of the Innocence Project begun at Cardozo School of Law took a step forward in March. Officials from upstate law schools met in Albany to talk about ways to provide assistance to help people believed to be wrongfully convicted. Coordinated by NYSDA through a grant from the Innocence Project, the upstate project currently has no clear source of operational funds. The costs of post-conviction services can be high, involving travel, investigation, and research. Financial help from law school administrators is hard to tap, with existing clinical law programs already struggling. As a result, the project's initial stages may be limited to informal mechanisms involving a few professors working with students. The upstate project is not prepared to respond to requests for assistance at this time. (*Times Union* [Albany], 3/29/02.)

### ***Guilty But Mentally Ill***

The effectiveness of any defense based on mental illness can be undercut by the popular perception that a defendant who successfully uses the defense is somehow escaping punishment. In an era of Mental Health Courts and Kendra's Law, serious consideration has been given to an alternative view of mental illness defenses—guilty but mentally ill (GBMI). The New York State Senate has passed Bill S1822, which [p]rovides for the entry of a plea in a criminal proceeding designated as 'guilty but mentally ill.'" Defendants convicted by this method face the same punishments as anyone else. They would be evaluated and referred to treatment by the Department of Correctional Services or the Department of Mental Hygiene, and subject to serving the remainder of their sentence in prison if their condition changed. This method has been adopted in 19 states. (*New York Law Journal*, 3/20/02.)

The impetus behind renewed examination of the insanity defense has been fueled in part by juror reactions. The post-partum psychosis defense in the Andrea Yates case was a recent example. A Texas jury was not prepared to acquit a woman who drowned her five children on insanity grounds nor were they prepared to sentence her to death—she was sentenced to life in prison. This case and similar instances have been cited by advocates of the "guilty but mentally ill" option. (*Associated Press*, 3/18/02.)

Defense lawyers have opposed GBMI statutes in the past. "[E]very organization from the American Bar Association to the American Psychiatric Association to the National Alliance for the Mentally Ill have condemned this proposed verdict on legal and conceptual grounds." Kase, "Guilty but Mentally Ill" Verdict Needed?: No," (*New York Law Journal*, 9/23/99.) It has been viewed as a thinly veiled way to cut down on the already small number of defendants found not guilty by reason of mental disease or defect. GBMI was seen as offering the jury an attractive, and seemingly humane, alternative verdict that in fact granted the defendant no relief. Persons found guilty of crime and diagnosed with mental illness should be receiving treatment for such illness without a GBMI verdict (*but see* item below). Persons not responsible for their crimes due to a mental condition should not be convicted, regardless of the "label" that conviction carries.

In any event, if New York does pass a GBMI statute, defense lawyers will need to be aware of the ramifications of having a client for whom a GBMI disposition might be suggested. South Carolina found counsel ineffective for advising a client to accept a GBMI plea, without first discussing the client's eligibility for an insanity defense, where the State's own psychiatrist had diagnosed the client as legally insane at the time of the crime. *Davenport v State*, 301 SC 39 (1990). A Michigan intermediate appellate court reversed a defendant's conviction because counsel at a bench trial had argued in summation for a GBMI verdict. Counsel's admission of guilt denied the client the constitutional right to have guilt or innocence decided by the trier of fact. *People v Fisher*, 119 MichApp 445 (1982); *but see Bell v Evatt*, 72 F3d 421 (CA 4 1995).

### ***Imprisoned But Mentally Ill***

Many inmates with mental problems are being allowed to deteriorate behind prison walls. The poor quality of treatment and the deleterious impact of isolated confinement in Special Housing Units (SHU) have resulted in serious injury and death for mentally ill prisoners. Neglect, handling by improperly trained personnel, and confinement in SHU have all contributed to the problem. Over the last three years, 32 percent of suicides in New York State prisons happened in the SHU (or the "Box"). (*Poughkeepsie Journal*, 12/16/01.)

Regarding the conditions in SHUs, NYSDA's Executive Director, Jonathan Gradess has observed, "More and more mentally ill people are de-compensating while in solitary confinement and less and less concern is being expressed about those who suffer." It is therefore good news that, for economic reasons, the Department of Correctional Services (DOCS) is closing SHU cells in 10 medium security prisons. (*Poughkeepsie Journal*, 3/10/02.) According to a recent medical survey, tens of thousands of prisoners in Western countries suffer from serious mental illness and are not receiving adequate treatment. (*Lancet*, 2/16/02.)

For those imprisoned in DOCS, developments such as mental health courts and supervised medication under Kendra's Law come too late, if they in fact offer benefits to persons suffering from mental illness. Keep up to date on all these issues by checking the "Mental Illness" page in the "Hot Topics" area of the NYSDA web site.

## **Stupid and Irrational and Barbarous— Judges' Views on the Rockefeller Drug Laws**

"Stupid and Irrational and Barbarous" is the title of a report issued by the Correctional Association of New York that provides a view of the Rockefeller Drug Laws from the judges who administer it on a daily basis. It reveals in their own words their frustration in being straightjacketed by mandatory minimum sentencing laws. The report also includes information about prison overcrowding, invidious law enforcement practices and the disproportionate impact on minorities. A copy of the report is available on the web: [www.droptherock.org/Judges\\_Report.htm](http://www.droptherock.org/Judges_Report.htm).

## **Jurors' Role and Voir Dire Expanded, Peremptories Challenged**

Jurors only get two chances to speak in the normal course of a trial—during *voir dire* and when they announce the verdict. The scope of that speech might be changing at both ends of the spectrum. In Westchester County, Judge Kenneth Lange's courtroom provides jurors the chance to do more than listen. Judge Lange, along with an increasing number of judges across the country, are encouraging jurors to take an active part in trials by allowing them to question witnesses. They believe that this improves jurors' understanding of the evidence. In most states, the decision to allow juror participation is discretionary. Some defense lawyers fear that juror questions might be too disruptive and lead to speculation. According to Professor Goldberg at Pace University School of Law, there is no evidence yet to show

that allowing jurors to ask questions results in better decision-making. (*Journal News*, 2/3/02.)

Two Court of Appeals cases have added another layer of scrutiny to the jury selection process. In *People v Chambers*, No. 23 (NY 3/19/02) a juror was asked whether he might be biased in favor of police testimony. He replied, "I don't think so." While holding that the juror's overall responses were unequivocal, the Court of Appeals offered stern advice for trial judges: "[W]hen a prospective juror qualifies a 'yes' or 'no' response regarding the ability to be fair with words such as 'I think' or 'I'll try,' an additional question or two at *voir dire* would easily dispel any doubt as to equivocation, assure an impartial jury, and avoid the delay, and risk, of appeals." (*New York Law Journal*, 3/19/02.) A digest of the opinion will appear in a future *REPORT*.

In *People v Brown*, No. 14 (NY 3/19/02) the Court rejected the defendant's *Batson* challenge based on an unsupported numerical argument. In a concurring opinion, Chief Judge Kaye spoke out against peremptory challenges in general. "My nearly 16-year experience with *Batson* persuades me that, if peremptories are not entirely eliminated (as many have urged), they should be very significantly reduced." Organizations including the New York State Bar Association have opposed reductions in peremptories. (*New York Law Journal*, 3/19/02.)

## **Stopping Traffic**

The right of police to stop and search vehicles on our roadways has taken some twists and turns lately. Shortly after the Court of Appeals adopted the US Supreme Court's *Whren* case permitting pretextual traffic stops (*People v Robinson*, No. 141 (12/18/01), the High Court expanded the "totality of the circumstances" test. In *United States v Arvizu*, 534 US \_\_\_ (1/15/02) the Court clarified its definition of the test to mean the cumulative circumstances observed by a law enforcement officer, including those with innocent explanations. Reliance on the officer's experience gained ground in the Court's decision. One commentator noted that "Arvizu sends lower courts a strong message that they should not lightly second guess the evaluation by an experienced law enforcement officer." (*New York Law Journal*, 2/19/02.) (See digest, pg. 12).

Roadblocks have not fared so well. A Massachusetts judge declared that roadblocks based on vague terrorism warnings issued by the government were unreasonable searches and seizures. In the first decision of its kind since 9/11, the court was unwilling to accept a "homeland security" exception to the 4th Amendment. (*Boston Globe*, 3/14/02.) Nearer to home, a Bronx Supreme Court declared that a police checkpoint intended for general crime control on a particular street was unconstitutional. (*New York Law Journal*, 2/13/02.) The court applied the reasoning of *Indianapolis v Edmond*, 531 US 32 (2000) to

ensure that “the guarantees of the Fourth Amendment should not be circumscribed because a resident happens to live in a high crime area.” *People v Pope*, NYLJ (Bronx Sup Ct 2/15/02).

New Jersey motorists may gain relief from the specter of unwarranted consent searches. In *State v Carty*, No. A-28-00 (NJ 3/4/02), the passenger of a car stopped for speeding signed a consent search form. The police discovered drugs on his person after a pat down. The rationale behind the search was to find evidence verifying ownership of the car, as the driver did not have his license or registration. The State Supreme Court, relying on state constitutional grounds, held that police officers needed reasonable and articulable suspicion of criminal wrongdoing before asking a motorist for consent to conduct a search. Determining ownership did not necessitate a consent search, when the information was verifiable by other means. The decision was intended to prevent “the police from turning routine traffic stops into a fishing expedition for criminal activity unrelated to the lawful stop.”

### **Vehicle Forfeiture**

A Nassau County defendant charged with Driving While Ability Impaired (DWAI) successfully moved for the return of his forfeited vehicle due to the County Attorney’s failure to enter a timely default judgment. In *Nassau County v Klein*, No. 1480-00 (Nassau Co Sup Ct 2/26/02), the defendant moved to dismiss the forfeiture complaint as abandoned under CPLR art 32. The County Attorney had filed a summons and complaint but did not enter a default judgment when the defendant failed to respond. The defendant’s motion to dismiss prevented the court from allowing the County to enter a late default judgment. The County raised law office failure due to a heavy backlog of over 1600 cases to explain its inability to act sooner. Since the defendant’s constitutional right to his property was at stake, the County was found not justified in waiting to act until the defendant moved to dismiss. (*New York Law Journal*, 2/25/02.)

In several other decisions, the Nassau County Supreme Court found the “nail and mail” service of process method, CPLR 308(4), used by the County to be faulty and ordered the return of the forfeited vehicles. The County was not able to show due diligence in locating the defendants before resorting to this method. (*New York Law Journal*, 3/11/02.)

### **March NYU Trainer a Success**

The 16th Annual New York Metropolitan Trainer drew about 230 attorneys to NYU Law School on Mar. 16, 2002. Among the topics covered were: Avoiding Ethical Pitfalls, presented by Cardozo Law School adjunct professor Michael Ross; Search and Seizure Update, by Barry Kamins, author of *New York Search and Seizure* (Gould

Publications); Interaction of Criminal and Family Court Representation, by Jamie Burke of Brooklyn Defender Services and Nancy Ginsberg of The Legal Aid Society; and The Right to Present a Defense, by Russell Gioiella, immediate Past President of the New York State Association of Criminal Defense Lawyers. Updates on caselaw from the Court of Appeals, the US Supreme Court, and the 2nd Circuit were provided by Edward J. Nowak, the Monroe County Public Defender, and Richard Ware Levitt, author of *Second Circuit Criminal Law Update*. Attending attorneys commented positively on the program. Written materials are available from the Backup Center for \$25.

### **New Publications on the Web**

Several new and important publications of interest to criminal defense attorneys have become available on the web.

- An updated version of *Reversible Errors 2002*, prepared by the Federal Public Defender for the Districts of Northern New York & Vermont, contains an extensive list of annotated case citations where defendants received relief from a United States Court of Appeals or the United States Supreme Court. A copy has been posted on the NYSDA Web Site, [www.nysda.org](http://www.nysda.org).
- The New York State Unified Court System has released a report that describes the budget implications of a proposal to restructure and simplify the court system, *Budgetary Impact of Trial Court Restructuring* (2002) ([www.courts.state.ny.us/CourtRestructuringMain.html](http://www.courts.state.ny.us/CourtRestructuringMain.html)).
- Legal Publications in Spanish ([www.publeg.com](http://www.publeg.com)) is a publishing house founded by David S. Zapp, a criminal defense lawyer in New York, whose aim is to produce books for the benefit of Spanish speaking defendants. They publish the *Federal Sentencing Guidelines in Spanish (Manual de Pautas)*, containing selected portions of the Guidelines, sections on narcotics and money laundering laws, and a guide developed by a federal probation officer; and *Habeas Corpus (Español/English)* drafted by the Columbia University Human Rights Review, which also includes court forms.
- The Health and Human Services agency has updated its *Poverty Guidelines, Research, and Measurement* web site ([www.aspe.hhs.gov/poverty/poverty.htm](http://www.aspe.hhs.gov/poverty/poverty.htm)), which contains links to current poverty measures and those going back to 1996. It also includes links to other federal resources on poverty issues. These measures are the basis for the LSC’s Eligibility Guidelines ([www.lsc.gov/FOIA/frn/fr161102.htm](http://www.lsc.gov/FOIA/frn/fr161102.htm)) appearing in the Federal Register. (These eligibility guidelines should not be used as the sole measure of eligibility for public counsel. As

NYSDA has noted, "many defendants who do not fall at or below the poverty level are nevertheless without sufficient financial resources to retain private counsel." *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* [1994]. The report, with a discussion of appropriate factors to be considered for eligibility, is available on NYSDA's web site.)

- The Census Bureau has published the *2001 Statistical Abstract of the United States* ([www.census.gov/prod/2002pubs/01statab/stat-ab01.html](http://www.census.gov/prod/2002pubs/01statab/stat-ab01.html)), which contains the complete data from the last census.
- Two other publications to note concern FOIA and expert evidence. The Reporters Committee for Freedom of the Press, has created an online version of their excellent publication on FOIA, *Tapping Officials' Secrets 2001* ([www.reporterscommittee.org/tapping2001/index.cgi](http://www.reporterscommittee.org/tapping2001/index.cgi)). The National Research Council has published a free online book about scientific evidence in the courtroom, *Age of*

*Expert Testimony* (2002) ([www.nap.edu/catalog/10272.html?onpi\\_listserv022202](http://www.nap.edu/catalog/10272.html?onpi_listserv022202))

## **Lindenauer Feted**

Susan B. Lindenauer, The Legal Aid Society's attorney-in-chief and counsel to the president, received the Edith I. Spivack Award at a luncheon at the New York County Lawyers' Association in March. (*New York Law Journal*, 3/5/02.)

## **SORA Changes to be Charted**

Substantial amendments to the Sex Offender Registration Act were enacted into law in legislation signed by Governor Pataki on Mar. 11, 2002 (L.2002, ch. 11) (S.6263-a). The changes, many of which went into effect on Mar. 12, expand the Act to bring New York into compliance with federal requirements for continued Byrne funding. Check NYSDA's website soon ([www.nysda.org](http://www.nysda.org)) for a downloadable chart of the statutory changes. ♪

## **Job Opportunities**

PRISONERS' LEGAL SERVICES OF NEW YORK (PLS) is seeking one **Staff Attorney** for the Central Intake Unit in **Ithaca, NY** and one **Staff Attorney** for the **Plattsburgh, NY** regional office. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. Doing both service work and impact litigation, PLS handles cases involving mental health and medical care; prison disciplinary matters; excessive use of force; conditions of confinement; sentence calculations; jail time credit and first amendment issues. PLS has been extremely successful in providing high quality effective legal services and in establishing important rights for its clients. Salary is competitive, outstanding benefit package including health, dental, disability and life insurance as well as a generous leave policy. PLS seeks to be a well balanced multi-cultural organization, encouraging people of color, women, and people with disabilities to apply. Staff fluent in Spanish needed.

Required for Central Intake position: licensed attorney, minimum of two years experience, demonstrated commitment to providing high quality legal services to clients in a broad variety of legal matters. Responsibilities include: screen client intake, analyze legal issues, coun-

sel and advise, provide brief service and referral of cases to regional offices, plus legal research and writing to provide *pro se* materials to our clients. Work with and provide supervision to two paralegals.

Required for Plattsburgh position: a law graduate or licensed attorney (up to four years of experience), demonstrated commitment to providing high quality legal services to clients in a broad variety of legal matters. Responsibilities will include advocacy work and state and federal court litigation, working with the Managing Attorney and paralegals to provide services to clients.

Send letter, résumé and list of three references to: Maria McGuinness, Human Resources Manager, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca, NY 14850. (607) 273-2283; e-mail [mmcguinness@plsny.org](mailto:mmcguinness@plsny.org) (Word or WP format)

The position of **Broome County Public Defender** is open. The successful candidate will run an 11-attorney office in Binghamton, NY providing public criminal representation at trial and appellate levels. Required: trial and administrative experience, and bar admission in New York State. AA/EOE. Salary base \$91,536. For an application, contact the Broome

County Department of Personnel, PO Box 1766, Binghamton NY 13902. (607) 778-2276.

THE BRENNAN CENTER FOR JUSTICE is seeking an **Attorney** for their Democracy Program, which collaborates with groups and government officials to eliminate barriers to full and equal political participation, to bring the ideal of representative self-government closer to reality. Required: excellent legal research, analysis, and writing skills; initiative, imagination, and versatility; organizational skills; ability to deal with diverse clients and work effectively in coalition with other organizations. Preferred: experience in some of the following—lobbying, legislative drafting, public education, or scholarship. Familiarity with democracy issues, practical political experience, political science grad work, or demonstrated commitment to public interest advocacy a real plus. EO, AA—women, people of color, persons with disabilities, and lesbians and gay men actively recruited. Salary CWE. Send cover letter, résumé, two writing samples, and three references to: Democracy Program Associate, Brennan Center for Justice, 161 Avenue of the Americas, 12th Floor, New York NY 10013. No calls please. ♪

# CONFERENCES & SEMINARS

**Sponsor:** National Association of Criminal Defense Lawyers  
**Theme:** Seminar: Race & Culture on Trial  
**Dates:** May 1-4, 2002  
**Place:** Cincinnati, OH  
**Contact:** NACDL: (202)872-8600; web site [www.criminaljustice.org](http://www.criminaljustice.org) or [www.nacdl.org](http://www.nacdl.org)

**Sponsor:** National Association of Sentencing Advocates  
**Theme:** 10th Annual Conference and Mitigation Institute  
**Dates:** May 8-11, 2002  
**Place:** Washington, DC  
**Contact:** NASA, c/o The Sentencing Project, tel (202)628-0871; fax (212)628-1091; web site [www.sentencingproject.org](http://www.sentencingproject.org)

**Sponsor:** New York Immigration Coalition  
**Theme:** Immigration Consequences of Criminal Behavior  
**Dates:** May 8, 2002  
 June 12, 2002  
**Place:** New York City  
**Contact:** Basia Michalska: (212)627-2227 xtn 227; fax (212)627-9314

**Sponsor:** Federal Bar Association & United States Sentencing Commission  
**Theme:** 11th Annual National Seminar on the Federal Sentencing Guidelines  
**Dates:** May 8-10, 2002  
**Place:** Palm Springs, CA  
**Contact:** Gus Centrone, Program Coordinator, Tampa Bay Chapter of FBA: (813)229-1118

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Cross to Kill  
**Date:** May 10, 2002  
**Place:** Brooklyn, NY  
**Contact:** Patricia Marcus: 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 & Defender Association  
**Theme:** Nuts and Bolts of Leadership & Management 2002  
**Dates:** May 16-18, 2002  
**Place:** Santa Rosa, CA  
**Contact:** Aimee Gabel: tel (202) 452-0620, ext. 214; e-mail [a.gabel@nlada.org](mailto:a.gabel@nlada.org); web site [www.nlada.org](http://www.nlada.org). For more info about the National Defender Leadership Institute at NLADA, contact Cait Clarke, Director.

**Sponsor:** Western Trial Advocacy Institute  
**Theme:** 2002 Western Trial Advocacy Institute  
**Dates:** July 6-12, 2002  
**Place:** Laramie, WY  
**Contact:** Meri Ramsey, Student Director, University of Wyoming College of Law, tel (307)766-2422; fax (307)766-6417; e-mail [Trial\\_Advocacy@hotmail.com](mailto:Trial_Advocacy@hotmail.com)

**Sponsor:** **New York State Defenders Association**  
**Theme:** **35th Annual Meeting and Conference**  
**Dates:** **(July 25-27, 2002)**  
**Place:** **Niagara Falls, 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 Bar Association  
**Theme:** 77th Annual Convention  
**Dates:** July 27-August 3, 2002  
**Place:** San Francisco, CA  
**Contact:** NBA: tel (202)842-3900; fax (202)289-6170; web site [www.nationalbar.org](http://www.nationalbar.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:** Patricia Marcus: tel (212) 532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site [www.nysacdl.org](http://www.nysacdl.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Ethics for Criminal Defense Lawyers  
**Date:** October 25, 2002  
**Place:** Westchester, NY  
**Contact:** Patricia Marcus: tel (212) 532-4434; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site [www.nysacdl.org](http://www.nysacdl.org) ↵

**Check the "TRAINING CALENDAR" on NYSDA's web site, [www.nysda.org](http://www.nysda.org), for up-to-date information on CLE trainings and other events of interest.**

**Gideon Coalition Public Information Table 2002**



**Gideon Day Press Conference 2002**

*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

Insanity (Civil Commitment) ISY; 200(3)

Sex Offenses (General) SEX; 350(4)

**Kansas v Crane**, 534 US \_\_\_, 122 Sct 867,  
151 LEd2d 856 (2002)

The trial court ordered the defendant, a previously convicted sexual offender suffering from exhibitionism and antisocial personality disorder, to be civilly committed. The state supreme court reversed, applying *Kansas v Hendricks*, 521 US 346 (1997), and holding that the federal constitution required a finding that such defendants cannot control their dangerous behavior. Kansas appealed, claiming it was not "always" necessary to prove that dangerous individuals were "completely" unable to control their behavior.

**Holding:** The federal constitution did not impose a rigid requirement of "total or complete lack of control" to be found as a basis for civil commitment under the statute. The state court read *Hendricks* too narrowly. *Hendricks* upheld the constitutionality of the Kansas Sexually Violent Predator Act finding the confinement to be civil, not criminal, and the statutory requirement for confinement, "mental abnormality or personality disorder," to be sufficient for substantive due process. While no absolute standard was envisioned, there must be some lack-of-control determination by the trial court, to weed out dangerous sexual offenders who should be civilly committed from ordinary dangerous persons who may be dealt with exclusively through criminal sanction. See *Foucha v Louisiana*, 504 US 71, 82-83 (1992). Identifying a "serious mental disorder" that indicated "a special and serious lack of ability to control behavior" was crucial. Hence "lack of control" was not to be defined too narrowly, but there must be proof of serious difficulty in controlling behavior. Civil confinement based only on "emotional" abnormality was not considered in *Hendricks* or here. Judgment vacated, case remanded.

**Dissent:** [Scalia, J] *Hendricks* and the Kansas statute did not warrant a separate "lack of control" determination. The judgment should be reversed, not vacated for further proceedings.

Appeals and Writs (Preservation of Error) APP; 25(64)

Continuances (General) CTN; 90(14)

**Lee v Kemna**, 534 US \_\_\_, 122 Sct 877,  
151 LEd2d 820 (2002)

During his murder trial, the petitioner's alibi witnesses left the courthouse before they were to testify and did not return. The defense requested a continuance until the next day to locate them. The motion was denied based on the court's belief that the witnesses had abandoned the petitioner and on scheduling problems. A post-conviction motion challenging the ruling and raising a federal constitutional right to present a defense was denied due to a failure to meet the formal requirements of state rules for continuances. Federal habeas corpus was sought; affidavits of the three witnesses were offered stating that they had been told by a court officer that their testimony was not needed until the next day. Relief was denied on the basis that the state court cited an adequate and independent state-law ground. That denial was affirmed based on state procedural default.

**Holding:** Dismissal of the petitioner's claim for failing to meet state procedural rules not raised at the trial level was not sufficient to bar federal habeas review. The petitioner's right to present a defense did not hinge on adherence to a rule whose basic interests of preventing unwarranted delays had been met. *Osborne v Ohio*, 495 US 103, 124 (1990). In limited circumstances, the exercise of federal rights will not be trumped by state procedural rules. See *Davis v Wechsler*, 263 US 22, 24 (1923). The defense actions satisfied *Osborne's* rule requiring an error to be timely raised so that a trial court can take corrective action to serve legitimate state interests. The sudden disappearance of the witnesses here was an unusual circumstance not addressed by the state court's decision after the petitioner substantially complied with the rules. Judgment vacated and remanded.

**Dissent:** [Kennedy, J] *Osborne* did not lay a foundation for the majority's revival of *Henry v Mississippi*, 379 US 443 (1965). Sound principles of federalism counsel against the result reached here.

Search and Seizure SEA; 335(15[k]) (75)

(Automobiles and Other  
Vehicles [Investigative  
Searches]) (Stop and Frisk)

**United States v Arvizu**, 534 US \_\_\_, 122 Sct 744,  
151 LEd2d 740 (2002)

An agent on border patrol observed the petitioner driving a minivan that tripped a sensor set up as part of a checkpoint. Upon the agent's approach, the van slowed. The petitioner sat stiffly and did not look at the agent. Children in the van sat as if with something under their

**US Supreme Court** *continued*

feet, and waved as if directed to at the agent. As the agent followed, the petitioner switched his turn signal on and off, then made a sudden turn on a path that avoided a checkpoint. A registration check showed the van's owner lived close to the border in an area well known for non-citizen and narcotics smuggling. Upon stopping the vehicle, the agent obtained permission to search it and found a duffle bag filled with marijuana. The trial court denied suppression, holding that the agent had reasonable suspicion to stop the van. The Ninth Circuit reversed finding that most of the factors relied upon by the lower court were meritless and the remainder insufficient to justify the stop.

**Holding:** The cumulative information observed by a law enforcement officer, including facts with innocent explanations, must be considered in assessing the "totality of the circumstances" for reasonable suspicion to stop a vehicle. *United States v Cortez*, 449 US 411, 417-418 (1981). Separating some factors from the others and rejecting them as meritless violated the "totality" principle. *Terry v Ohio*, 392 US 1, 22 (1968). *De novo* review of reasonable suspicion determinations does allow appellate courts to clarify legal principles and prevent opposite conclusions from identical facts. *Ornelas v United States*, 517 US 690, 697 (1996). But the approach below seriously undercut the "totality" principle. The whole array of facts combined with the agent's experience supported a finding of reasonable suspicion, despite the possibility of innocent explanations for particular actions. *Illinois v Wardlow*, 528 US 119, 125 (2000). Judgment reversed.

**Concurring:** [Scalia] Deferring to the trial court's factual inferences (not just its findings of fact) is incompatible with *de novo* review. However, traditional *de novo* review required reversal.

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**Death Penalty (Penalty Phase)** DEP; 100(120) (155[oo])  
(States [South Carolina])

**Sentencing (Instructions to Jury)** SEN; 345(45)

**Kelly v South Carolina**, 534 US \_\_\_, 122 S Ct 726,  
151 LEd2d 670 (2002)

During the penalty phase of the petitioner's capital trial, prosecution evidence of his maliciousness and misconduct in prison was presented. The petitioner requested a *Simmons v South Carolina*, 512 US 154 (1994) instruction about life without possibility of parole. The request was denied on the grounds that the evidence concerned character, not future dangerousness. The jury returned a recommendation of death. The Supreme Court of South Carolina affirmed, holding that future dangerousness was not raised and that *Simmons* did not apply to their sentencing statute.

**Holding:** *Simmons* did apply to this sentencing scheme, since a jury can only make a sentencing recommendation upon finding aggravating factors, which limits their choices to death or life without parole. *Shafer v South Carolina*, 532 US 36, 49-50 (2001). Prosecution evidence of the petitioner's violent behavior raised a strong implication of future dangerousness. Character evidence had the potential to reveal the characteristic of future dangerousness, among other inferences. The prosecutor's arguments also implied that the defendant would be released eventually. The failure of the jury to request instructions on parole eligibility did not relieve the trial judge from giving the *Simmons* instruction in the first instance. *Penry v Johnson*, 532 US 782 (2001). Judgment reversed.

**Dissent:** [Rehnquist, J] That evidence was presented to support aggravating factors that could have led a juror to infer that the defendant was a threat to society did not exceed the bounds of due process required by *Simmons*.

**Dissent:** [Thomas, J] Applying the *Simmons* rule to arguments with a "tendency to prove dangerousness in the future" undercut the state's discretion to determine when to instruct a jury about early release.

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**Forfeiture (General)**

FFT; 174(10)

**Due Process (General) (Notice)**  
(Prisoners)

DUP; 135(7) (20) (25)

**Dusenbery v United States**, 534 US \_\_\_,  
122 S Ct 694, 151 LEd2d 597 (2002)

The FBI seized firearms, large amounts of cash and an automobile from the petitioner while executing a search warrant for drugs. Two years after he was sentenced on the drug offense, the FBI began forfeiture proceedings under the Controlled Substances Act, 21 USC 801. Certified letters of intent to forfeit the property were sent to the petitioner in federal prison, his former home address, and his mother's address; and published in the local newspaper. No response was received within the statutory time; the items were forfeited. Five years after the petitioner's criminal proceedings were finished, he filed a motion seeking the property. During discovery (after various proceedings not relevant here), evidence showed that the prison received the FBI letter, but no documentation existed to prove it had been given to the petitioner. The court's holding that sending a certified letter to the petitioner's prison satisfied due process was affirmed on appeal.

**Holding:** Sending a letter by certified mail to a prisoner in a federal institution met the requirements of due process in forfeiture of property proceedings. The FBI's efforts were "reasonably calculated under all the circumstances" to inform the petitioner of the forfeiture proceedings. *Mullane v Central Hanover Bank & Trust Co.*, 339 US 306, 314 (1950). The certified mail combined with the

**US Supreme Court** *continued*

prison’s rules for mail distribution were adequate to assure delivery. Actual notice, verification of delivery or other heroic efforts were not constitutionally required, the petitioner’s citation to *Memnonite Bd. of Missions v Adams* (462 US 791, 796-787 [1983]) notwithstanding. Judgment affirmed.

**Dissent:** [Ginsburg, J] Federal prison policies for conveying a letter received in the mailroom to a prisoner were “substantially less likely to bring home notice” than a feasible substitute, as stated in *Mullane*. New regulations requiring prisoners to sign and acknowledge delivery of certified mail showed that a better method was feasible. The system in place at the time the FBI attempted to notify the defendant was inadequate.

**New York State Court of Appeals**

**Impeachment (Of Defendant)** IMP; 192(35)  
**Prior Convictions (Evidence)** PRC; 295(5)

**People v Hayes, No. 1, 2/7/02**

The defendant was charged with first-degree rape and coercion, second-degree burglary and unlawful imprisonment, and third-degree assault. After a pretrial hearing (see *People v Sandoval*, 34 NY2d 371), the court ruled that the prosecution could cross-examine the defendant as to the existence and nature, but not the underlying facts, of prior convictions for third-degree assault, first-degree sexual abuse, aggravated criminal sexual assault, and aggravated kidnapping. As a result, the defendant chose not to testify. He was convicted of most charges. The Appellate Division reversed, finding that the ruling was an abuse of discretion, as the defendant was the only witness who could have disputed the complainant’s testimony as to forcible compulsion.

**Holding:** The *Sandoval* determination rests largely within the discretion of fact-finding courts and is to be exercised in light of the facts and circumstances of that particular case. See *People v Shields*, 46 NY2d 764, 765. Fixed rules in determining where to draw the line and blanket prohibition of cross-examination based solely on the similarity of prior acts to the crimes charged have been avoided. See *People v Mattiace*, 77 NY2d 269, 275-276. Therefore, it was error for the reviewing court to demand that cross-examination be limited to the existence of those prior convictions similar to the pending charges. The trial court did not abuse its discretion, and weighed appropriate concerns. The possible unavailability of other witnesses may increase the importance of questioning the defendant’s credibility as well as the importance of the defendant’s presence on the witness stand. See *eg People v Kelly*, 270 AD2d 511, 513. Order reversed, case remitted.

**Guilty Pleas (General) (Vacatur)** GYP; 181(25) (55)  
**Impeachment (Of Defendant)** IMP; 192(35)  
**Prior Convictions (Evidence)** PRC; 295(5)

**People v Brady, No. 8, 2/7/02**

The defendant was arrested and charged with this robbery after pleading guilty to, but before being sentenced for, attempted robbery in a different case. A *Sandoval* hearing (see *People v Sandoval*, 34 NY2d 371) was held in this case. The court ruled that the prosecution could cross-examine the defendant about the first case only to the extent of asking whether he “stole money from a kid, and whether he admitted that in court.” The defendant did not testify and was convicted. The Appellate Division affirmed.

**Holding:** Unlike *People v Betts* (70 NY2d 289), where it was held improper to force a defendant on cross-examination to give possibly incriminating testimony about an unrelated *pending* charge, the unrelated charge here was no longer pending. The defendant had pled guilty to that charge in open court, waiving his fifth amendment rights. The mere possibility that he might attempt to vacate the plea does not bestow a status of “pending” upon that charge. Had the defendant addressed the prospect of a withdrawal or vacatur of the plea, the court would have been able to deal with a possible self-incrimination issue. Absent that, the applicability of *People v Spitaleri* (9 NY2d 168) need not be addressed. Any incriminating inquiry as to the attempted robbery was foreclosed by the court’s limitation of inquiry to what was said during the plea colloquy. *Mitchell v United States* (526 US 314) has no bearing here because the present sentencing scheme does not require proof following a guilty plea. Order affirmed.

**Instructions to Jury (General)** ISJ; 205(35)  
**Juries and Jury Trials (General)** JRY; 225(37)  
**Trial (Mistrial)** TRI; 375(30)

**People v Smith, No. 2, 2/13/02**

During jury deliberations, a nontestifying witness’s statement was inadvertently included on the back of a trial exhibit. At least six jurors read it. Contrary to the defendant’s trial testimony, the written statement indicated that the witness had given the defendant a ride and had gone to a restaurant with him and another person two weeks before the shooting, not on the night of the killing. The court denied the defendant’s motion for mistrial and gave a curative instruction. The defendant was convicted of second-degree murder and attempted second-degree murder. The Appellate Division reversed.

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**Holding:** Assuming that the inclusion of the nontestifying witness's statement was constitutional error, a mistrial is required unless there is no reasonable possibility that it might have contributed to the conviction. *See People v Crimmins*, 36 NY2d 230, 237. Here, there was overwhelming proof of the defendant's guilt without reference to the error. The defendant confessed to police after being given *Miranda* warnings. He provided drawings of where he disposed of the gun [though no part of it was ever found] and identified the bike he rode during the shooting. A police officer testified, without challenge, that he heard the defendant confess to his mother. An eyewitness identified the defendant [although only "bodywise," not "facewise"]. There is no reasonable possibility that the erroneously included statement contradicting the defendant's testimony as to his activity and location prior to the shooting contributed to his conviction. Order reversed.

**Constitutional Law (General)** CON; 82(20)

**Insanity (Post-commitment Actions)** ISY; 200(45)

### Matter of David B., Nos. 5 and 6, 2/13/02

Two individuals raised issues concerning the nature of the showing needed to retain insanity acquittees. At David B.'s most recent retention hearing the court found that the prosecution had proven by a preponderance of the evidence that David B. suffers from a mental illness within the meaning of the statute and ordered continued confinement in a non-secure psychiatric facility. The Appellate Division affirmed.

The Commissioner of Mental Health petitioned the court for a retention order for Richard S. at a secure facility on grounds that he continued to suffer from "a dangerous mental disorder." At a hearing, the court rejected that finding but did find that Richard S. suffered from a "mental illness which is presently in a state of remission" and should be placed in a less secure facility. In affirming this decision the Appellate Division noted that the prosecution failed to show by a preponderance that Richard S.'s mental condition caused him to "currently [constitute] a physical danger to himself or others" as required by CPL 330.20(1)(c)(ii) but, citing CPL 330.20(1)(c)(i), affirmed the non-secure placement because he still suffers from a "mental illness." The appellants argue that CPL 330.20 does not meet the constitutional requirements for retaining an insanity acquittee because it does not require a finding of dangerousness.

**Holding:** Both "mental illness" and "dangerousness" are necessary elements for committing or retaining an insanity acquittee. *See Jones v United States*, 463 US 354

(1983). Neither element alone satisfies due process. *See Foucha v Louisiana*, 504 US 71 (1992). CPL 330.20(1)(d) allows an individual to be classified as having a "dangerous mental disorder," requiring secure placement, being "mentally ill," requiring non-secure placement, or suffering from neither, requiring release with conditions. The characteristics of being "mentally ill" are that the defendant requires inpatient care, which is essential to the defendant's welfare, and because of impaired judgement the defendant does not understand the need for such care. "Dangerousness" is not coterminous with violence.

A finding that an individual is "mentally ill" under this statute satisfies the criteria for finding "dangerousness" by considering that failure to give such care would be a danger to that person. CPL 330.20(1)(d) is therefore constitutional on its face. The prosecution must show by a preponderance that continued care and treatment are essential and that the individual is unable to understand the need for such care. A court may consider any relevant factors that form a part of one's psychological profile. *See Matter of George L.*, 85 NY2d 275, 308.

Given the court's error in citing to CPL 330.20(1)(c)(i) instead of to 330.20(1)(d), and its lack of factual findings, it is unclear whether the court applied a standard that included consideration of the danger that the patients could present to themselves or others if released. Therefore, the court may have failed to determine their "dangerousness." The court must weigh the evidence using the proper standard and should rely on the existing record in addition to any further evidence the court deems necessary. Order reversed, matter remitted.

**Death Penalty (Due Process)** DEP; 100(55)

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

**Homicide (Murder [Sentence])** HMC; 185(40)(v)

### People v Mower, No. 9, 2/14/02

The defendant was indicted for two counts of first-degree murder as well as second-degree intentional murder. The prosecution never filed a CPL 250.40 notice of intent to seek the death penalty. On the last day that such notice could be filed, the defendant pled guilty to one count of first-degree murder in exchange for a sentence of life imprisonment without the possibility of parole. He withdrew his omnibus motion, which included constitutional challenges to the first-degree murder statute, during the plea colloquy. Three years after his plea was accepted, the defendant initiated a CPL 440.10 proceeding to vacate his conviction. He relied on *Matter of Hynes v Tomei* (92 NY2d 613), which held that certain plea provisions in New York's death penalty statute were unconstitutional. The defendant argued that the infirmity identified in *Hynes*, which invalidated sections 220.10(5)(e) and

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220.30(3)(b)(vii) of the CPL, rendered his plea invalid and sentence illegal. He seeks to be resentenced to an indeterminate term. The denial of his application was affirmed by the Appellate Division.

**Holding:** The right to be sentenced as provided by law can't be waived or forfeited by a guilty plea, making this claim reviewable. *See People v Laureano*, 87 NY2d 640, 643. However, the court's sentencing authority here was not derived from the plea provisions struck down in *Hynes*. Penal Law 60.06 delineates three sentencing options for a first-degree murder conviction. After such a conviction, in accordance with CPL 400.27, the court must sentence the defendant to death, life imprisonment without the possibility of parole, or an indeterminate term of from 20-to-25 years to life. Life without parole is authorized only upon a conviction for first-degree murder under PL 70.00(5) and in accordance with law, *ie* the CPL procedures. Statutory language indicates that these apply when the prosecution has declined to seek a death sentence, regardless of expiration of the period for giving notice. The sentencing authority that would be vested in the jury in a death case (*see* CPL 400.27[i]) remains with the trial court where the prosecution has not sought the death penalty. This specifically includes the authority to impose a sentence of life without parole.

The contention that the defendant's conviction was affected by a mistake of law because he pled guilty pursuant to provisions later invalidated in *Hynes* is unpreserved. He did not raise this alleged constitutional infirmity before he pled guilty or was sentenced. *Cf People v Edwards*, 96 NY2d 445. No exceptions apply. The defendant's remaining claims were abandoned or forfeited when he expressly withdrew all motions pending before the court. *See People v Callahan*, 80 NY2d 272, 282. Order affirmed.

**Homicide (Manslaughter [Defenses]) (Murder [Defenses])** HMC; 185(30[g]) (40[a])

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

**People v Deis, No. 13, 2/14/02**

The defendant was indicted for second-degree murder and first-degree manslaughter. The facts, viewed most favorably for the defendant, are that the highly intoxicated decedent entered the defendant's store, harassed customers, argued with the clerk, and physically threatened him. The defendant escorted the decedent outside, where the decedent initiated a fight. The defendant reentered the store, followed by the decedent who began throwing mer-

chandise, threatened to kill the defendant and the clerk, then punched the defendant who picked up a knife and swung it intending to scare the decedent, but instead, killing him. The court refused to charge the jury on the justifiable use of deadly force in defense of burglary under Penal Law 35.20. The defendant's conviction of criminally negligent homicide was affirmed.

**Holding:** Under Penal Law 35.20(3), a person in control of an occupied building who reasonably believes that another person is committing or attempting to commit a burglary may use deadly force upon a reasonable belief that such force is necessary to prevent or terminate the burglary. Third-degree burglary is committed when someone knowingly enters or remains unlawfully with the intent to commit a crime. Penal Law 140.20. A trier of fact could reasonably conclude that the decedent's originally lawful entry became unlawful under Penal Law 140.00[5] when he defied the defendant's order to leave. It could also conclude that the decedent's conduct support the reasonableness of the defendant's belief that deadly force was necessary to prevent or terminate a burglary. Order reversed, indictment dismissed without prejudice to the prosecution applying for leave to resubmit criminally negligent homicide to a grand jury.

**Counsel (Effective Assistance)** COU; 95(15)

**People v LaValle, Mo. No. 118, 2/19/02**

The defendant seeks reconsideration of his previously denied request for new counsel, appointment of new counsel, and "in the alternative," change of lead counsel within the Capital Defender's Office based on claims of ineffective assistance of counsel due to irreconcilable conflict.

**Holding:** The defendant has failed to present particularized allegations that counsel will be ineffective. "[G]ood appellate practice might require a retained attorney to take a different approach from that urged by the client when experience has proven that the attorney's approach is in the client's best interest' (*People v White*, 73 NY2d 468, 479)." This also applies to a defendant represented by assigned counsel. *See Jones v Barnes*, 463 US 745, 751-754 (1983). Allowing the defendant to file a supplemental *pro se* brief insures that all issues he wishes to raise will be before the court. Motions denied.

**Search and Seizure (Arrest [Scope])** SEA; 335(10[m])

**People v More, No. 3, 2/19/02**

Police obtained a tenant's permission to enter his apartment. The tenant told the police that individuals present were preparing cocaine for sale, and one was wanted by police. Entering, police saw the defendant seated near a crack pipe and a small piece of crack

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cocaine. The police arrested and handcuffed him, and conducted a “quick pat-down” search. They then strip searched him and removed a plastic bag, part of which was protruding and which contained cocaine, from his rectum. A motion to suppress the drugs seized during the body cavity search was denied. The conviction was affirmed.

**Holding:** An informed, detached and deliberate determination of whether to invade another’s body in search of evidence is indisputably of great importance. The 4th Amendment forbids any intrusions beyond the body’s surface made “on the mere chance that desired evidence might be obtained.” See *Schmerber v California*, 384 US 757, 770 (1966). Even with a “clear indication” that incriminating evidence will be retrieved, search warrants are required absent an emergency where an officer reasonably believed that the delay to obtain a warrant threatened destruction of the evidence. See *Preston v United States*, 376 US 364 (1964). The body cavity search here was unreasonable and invalid. The prosecution offered no evidence of an emergency in which delay to obtain a warrant posed a threat to the officer’s safety or to the evidence. The prosecution’s invocation of the inevitable discovery doctrine to validate use of the evidence was not preserved for review. See *People v Dodt*, 61 NY2d 408, 416. Order reversed, motion to suppress granted, case remitted.

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

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

**People v Hart, 286 AD2d 584, 729 NYS2d 890 (1st Dept 2001)**

**Holding:** The trial court properly granted the defense motion to suppress physical evidence. The prosecution did not meet their burden of proving that consent to search the defendant’s house was voluntarily given by his common law wife. The totality of these circumstances does not show “an unequivocal product of an essentially free and unconstrained choice.” *People v Gonzalez*, 39 NY2d 122, 128. Order affirmed. (Supreme Ct, Bronx Co [Bamberger, JJ])

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

**People v Mundo, 286 AD2d 592, 730 NYS2d 305 (1st Dept 2001)**

Police officers stopped an out-of-state vehicle that had made an illegal right turn on red. The vehicle then drove away. The officers followed. The vehicle again stopped, then pulled away. The officers saw the defendant make movements as if he were hiding something in the back seat. At the third stop, the officers removed and frisked the vehicle’s occupants. While searching the back seat for weapons, police found an access panel to the trunk, which when opened smelled of a chemical used to cut cocaine.

**Holding:** The court properly denied the defendant’s motion to suppress drugs found in the trunk, given the totality of the circumstances, including an “extraordinary series of evasive actions” and the defendant’s furtive activity as he eyed the pursuing police car. The officers had actual and specific reason to believe there was a substantial likelihood that the defendant had secreted a weapon. See *People v Worthy*, 261 AD2d 277 *lv den* 93 NY2d 1029. Whether the place of concealment is a container, under a seat, between seat cushions, or through an access panel makes no difference when a passenger makes obvious concealing motions. See *People v Peart*, 726 AD2d 625. Dismissal of a non-inclusory concurrent count of third-degree drug possession is appropriate where it arose from the same facts as the first-degree charge. Order affirmed as modified. (Supreme Ct, New York Co [Drager, JJ])

**Dissent:** [Rosenberger, JJ] A reasonable basis for suspecting the presence of a gun was insufficient to justify intrusion into the vehicle once the defendant was removed and frisked, absent record support for an “actual and specific” perception of danger. See *People v Carvey*, 89 NY2d 714.

**Accusatory Instruments (Amendment) (General)** **ACI; 11(5) (10)**

**People v Parrilla, 285 AD2d 157, 730 NYS2d 301 (1st Dept 2001)**

The defendant was arrested on Sept. 24, 1993. A nine-count indictment was filed on Oct. 18, 1993 which alleged as to each count that the crimes were committed “on or about and between September 10, 1993 and November 30, 1993.” An unopposed prosecution motion to amend counts 1 through 8 to allege commission between September 10 and 11, 1993, and count 9 to allege commission between Sept. 25 and 26, 1993, was granted. The defendant pled guilty. He challenged the amendment for the first time on June 7, 1996, moving to vacate the judgment because the indictment was jurisdictionally defective.

**Holding:** An indictment must state that the offense occurred “on, or on or about, a designated date, or during a designated period of time.” See CPL 200.50[6]. The court

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may order the amendment of an indictment under CPL 200.70(1). Here, the amendment did not charge the defendant with new offences or alter the prosecution’s theory. Rather, it defined their theory more precisely. *People v Van Every* (222 NY 74) is distinguishable; there, the indictment alleged the defendant’s commission of a misdemeanor that allegedly occurred eight months after the indictment. The amendments in *People v Perez* (83 NY2d 269) would have effectively added new charges, substantively changing the theory of the prosecution, which is not true here. Since this indictment was not jurisdictionally defective, and no timely challenge was made, the present claim is unpreserved. See *People v Iannone*, 45 NY2d 589, 600. In any event, it is meritless. Order affirmed. (Supreme Ct, Bronx Co [Covington, JJ])

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

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

**People v Williams, 286 AD2d 620, 730 NYS2d 102 (1st Dept 2001)**

The defendant was convicted after jury trial and sentenced. His CPL 440.10 motion to vacate judgement was denied.

**Holding:** The court properly exercised its discretion in denying the defense mistrial motion based on his physical condition after assessing the defendant’s facial swelling and bruises as too insignificant to prejudice the jury. See *People v Brown*, 202 AD2d 266, 267 *lv den* 83 NY2d 964. The jury is presumed to have heeded the court’s instruction not to consider the defendant’s physical condition. See *People v Davis*, 58 NY2d 1102, 1104. Alleged misconduct by correction officers in inflicting the injuries is not a basis for mistrial where the conduct was not designed to affect the judicial proceedings. See *People v Brown*, 136 AD2d 1 *lv den* 72 NY2d 857 *cert den* 488 US 897. The defendant never requested a judicial hearing into the extent or causes of the injuries, thereby failing to preserve the issue of whether such a hearing should have been conducted. The trial court’s observations that the injuries were too minor support a finding that no hearing was necessary. See *People v Tortorici*, 92 NY2d 757 *cert den* 528 US 834. The defendant’s motion to vacate on the above grounds with the added support of non-record prison medical records was properly denied. The facts should have been placed on the record during trial and the issues may be resolved on the existing record. See CPL 440.10[3][a] and [2][b]. If the merits were reached, the medical records would be found to confirm the court’s assessment of the injuries. Order affirmed. (Supreme Ct, Bronx Co [Covington, JJ])

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

**People v Jenkins, 286 AD2d 634, 730 NYS2d 428 (1st Dept 2001)**

**Holding:** The defendant’s speedy trial motion was properly denied because the delay falls below the statutory threshold when the following exclusions are made. The period from Feb. 9, 1999 to Mar. 9, 1999 was correctly excluded because the defendant requested an adjournment. See CPL 30.30[4][b]; *People v Delacruz*, 241 AD2d 328 *lv den* 90 NY2d 939. The period from Mar. 23, 1999 to Apr. 14, 1999 was properly excluded because defense counsel was on trial. See CPL 30.30[4][f]; *People v Douglas*, 264 AD2d 671 *lv den* 94 NY2d 862. Order affirmed. (Supreme Ct, New York Co [Adlerberg, JJ])

**Ethics (General)** **ETH; 150(7)**

**Evidence (Destruction (Preservation))** **EVI; 155(49) (107)**

**Matter of Deutsch, 286 AD2d 91, 730 NYS2d 503 (1st Dept 2001)**

In 2000, the respondent was convicted of federal charges including witness tampering (18 USC 1512 [b]) for removing incriminating documents from files and inserting exculpatory ones after the INS began investigating fraudulent visa applications submitted on behalf of hairdressers brought to the US to staff a client firm’s salons. His conviction was affirmed on appeal. The petitioner seeks to have the respondent’s name stricken from the roll of attorneys pursuant to Judiciary Law 90(4) (b) as automatically disbarred based on that conviction (Judiciary Law 90[4] [e]), or to have him immediately suspended and required to show cause why he should not be disciplined for having been convicted of a “serious crime” under Judiciary Law 90 (4)(d).

**Holding:** Read in isolation, the federal witness tampering statute may not appear “essentially similar” to New York’s felony of tampering with physical evidence (Penal Law 215.40[2]), which is required for automatic disbarment. However, considering the respondent’s fabrication of exculpatory documentation and deletion of other material with knowledge of the ongoing investigation, it is clear that the basis of the witness tampering charge was removal and creation of physical evidence, rendering the federal and state statutes analogous. Petition granted, the respondent’s name stricken from the roll.

**Counsel (Advice of Right to)** **COU; 95(5)**

**Confessions (Advice of Rights)** **CNF; 70(10)**

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

**First Department** *continued***People v Lawrence, 287 AD2d 268, 731 NYS2d 3  
(1st Dept 2001)**

In 1999 the defendant was convicted, upon his plea of guilty, of third-degree attempted criminal sale of a controlled substance, and sentenced to a term of 3½ to 7 years.

**Holding:** The defendant is entitled to a remand for resentencing with the assistance of counsel. He was deprived of his right to counsel at sentencing by the court's granting his request to represent himself without making any inquiry into his ability to do so and understand the risks of doing so. *See People v Smith*, 92 NYSd 516. Judgment modified and remanded for resentencing. (Supreme Ct, New York Co [Goodman, JJ])

**Freedom of Information (General)** FOI; 117(20)

**Records (Access)** REC; 327(5)

**Application of Alicea, 287 AD2d 286, 731  
NYS2d 19 (1st Dept 2001)**

In 2000, the petitioner's motion to compel disclosure under the Freedom of Information Law of the "UF-61 Form #3231" and the "DD-5 Follow up Report #3221" concerning his arrest for a murder and weapons possession was denied. In 1999, he was denied the requested information by a sergeant, whose letter stated that the police were unable to locate the requested documents due to an inaccurate NYCID number. The petitioner appealed to the Police Commissioner, who failed to respond. The sergeant then sent documents and a form letter, but they related to a different case. The motion court found that the petitioner failed to articulate a demonstrable factual basis to conclude the existence of required documents.

**Holding:** The respondent satisfied its statutory obligation (Public Officer's Law § 89[3]) by averring that all responsive documents had been disclosed and that it had conducted a diligent search for the documents it could not locate. *Rattley v New York City Police Department*, 96 NY2d 873. Judgment affirmed. (Supreme Ct, New York Co [Kapnick, JJ])

**Juries and Jury Trials (General)** JRY; 225(37) (50) 55)  
**(Qualifications) (Selection)**

**People v Paulino, 287 AD2d 302, 731 NYS2d 152  
(1st Dept 2001)**

**Holding:** "The courts excusal of prospective jurors who stated that they would not be able to serve on an upcoming Jewish holiday was not discriminatory and did not deprive defendant of a fair cross-section of the community." *People v Marrero*, 110 AD2d 785 *lv den* 65 NY2d

983. Rejecting the defendant's proposal to adjourn during the holiday was a proper exercise of discretion.

The defendant's ineffective assistance of counsel argument would require a CPL 440.10 motion because it involves facts dehors the record about matters of strategy. *See People v Love*, 57 NY2d 998. On the existing record, counsel provided meaningful representation. Judgment affirmed. (Supreme Ct, New York Co [Tejada, JJ])

**Prior Convictions (Constitutionality)** PRC; 295(3) (6)  
**(Foreign Convictions)**

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

**People v Robertson, 287 AD2d 312, 731 NYS2d 368  
(1st Dept 2001)**

**Holding:** The defendant asserted that the Maryland conviction underlying his current sentence as a second felony offender was obtained unconstitutionally due to the lack of effective assistance of counsel. He also claimed that the Maryland crime he was convicted of was not the one alleged in the predicate felony information. He is entitled to a hearing on the constitutionality of the Maryland conviction since his assertions were made with sufficient specificity prior to sentencing. A conviction obtained in violation of an individual's constitutional rights cannot be considered a predicate felony for purposes of sentencing. *See People v Mack*, 203 AD2d 131. He is also entitled to a hearing as to whether his Maryland conviction constitutes a felony conviction under CPL 400.21(5). Matter held in abeyance, matter remanded. (Supreme Ct, New York Co [Adlerberg, JJ])

**Ethics (General)** ETH; 150(7)

**Misconduct (General)** MIS; 250(7)

**Matter of Prosperi, 286 AD2d 99, 731 NYS2d 154  
(1st Dept 2001)**

The respondent, an attorney, was convicted in the United States District Court for the Southern District of Florida of three felony counts of making, uttering, or possessing counterfeit securities. The Departmental Disciplinary Committee sought to disbar him.

**Holding:** "Judiciary law § 90(4) provides for the automatic disbarment of an attorney convicted of a felony, which is defined as any criminal offense classified as a felony under New York law or 'any criminal offense committed in any other state . . . classified as a felony therein which if committed within this state, would constitute a felony.'" *See Matter of Margiotta*, 60 NY2d 147, 150. The federal statute in question, 18 USC 513, and New York Penal Law 170.25 (criminal possession of a forged instrument in the second degree) are "essentially similar" in prohibiting the uttering or possession of a falsely made

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instrument with the intent to deceive. The respondent is subject to automatic disbarment. Name stricken from the roll of attorneys.

**Discovery (Brady Material and Exculpatory Information) (Matters Discoverable)** **DSC; 110(7) (20)**

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

**Sex Offenses (Psychiatric Exam)** **SEX; 350(20)**

**People v Jones, 287 AD2d 339, 731 NYS2d 180 (1st Dept 2001)**

**Holding:** The court properly discharged a sitting juror as being grossly unqualified to serve, having found that the juror could not remain impartial. The juror would have been preoccupied with the disruption of his travel plans if deliberations continued for more than one day. *See People v Sipas*, 246 AD2d 408. The court properly exercised its discretion by rejecting the defendant’s offer to consent to the later substitution of the juror if deliberations exceeded one day. The court was validly concerned that such anticipatory consent would not be binding, and that the proposed consent does not appear to be authorized by CPL 270.35[1].

The court properly denied the defendant’s application for an order compelling the complainant to submit to a psychiatric examination. Assuming, without deciding, that a court may issue such an order (*see People v Earel*, 89 NY2d 960), the court here properly concluded that the defendant hadn’t established the necessity for such an exam. The complainant’s psychiatric background and mental condition were fully explored by calling a defense expert who had reviewed the complainant’s records.

The court properly allowed limited testimony by the complainant about the defendant’s threatening behavior. This was probative of the element of forcible compulsion, even though the defense was not consensual sex but that the act never occurred. *See People v Cook*, 93 NY2d 840, 841. Judgment affirmed. (Supreme Ct, New York Co [White, JJ])

**Juries and Jury Trials (Qualifications)** **JRY; 225(50)**

**People v Thompkins, 287 AD2d 381, 731 NYS2d 457 (1st Dept 2001)**

**Holding:** During jury selection, two prospective jurors indicated that the defendant’s prior conviction would lead them to believe he was guilty of the charged crime. No personal assurances of impartiality were secured aside from answers given by the entire panel

about their collective ability to follow the law. Faced with such an expression of potential jurors’ bias and the defendant’s application, the court was obligated to discharge the jurors for cause if the court could not secure from them a “personal, unequivocal assurance of impartiality.” *See People v Arnold*, 96 NY2d 358, 364. Collective answers by the entire panel do not remedy this deficiency. Judgment reversed, case remanded for new trial. (Supreme Ct, New York Co [Wittner, JJ])

**Larceny (Credit Cards)** **LAR; 236(10)**

**People v Thompson, 287 AD2d 399, 731 NYS2d 711 (1st Dept 2001)**

The defendant was convicted of fourth-degree grand larceny and other charges for stealing a pocketbook from an undercover officer. The credit card contained within was a “decoy.”

**Holding:** General Business Law 511, which is incorporated into Penal Law 155.00(7), requires that a credit card be “issued by a person to another person which may be used to obtain a cash advance or a loan or credit or to purchase or lease property or services on the credit of the issuer or of the holder.” The decoy card was valid and had a \$100 credit line. A “person” includes an individual. . . or any other legal or commercial entity.” While the statute does not define the term “issue,” a dictionary defines it as “to put forth and distribute.” The card was put forth and distributed by the credit card company to the New York City Police Department (both of which qualify as “other legal or commercial entities” and therefore as a “person” as defined). It could be used to obtain cash or credit up to the limit. it qualifies as a “credit card” under the statute. Nothing in the statute requires that the parties contemplate financial use of the card by the Police Department. Criminal liability can attach even to non-activated, expired or canceled cards. *See People v Radoncic*, 259 AD2d 428, 429 *lv den* 93 NY2d 1005. Judgment affirmed. (Supreme Ct, New York Co [Lewis, JJ])

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

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

**People v Brown, 287 AD2d 404, 731 NYS2d 704 (1st Dept 2001)**

**Holding:** The court properly granted the prosecution a missing witness charge regarding the defendant’s half-brother who lived in the same house and was neither a codefendant nor an accomplice. Under the circumstances of the case, the possibility that the half-brother might invoke his privilege against self-incrimination was not enough to avoid the instruction. *See People v Macana*, 84 NY2d 173, 177-179. The defendant’s claim that his half-

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brother was not under his control is unpreserved and, if reviewed, would be rejected. *See People v Gonzalez*, 68 NY2d 424, 428-429.

The court properly set aside the defendant's prior convictions for first and second-degree sale of firearms. Penal Law 265.12 and 13 require the sale of 10 or 20 guns. None of the transactions here involved more than five guns. The prosecution argues that the defendant's various sales to the same customer constitute a "common scheme or plan pursuant to a single intent" which should be aggregated to raise the degree of the crime. *See People v Cox*, 286 NY137. Such an argument is not consistent with the plain language and legislative history of the statute. Judgment affirmed. (Supreme Ct, New York Co [Wittner, JJ])

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**Accusatory Instruments (Sufficiency)** ACI; 11(15)

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

**People v Montanez, 287 AD2d 407, 731 NYS2d 721 (1st Dept 2001)**

**Holding:** A challenge to the fact that the prosecutor, rather than the judge, conducted most of the plea allocution is a claim that must be preserved. *See People v Sanchez*, 725 NYS2d 548. The unpreserved claim here will not be reviewed in the interest of justice. If it were, the trial court would be found not to have improperly delegated its authority by allowing the prosecutor to conduct most of the plea allocution (in the court's presence and supervision), although this practice is not recommended. The defendant's argument that the indictment was defective because it failed to specify the date, time and place of the charged offense is also unpreserved and, in any event, was forfeited by the guilty plea. *See People v Long*, 273 AD2d 67. The requirements of Criminal Procedure Law 195.20 were met since the waiver of indictment and superior court information constituted a single document. Judgment affirmed. (Supreme Ct, Bronx Co [Quattrochi, J at plea, Collins, J at sentence])

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

**Application of Altreche v Safir, 287 AD2d 409, 732 NYS2d 332 (1st Dept 2001)**

**Holding:** The New York City Police Commissioner found that police officer Gilbert Altreche punched a civilian without just cause and used discourteous language. An article 78 proceeding was brought and transferred to the Appellate Division. Because the commissioner's findings were supported by substantial evidence, including testimony by the complainant, the determination may not

be judicially disturbed. *See Matter of Sanders v Safir*, 726 NYS2d 844. The penalty of 12 days' suspension does not shock the court's sense of fairness. Determination affirmed, petition denied.

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**Evidence (Circumstantial Evidence)** EVI; 155(25)

**Instructions to Jury (Circumstantial Evidence)** ISJ; 205(32)

**People v Civilize, 288 AD2d 8, 733 NYS2d 2 (1st Dept 2001)**

**Holding:** The complainant testified that while he could not see his assailants' faces during the robbery, he was sure that he felt two people robbing him. One held him by the shoulders with two hands while another reached into his pocket. After being released, the complainant turned and saw two men running from the scene. The defendant concedes that he was one of those men. Given the totality of the evidence, including the defendant's testimony concerning his actions before, during and after the robbery, the court properly decline delivery of a circumstantial evidence charge. The victim's testimony constituted direct evidence. Since direct evidence as well as circumstantial evidence established the defendant's guilt, no circumstantial evidence instruction was required. *See People v Roldan*, 88 NY2d 826. Judgment affirmed. (Supreme Ct, New York Co [Sudolnik, JJ])

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

**Witnesses (Child)(Experts)** WIT; 390(3)(20)

**People v Paramore, 288 AD2d 53, 732 NYS2d 410 (1st Dept 2001)**

After a nonjury trial, the defendant was found guilty of first-degree course of sexual conduct against a child.

**Holding:** The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The defendant had access to the complainant for seven months. A fair reading of the complainant's testimony established that the conduct occurred through most of that period. The complainant's reference to a change in weather could reasonably be interpreted to mean a change of seasons. The evidence warranted the conclusion that the sexual conduct against the complainant extended "over a period of time not less than three months in duration" as required by Penal Law 130.75.

The court properly permitted the six-year-old complainant to testify under oath. *Voir dire* established that the complainant understood the nature and consequences of an oath (CPL 60.20 [2]), as she could differentiate between the truth and a lie and expected divine punishment if she lied. *See People v Nisoff*, 36 NY2d 560, 565-566. Allowing the complainant to give this testimony via closed circuit

**First Department** *continued*

television under CPL Article 65 was not error. The court relied on its own observances and the testimony of two witnesses in making its determination. Expert testimony was not required given the presence of this other evidence. *See People v Cintron*, 75 NY2d 249, 265. Judgment affirmed. (Supreme Ct, Bronx Co [Benitez, JJ])

**Juries and Jury Trials (Discharge) JRY; 225(30)**

**People v Cleckley, 288 AD2d 63, 732 NYS2d 339 (1st Dept 2001)**

The defendant was convicted by a jury of assault, possession of a weapon, and reckless endangerment. He was sentenced to an aggregate term of 15 years.

**Holding:** The prosecution concedes that it was error for the court to replace a deliberating juror without obtaining the defendant’s written consent. *See CPL 270.35*. Judgment, reversed, new trial ordered. (Supreme Ct, Bronx Co [Williams, JJ])

**Parole (Officers) (Release [Conditions]) PRL; 276(25)(35[a])**

**Search and Seizure (Parolees and Probationers) SEA; 335(50)**

**People v Lopez, 288 AD2d 70, 733 NYS2d 154 (1st Dept 2001)**

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

**Holding:** The court properly denied the defendant’s motion to suppress the drugs. The defendant had consented to home entries and searches by parole officers as a condition of his parole. The parole officers’ entry into the defendant’s apartment—which was not the home in which he was permitted to reside—accompanied by police was lawful, as their conduct was rationally and reasonably related to the performance of their official duties. *See People v Hale*, 93 NY2d 454. “There is no evidence that the parole officers were acting as a conduit for police activity.”

Executive Law 259-I (3)(a)(1) does not require suppression here based on the lack of a parole violation warrant. The defendant was not actually “retaken” by the parole officers but arrested for drugs in plain view. The error, if any, was not of constitutional dimension so the exclusionary rule should not be applied. *See People v Dyla*, 142 AD2d 423, 433-442 *lv den* 74 NY2d 808. Judgment affirmed. (Supreme Ct, New York Co [Berkman, JJ])

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

**Narcotics (Defenses) (Evidence) (Sale) NAR; 265(8) (20) (59)**

**People v Tucker, 288 AD2d 95, 733 NYS2d 39 (1st Dept 2001)**

The defendant was convicted by jury of third-degree criminal sale of a controlled substance.

**Holding:** Weighing “the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony,” the jury’s verdict is found to be against the weight of the evidence. *People v Bleakley*, 69 NY2d 490, 495. The prosecution showed that an undercover policewoman approached the defendant and asked if “anybody was working.” The defendant said yes and offered to take her up the block, while suggesting they get together after the buy. The defendant escorted the undercover to some dealers, from whom she purchased two vials of crack. Throughout the sale, the defendant tried to persuade the undercover to “get together” with him. The defendant then followed her down the block in an attempt to convince her to go with him. He only gave up when she pretended another undercover was her boyfriend. The defendant testified that he was not working with the dealers and that he only helped the undercover in the hope of having sex with her. The defendant did not profit, or stand to profit, from the transaction and had no other drug dealings with the undercover or any others. *See People v Lam Lek Chong*, 45 NY2d 64, 75 *cert den* 439 US 935. He was clearly acting to procure what the undercover wanted because he was asked to do so, not out of any independent inclination to promote the transaction. *See People v Argibay*, 45 NY2d 45, 53-54 *cert den sub nom Hahn-DiGuiseppa v New York*, 439 US 930. Unlike a “steerer” for a drug seller, the defendant did not know if the seller was carrying. A “steerer” would not have abandoned his post for as long as the defendant did. Judgment reversed. Supreme Ct, New York Co [Allen, JJ])

**Juries and Jury Trials (Deliberation) (General) JRY; 225(25) (37)**

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

**People v Lopez, 288 AD2d 95, 733 NYS2d 39 (1st Dept 2001)**

The defendant was convicted of criminal sale of a controlled substance in or near school grounds, third-degree criminal sale of a controlled substance, two counts of criminal possession of a controlled substance and, upon his plea of guilty, of third-degree criminal sale of a controlled substance. The court sentenced him as a second felony offender to four concurrent terms of seven and a

**First Department** *continued*

half to 15 years concurrent with a term of four and a half to nine years.

**Holding:** “The conviction of criminal possession of a controlled substance in the third degree based on the heroin sold to the undercover officer is vacated in the interest of justice as a non-inclusory concurrent count of criminal sale of a controlled substance in the third degree (see *People v Gaul*, 63 AD2d 563, *lv denied* 45 NY2d 780).” The court properly admitted expert testimony on street-level narcotics transactions in order to explain the defendant’s role in the transaction and the absence of drugs or pre-recorded buy money in his possession when he was arrested. See *People v Kelsey*, 194 AD2d 248. The judge’s unobjected to direction to the court officer to tell the jury that they could take a break and to remind them of the court’s prior admonition not to engage in premature deliberations was not an improper delegation of judicial authority. It was a ministerial act, not a judicial function. *People v Bonaparte*, 78 NY2d 26. Judgment affirmed as modified. (Supreme Ct, Bronx Co [Tallmer, JJ])

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

**Ethics (Defense)** ETH; 150(5)

**People v Berroa, 287 AD2d 88, 733 NYS2d 52 (1st Dept 2001)**

At his murder trial, the defendant called witnesses to say that at the time in question, his hair was dyed orange-yellow. Witnesses had described the shooter as having black hair and unique yellow-green eyes. No alibi notice was filed. At trial, defense witnesses discussed their travels with the defendant, with his hair yellow-orange, and it became clear they were seeking to establish an alibi for him. Defense counsel agreed that if any of the witnesses said they had told her of the alibi, she would stipulate that they had not done so. Such a stipulation was entered. On summation, defense counsel stressed misidentification and told the jury that as to the alibi evidence, they could take it for what they wanted, they had heard her stipulation. The prosecutor made no comment about the stipulation, noting only that the witness to whom it related had failed to tell anyone prior to trial about the exculpatory information she had.

**Holding:** Defense counsel’s revelation was not to protect her own reputation, but to meet her ethical obligation to prevent and disclose frauds upon the court. This finding is consistent with *People v Beals*, 162 Ill2nd 497 (Supreme Ct Illinois), *State of Connecticut v Crespo*, 246 Conn 665, 691 *cert den* 525 US 1125, and *People v Baldi*, 54 NY2d 137. Had counsel withdrawn, she might have been

called as a witness by the prosecution and done more damage to the defendant’s case than the stipulation did. The defendant’s consent was not required. Reversal is not required in any event; the evidence against the defendant was overwhelming, preventing any prejudice from the alleged ineffective assistance. Judgment affirmed. (Supreme Ct, Bronx Co [Benitez, JJ])

**Dissent:** [Tom, JJ] Counsel placed her interest in preserving her own professional integrity above that of her client. Whether counsel could continue to represent the defendant was barely considered. The cases cited by the majority are distinguishable, and harmless error analysis is not applicable. *People v Ayala*, 75 NY2d 422, 431.

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

**Application of McBride v Franklin, 288 AD2d 130, 733 NYS2d 174 (1st Dept 2001)**

The court dismissed the petitioner’s CPLR article 78 petition to compel the respondent to comply with the petitioner’s request for disclosure pursuant to the Freedom of Information Law (Public Officers Law 84, *et seq*).

**Holding:** “The petition was properly dismissed since respondent, a private investigator hired by petitioner’s 18-B attorneys in a criminal manner, is not an “agency” subject to the disclosure requirements of the Freedom of Information Law (see, Public Officers Law § 86[3]).” Judgment affirmed. (Supreme Ct, New York Co [Wilk, JJ])

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

**Motions (Suppression)** MOT; 255(40)

**People v Bonnet, 288 AD2d 161, 733 NYS2d 186 (1st Dept 2001)**

The court dismissed an indictment, granting the prosecution leave to re-present the charges. The defendant then waived indictment and was prosecuted by a superior court information. The defendant later moved to suppress physical evidence.

**Holding:** The conviction was not jurisdictionally defective. Compare *People v D’Amico*, 76 NY2d 877, with *People v Boston*, 75 NY2d 585. The court’s dismissal of the original indictment placed the defendant back on a “formal pre-indictment procedural track.” See *People v Casdia*, 78 NY2d 1024, 1026. Additionally, the prosecution filed a new felony complaint containing a new charge. Summary denial of the defense suppression motion was proper. The only factual allegations were a denial of unlawful activity “at any time prior to his arrest.” These were insufficient to raise a factual hearing warranting a hearing; they failed to address the prosecution’s specific contention that the defendant had sold drugs to an undercover officer. See *People v Jones*, 95 NY2d 721. Judgment affirmed. (Supreme Ct, New York Co [Soloff, JJ])

**Second Department**

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

**Identification (Wade Hearing) IDE; 190(57)**

**People v Scott, 283 AD2d 98, 728 NYS2d 474  
(2nd Dept 2001)**

At a *Wade* hearing (*US v Wade*, 388 US 218 [1967]), a witness was allowed to identify the defendant by voice as being one of the assailants. The defendant was convicted of first-degree and second-degree robbery, and first-degree reckless endangerment.

**Holding:** The prosecution witness made no visual identification of the defendant at trial, and made no in-court identification of the defendant based on his presumed ability to recall the voice of the robber. The witness's testimony about his extra-judicial voice identification was the cornerstone of the prosecution's case. The defendant was not compelled to speak at trial, and no recording of his voice was offered into evidence. "Had such an exemplar been admitted into evidence, the jury would at least have had the opportunity to hear for itself the supposedly distinctive character of the defendant's voice and, consequently, the opportunity to assess the reliability of the claim that the complaining witness was able to distinguish that voice from all others." The prosecution failed to demonstrate the reliability of the identification procedure. The verdict was against the weight of the evidence. Judgment reversed. (Supreme Ct, Queens Co [Rios, JJ])

**Arrest (Identification) ARR; 35(15)**

**Counsel (Choice of Counsel) COU; 95(9.5)**

**People v Garcia, 284 AD2d 479, 727 NYS2d 128  
(2nd Dept 2001)**

**Holding:** The defendant contends that identification testimony was obtained as a result of an arrest not based on probable cause, and should be suppressed. The defendant is a 5'8" Hispanic male. The description of the armed suspect given to the arresting officer via radio was of a 5'8" Hispanic male. The defendant was seen by the officer in the time and place where the suspect was supposed to be, appeared to have been running, and there was no one else present on the street. On these facts, there was reasonable suspicion to stop and detain the defendant until other police units arrived. *See People v Hicks*, 68 NY2d 234. As the suspect was believed to be armed, the officers were entitled to handcuff the defendant as a safety precaution. *See People v Allen*, 73 NY2d 378. The arrest was permissible under the fellow-officer rule. The police as a whole had information sufficient to constitute probable cause, since the defendant's photograph was circulated to the

team that apprehended him. *See People v Mims*, 88 NY2d 99, 113-114.

The defendant's request for new counsel was properly denied. He did not have the right to a choice of assigned counsel. *See People v Sawyer*, 57 NY2d 12 *cert den* 459 US 1178. The decision to appoint new counsel is within a court's discretion, upon a showing of good cause. *See People v Sides*, 75 NY2d 822. Judgment affirmed. (Supreme Ct, Kings Co [Tomei, JJ])

**Search and Seizure (Stop and Frisk) SEA; 335(75)**

**People v Folk, 284 AD2d 476, 727 NYS2d 131  
(2nd Dept 2001)**

The defendant was stopped and frisked based on an anonymous tip from a 911 caller who "had stated that a black male, who was wearing a dark baseball cap, blue jeans, and a long-sleeved button-down shirt, and who was at the corner of St. Edwards Street and Park Avenue in Brooklyn, was in possession of a gun."

**Holding:** The anonymous tip was insufficient to sustain a finding of reasonable suspicion to stop and frisk. The tip consisted of a detailed description of the physical, visible characteristics of the individual claimed by "an unaccountable informant to be present at a certain place at a certain time, accompanied by the assertion that the person had a gun." *See Florida v J.L.*, 529 US 266 (2000) and *People v Ballard*, 279 AD2d 529. "This without more, is an insufficient basis upon which to stop and frisk a suspect who matches the description." Judgment reversed, suppression granted, indictment dismissed, matter remanded. (Supreme Ct, Kings Co [Tomei, JJ])

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

**Juveniles (Persons in Need of Supervision) JUV; 230(110)**

**Matter of Naquan J., 284 AD2d 1, 727 NYS2d 124  
(2nd Dept 2001)**

The defendant was judged to be a Person in Need of Supervision (PINS) by the Family Court and placed in a residential treatment center for 12 months. Before and after the PINS disposition, the defendant had repeatedly disobeyed the orders of the court by escaping from the facilities in which he was placed. The court, on its own order to show cause, initiated two successive proceedings pursuant to Family Court Act 156 and Judiciary Law 750 to punish the defendant for criminal contempt. The court felt that article 7 of the Family Court Act does not provide an adequate remedy for such chronic runaway behavior and persistent disobedience of court orders.

**Holding:** The Family Court had no statutory authority to issue the criminal contempt orders here and commit

**Second Department** *continued*

the defendant to secure detention facilities. The court could not properly “employ a ‘bootstrapping’ process and use its inherent contempt power to punish this runaway status offender with criminal consequences.” The legislature should fashion a remedy whereby PINS individuals who flagrantly and repeatedly violate court orders can be fairly and effectively dealt with. Orders reversed, contempt proceedings dismissed. (Family Ct, Kings Co [Hepner, JJ])

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

**Juveniles (Persons in Need of Supervision)** JUV; 230(110)

**In the Matter of Jasmine A., 284 AD2d 452, 727 NYS2d 122 (2nd Dept 2001)**

The defendant was originally adjudicated a Person in Need of Supervision (PINS) pursuant to Family Court Act article 7. She violated the terms of probation by repeatedly escaping from the treatment facility. The Presentment Agency filed a petition to judge her a juvenile delinquent under Family Court Act article 3 alleging that her violation of probation constituted an act, which if committed by an adult, would have constituted the crime of second-degree criminal contempt. The defendant was found to be a delinquent and placed in a limited secure facility.

**Holding:** The court’s decision would have been prohibited in a PINS proceeding by Family Court Act 720(2). Escaping from the facility was an act consistent with PINS behavior, not with juvenile delinquency. “Notwithstanding the Family Court’s frustration with the statutory scheme, which often renders the PINS proceeding an exercise in futility, the Family Court may not do indirectly what it is prohibited from doing directly -placing a PINS in a secure facility (*see, Matter of Sylvia H.*, 78 AD2d 875; *Matter of Freeman*, 103 Misc 2d 649; *see also, Matter of Ronald S.*, 69 Cal App 3d 866).” Order reversed, petitions dismissed, record sealed under Family Court Act 375.1. (Family Ct, Suffolk Co [Simeone, JJ])

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**Admissions (Interrogation) (Miranda Advice) (Voluntariness)** ADM; 15(22) (25) (35)

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

**People v McCoy, 284 AD2d 554, 727 NYS2d 133 (2nd Dept 2001)**

**Holding:** The record supports a conclusion that the defendant’s written and videotaped statements made to

law enforcement authorities did not result from any coercive police strategy or trickery. *See People v Holland*, 268 AD2d 536. The defendant was not threatened, abused, or otherwise mistreated by the police. *See People v Miller*, 268 AD2d 600, 601). There is no evidence that he requested an attorney at any time, was deprived of food or drink, or was subjected to interrogation so fundamentally unfair as to deny him due process. The defendant was given his *Miranda* rights (*see Miranda v Arizona*, 384 US 436) three times and voluntarily waived them before making his statements.

The robbery sentence must run concurrently with the felony murder sentence, as the robbery constituted an element of the murder offense. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Feldman, JJ])

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

**Instructions to Jury (Preliminary Instructions)** ISJ; 205(48)

**People v Hill, 285 AD2d 474, 727 NYS2d 892 (2nd Dept 2001)**

The defendant was convicted of first-degree manslaughter.

**Holding:** “The Supreme Court’s instruction to the jury that the People were not required to establish the elements of the crime ‘beyond all reasonable doubt’ was error (*see, People v Simon*, 224 AD2d 458; *People v Blackshear*, 112 AD2d 1044; *People v Ginsberg*, 274 App Div 1007). Therefore, the defendant is entitled to a new trial.” The court also erred in directing defense counsel to disclose a prosecution witness’s prior inconsistent statement before any testimony was presented. Such disclosure was not authorized by CPL article 240. *See People v Colavito*, 87 NY2d 423. The prosecution was not entitled to the statement until after counsel used it to impeach that witness. *See People v Barbera*, 220 AD2d 601. The court “is directed to fashion an appropriate remedy to minimize the prejudice resulting from the premature disclosure of the statement.” Reargument granted, prior decision and order vacated, judgment reversed, indictment dismissed without prejudice to resubmit appropriate charges to another grand jury. (Supreme Ct, Kings Co [Bruno, JJ])

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

**People v Forbes, 283 AD2d 92, 728 NYS2d 64 (2nd Dept 2001)**

Two officers stopped a car for traffic violations. The defendant, in the passenger’s seat, attempted to leave the car and was told by an officer to remain inside. While the

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officers were checking the driver’s information, they heard the sound of a semi-automatic weapon being “racked,” pushing ammunition into the chamber. As the officers returned to the car, the defendant got out. When an officer attempted to search him, he resisted. A 9-milimeter weapon was found on him. A search of the vehicle uncovered a round of ammunition.

**Holding:** It is more intrusive to force passengers to leave a vehicle, which is permissible (*see eg Maryland v Wilson*, 519 US 408 [1997]), than to have them stay inside. Even if it were more intrusive, such intrusion cannot outweigh the safety concerns for the police officers conducting a lawful stop. Potential danger is increased where there is more than one occupant of a vehicle. *See People v Robinson*, 74 NY2d 773, 775 *cert den* 493 US 966. Here, there was no search until the officers heard the weapon being racked, which provided reasonable suspicion that an occupant of the car had a weapon, warranting a search. Risks present included the high crime nature of the area and the tinted windows of the car, which could have masked the presence of more passengers. Judgment affirmed. (Supreme Ct, Richmond Co [Rienzi, JJ])

**Admissions (Interrogation)** ADM; 15(22)

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

**People v Johnson, 285 AD2d 516, 728 NYS2d 490 (2nd Dept 2001)**

The defendant, a jail prisoner, said he had information about a crime. After being taken to the station house, he asked to go to his mother’s house because he feared that someone would harm his mother if he talked to the police. When police refused his request, he refused to talk. The defendant argued that his statement to the police about his mother being harmed should have been suppressed because it was obtained in violation of his right to counsel, which attached by virtue of a judicial “take-out order” and because he was represented by counsel in an unrelated criminal action.

**Holding:** The defendant’s statement was spontaneous. He did not make the statement based on police conduct reasonably anticipated to evoke a declaration from him. *See People v Webb*, 224 AD2d 464, 465. “The detectives’ conduct before the defendant spoke of his concern for his mother was innocuous, and the defendant was merely advised that he had an opportunity to disclose information he had about the crime. There was no evidence that the detectives used any coercive influence or ploys to compel the defendant to furnish the statement, or that he was particularly vulnerable to custodial pressure. Thus, the Supreme Court properly declined to sup-

press the defendant’s statement.” Judgment affirmed. (Supreme Ct, Kings Co [Martin, JJ])

**Civil Practice (General)**

**CVP; 67.3(10)**

**In the Matter of Mavis L., 285 AD2d 509, 727 NYS2d 640 (2nd Dept 2001)**

**Holding:** “The Supreme Court has broad discretion in determining the reasonable amount to award as an attorney’s fee in a guardianship proceeding (*see, Ricciuti v Lombardi*, 256 AD2d 892). However, it must provide a clear and concise explanation for its award in a written decision with reference to the following factors: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, (2) the attorney’s experience, ability, and reputation, (3) the amount involved and the benefit flowing to the ward as a result of the attorney’s services, (4) the fees awarded in similar cases, (5) the contingency or certainty of compensation, (6) the results obtained, and (7) the responsibility involved (*see, Matter of Freeman*, 34 NY2d 1; *Ricciuti v Lombardi, supra*; *Matter of Stark*, 174 AD2d 746).” The only explanation in the instant order is that the court considered the “small amount of money in the estate.” A proper analysis of the above-mentioned required factors would have resulted in a higher award. Without the attorney’s experienced service, the estate would have been minimal; the results obtained were remarkable considering the circumstances. Order modified to raise attorney’s fees from \$2,000 to \$12,500 plus \$409 for disbursements, and as modified, affirmed. (Supreme Ct, Queens Co [Kassoff, JJ])

**Evidence (Instructions (Preservation))**

**EVI; 155(80) (107)**

**People v Hernandez, 285 AD2d 559, 727 NYS2d 899 (2nd Dept 2001)**

**Holding:** The trial court’s refusal to give an adverse inference charge concerning evidence discarded by the prosecution was error. A new trial is required, in light of the prosecution’s heavy reliance on the discarded items. The prosecution has an affirmative duty to preserve all discoverable evidence within its possession. *See People v James*, 93 NY2d 620, 644. If discoverable evidence gathered by the prosecution or its agent is lost, the prosecution must establish that diligent, good-faith efforts were made to prevent that loss. *People v Kelly*, 62 NY2d 516, 520. If that heavy burden is not met, the trial court is to exercise its discretion in choosing an appropriate sanction. *People v Martinez*, 71 NY2d 937, 940. Sanctions are generally imposed when a law enforcement officer acting in the scope of official duties loses or destroys evidence already committed to police custody. In deciding what sanctions

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may be imposed, the court may consider the degree of prosecutorial fault, “but the overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society” (*People v Kelly*, 62 NY2d 516, 520).” Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Dunlop, JJ])

**Discovery (Informants) (Witnesses)** DSC; 110(15) (35)

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

**People v Soto, 285 AD2d 618, 728 NYS2d 385  
(2nd Dept 2001)**

**Holding:** “The failure to disclose the identities of two witnesses and an informant possessing exculpatory information deprived the defendant of a fair opportunity to conduct an investigation into this information (*see, Brady v Maryland*, 373 US 83; *People v Roberts*, 203 AD2d 600). There is a reasonable possibility that the failure to disclose the identities of these individuals affected the outcome of the trial (*see, People v Vilardi*, 76 NY2d 67).” The court erred in instructing the jury on the charges before the summations. *See* CPL 260.30, 270.40. The instructions created the possibility of premature jury deliberations. *See People v Mollica*, 267 AD2d 479. The error deprived the defendant of a fair trial and was not harmless. *See People v Crimmins*, 36 NY2d 230; CPL 470.15[6][a]. Judgment reversed, new trial ordered. (Supreme Ct, Richmond Co [Goldberg, JJ])

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

**Robbery (Elements) (Evidence)** ROB; 330(15) (20)

**People v Briggs, 285 AD2d 651, 728 NYS2d 763  
(2nd Dept 2001)**

**Holding:** The contention that the defendant’s identification was not proved beyond a reasonable doubt is rejected. The witness’s single error in recalling the date of one of his previous encounters with the defendant does not diminish the otherwise strong identification evidence. The defendant correctly contended that the prosecution did not offer legally sufficient evidence of physical injury to sustain the conviction of second-degree robbery. *See* Penal Law 160.10[2][a]. “Physical injury is defined as ‘impairment of physical condition or substantial pain’ (Penal Law 10.00[9]).” The defendant punched the witness in the right side of the face and hurt the complainant’s right shoulder and throat. The complainant treated the pain with over-the-counter medicine. “Without further evidence of the extent of the complainant’s injuries or that the complaint was in substantial pain,” the evidence adduced was legally insufficient.

Court officers accompanying the defendant at sidebar conferences was an acceptable method of balancing his right to be present at the side-bar conference and the court’s duty to maintain an orderly and secure courtroom. *See* 22 NYCRR 700.5[a][d], *People v Cousart*, 217 AD2d 556. Reargument granted, prior decision and order vacated, judgment modified and as modified, affirmed. (County Ct, Queens Co [Pitaro, JJ])

**Discovery (Procedure [Subpoena  
*Duces Tecum*])** DSC; 110(30)[t]

**Matter of Brown v Grosso, 285 AD2d 642,  
729 NYS2d 492 (2nd Dept 2001)**

The defendant served subpoenas *duces tecum* on the Queens County District Attorney, the New York City Police Department, and the Civilian Complaint Review Board. The court ordered the District Attorney and the Police Department to “forward all their records and documents to the defense, regarding the investigation as it relates to defendant [William] Hodges, only.” The City appealed a denial of a motion to quash, and the District Attorney brought this proceeding in the nature of prohibition to prohibit the enforcement of the orders.

**Holding:** There is no constitutional right to discovery in a criminal prosecution, and, where no statutory right of discovery is provided, no substantive right exists *See Matter of Miller v Schwartz*, 72 NY2d 869, 870. No statutory right exists to disclosure of “[a]ll reports, memoranda, documents, interview reports, and analyses concerning or relating to [an ongoing] investigation’ . . . nor to any documents in the possession of the Civilian Complaint Review Board.” There is no statutory right to compel the Police Department or its Internal Affairs Bureau to turn over the categories of documents demanded. The subpoena power cannot be used to circumvent limited discovery rights. These orders exceeded the court’s subpoena power. *See Matter of County of Nassau Police Dept. v Judge*, 237 AD2d 354. Petition granted, prohibition granted, subpoenas quashed. Judgment reversed. (County Ct, Queens Co [Grosso, JJ])

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

**Trial (Mistrial)** TRI; 375(30)

**Matter of Kleigman o/b/o Alvarez v  
Justices of the Supreme Court, 285 AD2d 646,  
728 NYS2d 761 (2nd Dept, 7/30/01)**

During jury deliberations, one juror had to go to the hospital and was unable to return to deliberations the next day. The defendant wanted an evidentiary hearing on medical necessity before determining whether a reasonable alternative existed that would allow continued deliberations. The request was denied and the defendant was

**Second Department** *continued*

given the choice of a mistrial or agreeing to a nonsequestered jury that could stand by until the ill juror could continue deliberations. The alternative was rejected, so the court declared a mistrial. The defendant began a CPLR article 78 proceeding to prohibit his retrial.

**Holding:** Double jeopardy generally bars retrial when a mistrial is granted over defense objection, or without defense consent, unless the mistrial was the product of manifest necessity. *Matter of Davis v Brown*, 87 NY2d 626, 630. There must be a high degree of necessity before concluding that a mistrial is appropriate. The court did not err in declaring a mistrial without conducting an evidentiary hearing, where the juror’s doctor had made it clear that awaited test results would not change the recommendation that the juror, a “very sick man,” have one to two weeks bedrest. Prohibition is denied because the defendant has failed to show that there is a clear legal right to the relief sought. Petition dismissed. (County Ct, Kings Co)

**Arrest (Probable Cause)** ARR; 35(35)

**Counsel (Effective Assistance)** COU; 95(15)

**People v Esteves, 286 AD2d 342, 728 NYS2d 787 (2d Dept 2001)**

The court granted the defendant a *Huntley* hearing (*People v Huntley*, 15 NY2d 72) but refused to reopen it to include probable cause because counsel did not submit sworn allegations of fact to support the claim.

**Holding:** The defendant was not deprived of effective assistance of counsel because counsel’s failure to obtain a hearing on probable cause for the defendant’s arrest “did not prejudice the defense or defendant’s right to a fair trial.” See *People v Hobot*, 84 NY2d 1021, 1024. The record shows that the police had probable cause to arrest the defendant. See *People v Hoover*, 251 AD2d 348. The defendant’s amended sentence was neither illegal nor excessive, where he had violated a “no re-arrest prior to sentencing” condition. See *People v Thorpe*, 189 AD2d 903. Judgment affirmed. (County Ct, Suffolk Co [Weissman, JJ])

**Dissent:** [Florio, JJ] Testimony given at the *Huntley* hearing showed that if the probable cause issue had been considered, all of the defendant’s statements to police would have been suppressed as fruits of an illegal arrest. See *People v Williams*, 191 AD2d 989. Under such circumstances, the court should have granted the motion to reopen the hearing to consider probable cause. See *People v Campbell*, 148 AD2d 743.

**Due Process (General)** DUP; 135(7)

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

**People v Orengo, 286 AD2d 344, 728 NYS2d 775 (2d Dept 2001)**

At the defendant’s sentencing for second-degree murder, the prosecution alleged that the defendant had prior convictions which the defendant asserted were his cousin’s of the same name. This was confirmed by the probation report.

**Holding:** The sentencing court stated, “[H]aving read the probation report, after listening to the Assistant District Attorney, considering the nature of the crime, and the defendant’s prior record, and I’ve taken into consideration that this may not be his record, all right, I’m going to base it upon, this sentence, based upon the crime that was charged, and the verdict of the jury on this case. . .” These remarks demonstrate that the sentence was based solely upon the crime and its circumstances and not upon the incorrect information. Any ambiguity about what was considered was dispelled when the court noted that it had “disregarded the district attorney’s comments [at sentencing],” when denying the defendant’s CPL 440.20 motion. Order affirmed. (Supreme Ct, Kings Co [Gerges, JJ])

**Dissent:** [Miller, JJ] The record is not clear whether the court considered untrue information at sentencing. As a matter of due process, an offender may not be sentenced on the basis of “materially untrue” assumptions or “misinformation.” *US v Pugliese*, 805 F2d 1117, 1123. To comply with due process, the court must assure itself that the info it bases the sentence on is reliable and accurate. See *People v Outly*, 80 NY2d 702, 712. Yet here, “no one, including the defendant’s assigned trial counsel, ‘bothered to check’ the accuracy of the information.” Resentencing should be ordered.

**Double Jeopardy (General)** DBJ; 125(7)

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

**People v Villante, 286 AD2d 406, 728 NYS2d 706 (2d Dept 2001)**

**Holding:** The defendant sought a writ of error *coram nobis* to vacate a prior order, on the ground of ineffective assistance of counsel. He is granted leave to serve and file a brief on the issues of whether the trial court erred by instructing the jury to consider the defendant’s guilt of the crime of third-degree robbery if it found him not guilty of first-degree robbery, and whether the defendant’s robbery convictions violated double jeopardy. New counsel is assigned.

**Second Department** *continued***Appeals and Writs (Record)** APP; 25(80)**Transcripts (General)** TSC; 373.5(20)**People v Jacobs, 286 AD2d 404, 729 NYS2d 189  
(2d Dept 2001)**

**Holding:** The defendant moved for summary reversal after the court reporter, following many delays over three years, produced an incomplete transcript lacking the summations, jury instructions, and a read back of charges. A reconstruction hearing was ordered at which both the trial judge and defense attorney admitted that their recollections were vague. The court then determined that the missing minutes could not be accurately reconstructed. Under the circumstances, the defendant is entitled to summary reversal and a new trial. *See People v Rivera*, 39 NY2d 519. Judgment reversed, new trial ordered. (County Ct, Orange Co [Byrne, JJ])

**Trial (Public Trial)** TRI; 375(50)**People v Singh, 287 AD2d 748, 732 NYS2d 415  
(2d Dept 2001)**

**Holding:** In response to the defendant's objection following the prosecution's summation to the presence of one of the police witnesses in the courtroom, the court *sua sponte* closed the courtroom over the defendant's objection. The defendant moves under CPL 330.30 to set aside the guilty verdict because his constitutional right to a public trial had been denied. The court's closure of the courtroom prior to charging the jury until after announcement of the verdict was "manifest" error and warrants a new trial. *See Waller v Georgia*, 467 US 39 (1984). Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Blackburne, JJ])

**Parole (Release [Consideration for])** PRL; 276(35[b])**Matter of Thomas, 286 AD2d 393, 729 NYS2d 160  
(2d Dept 2001)**

Supreme Court granted a CPLR article 78 petition, annulling a parole board determination and remitting for a de novo hearing.

**Holding:** The determination by a parole board whether to grant parole is discretionary, only subject to judicial review if it is not made in accordance with relevant statutory factors and there is "a showing of irrationality bordering on impropriety." *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 72. This determination

properly considered all relevant factors; no showing of irrationality was present. Order reversed. (Supreme Ct, Westchester Co [Lange, JJ])

**Dissent:** [Miller, JJ] The petitioner obtained a certificate of earned eligibility pursuant to Correction Law 805 and Executive Law 259-i(2)(c)(A) which requires that she be granted parole unless there is a reasonable probability that, if released, she will not live and remain at liberty without violating the law. *See Matter of King v New York State Div. of Parole*, 190 AD2d 423. There is no evidence in this record demonstrating such a probability. The petitioner had no entanglements with the law in her 12 years of liberty between the instant offense and her conviction. She asserted that her co-defendant committed most acts leading to the decedent's heart attack but acknowledged her part in burglarizing the decedent's apartment. The Board should hold another *de novo* hearing, avoid consideration of inappropriate factors and determine upon the true facts and appropriate legal standards whether the petitioner has earned parole release.

**Evidence (General)** EVI; 155(60)**Sentencing (Ex Post Facto Punishment)** SEN; 345(35)**People v Sumpter, 286 AD2d 450, 729 NYS2d 506  
(2d Dept 2001)**

Police officers on patrol heard gunshots and saw the defendant and another man fleeing the area. While giving chase, police observed the defendant throw what appeared to be a gun over a fence.

**Holding:** The court properly admitted the gun because the defendant deliberately abandoned it. *See People v Bloomfield*, 221 AD2d 651. The court erred in admitting shell casings found at the scene of the shooting because ballistics experts could not connect them to the defendant's gun. This error was harmless, as nearly all witnesses testified, without objection, that several shots had been fired and that there were casings on the ground. *See People v Crimmins*, 36 NY2d 230. The five years post-release supervision imposed as part of the sentence must be vacated because the crimes were committed before Penal Law 70.45(1) became effective. Order affirmed as modified. (County Ct, Nassau Co [Boklan, JJ])

**Ethics (Defense)** ETH; 150(5)**Misconduct (Defense)** MIS; 250(5)**Matter of Bernstein, 285 AD2d 233; 729 NYS2d 520  
(2d Dept 2001)**

A Special Referee sustained all three charges of professional misconduct against the respondent, who

**Second Department** *continued*

opposed the Grievance Committee’s motion to confirm the referee’s report.

**Holding:** Two charges should not have been sustained. As to the third charge, the respondent allowed his client to remain in prison while the respondent converted to his own use money that was supposed to be used for bail. The respondent presented no mitigating circumstances. Despite the fact that he was admitted into practice less than one year before the events in question, the respondent’s actions warrant disbarment. Respondent disbarred.

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

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

**People v Sorbello, 285 AD2d 88, 729 NYS2d 747 (2d Dept 2001)**

During jury deliberations, the defendant learned that the prosecution possessed, but did not turn over, a recorded statement of a nonwitness embodying a statement of a witness. The defendant claimed a violation of the *Rosario* rule.

**Holding:** CPL 240.75, as amended by the Sexual Assault Reform Act of 2000 (L 2000, ch1), now permits the use of harmless error analysis in *Rosario* (*People v Rosario*, 9 NY2d 286 *cert den* 368 US 866) cases. This amendment, sought for decades to overturn *People v Ranghelle* (69 NY2d 56), was effective Feb. 1, 2001. This appeal was perfected on Sept. 2, 2000. The new section applies to this decision. The legislative intent was for the statute to operate retroactively to all cases pending as of its effective date. Procedural statutes will generally be construed to operate retroactively. *See McKinney’s Consolidated Laws*

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of NY, Book 1, Statutes § 55. Additionally, *Rosario* is not of constitutional dimension. *See People v Jackson*, 78 NY2d 638, 648. The record here amply shows that the nondisclosure was harmless and cross-examination of the non-witness would have added little to the impeachment of the witness.

The defendant’s sentence is modified to provide that the terms of imprisonment imposed on the convictions of second-degree murder and robbery shall run concurrently, not consecutively. The robbery conviction was one of the material elements of the murder conviction. *See Penal Law 70.25*[2]. Order modified and affirmed. (Supreme Ct, Kings Co [Lott, JJ])

**Fourth Department**

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

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

**People v Lucious, 285 AD2d 968, 730 NYS2d 384 (4th Dept 2001)**

The defendant was absent from sidebar conferences with prospective jurors. On remittal (*People v Lucious*, 269 AD2d 766) to reconstruct whether the defendant was denied his right to be present, the court relied on its usual practice of obtaining a written waiver and the court reporter’s handwritten notation that such a waiver had been obtained. There were no stenographic records of any proceedings that may have occurred before the prospective jurors entered the courtroom, and the court clerk’s minutes, which would have recorded the oral waiver and to which the written waiver would have been attached, could not be located.

**Holding:** The finding that the defendant had waived his right to be present at a critical stage of the trial was incorrect. The evidence at the reconstruction hearing was insufficient to establish that defendant waived his *Antommarchi* (*People v Antommarchi*, 80 NY2d 247 *rearg den* 81 NY2d 759) rights. *Cf People v DeJesus*, 272 AD2d 61, 62-63 *lv den* 95 NY2d 962. As to the determination that the defendant executed a written waiver, the court improperly placed the burden of proof on the defendant. The evidence at the reconstruction hearing established that the court’s usual practice was varied at this trial. The record does not negate the possibility that the defendant could have provided valuable input on whether to excuse them. *People v Feliciano*, 88 NY2d 18, 28. Judgment reversed, counts 1, 3-5 dismissed without prejudice to re-presenting appropriate charges under count 1. (Supreme Ct, Monroe Co [Mark, JJ])

**Prisoners (Conditions of Confinement)** PRS 1;300(5)

**Prisons (Prison Industries)** PRS 11; 300.5(50)

**Fourth Department** *continued***Matter of Williamson v Goord, 285 AD2d 979,  
730 NYS2d 387 (4th Dept 2001)**

**Holding:** The commissioner of the Department of Correctional Services (DOCS) has broad discretion over inmates' wages and may hold wages in trust until the prisoner is released. *See Allen v Cuomo*, 100 F3d 253, 257-258. While the petitioner has been sentenced to life imprisonment without the possibility of parole, he could be released from prison for a variety of reasons such as medical furlough or a reversal and/or modification of his conviction or sentence. In that instance, wages withheld under DOCS Directive 2788, which requires that 15 days' wages be withheld from a prisoner until release, would be returned to him. The petitioner has not made the requisite showing of a statutory violation or abuse of discretion warranting court interference with the commissioner's authority. *Matter of Cowart v Coombe*, 247 AD2d 729 *lv den* 92 NY2d 803. Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, JJ])

**Sentence (General)** **SEN; 345(37)**

**People v Harris, 285 AD2d 980, 727 NYS2d 233  
(4th Dept 2001)**

**Holding:** The defendant was sentenced to determinate five-year terms for two counts of first-degree robbery and an indeterminate term of one and one-third to four years for one count of third-degree robbery, all running concurrently. The three and one-half year period of post release supervision (*see* Penal Law 70.45[2]) was not unduly harsh or severe. The order of protection issued as to the complainant in the third-degree robbery exceeded the maximum limit under Criminal Procedure Law 530.13[4]. The applicable limit of three years from the date of expiration of the maximum prison sentence must be added not to the aggregate sentence but to the sentence on the count for which the order of protection was issued. *People v Warren*, 280 AD2d 75, 77. All three orders of protection issued here must be amended to reflect jail credit. *See* Penal Law 70.30(3) (a). Judgment otherwise affirmed. (County Ct, Ontario Co [Henry, Jr., JJ])

**Sentence (General)** **SEN; 345(37)**

**People v Christie, 285 AD2d 980, 727 NYS2d 683  
(4th Dept 2001)**

**Holding:** The imposition of a 10% surcharge on restitution rather than the statutory five percent (Penal Law 60.27[8]) was improper. The affidavit filed by the director of probation failed to show that the actual cost of collecting and administering the restitution would exceed the statutory limit. *See People v Hill*, 277 AD2d 971. The per-

manent order of protection must be amended to limit its duration to three years from the end of the maximum indeterminate sentence imposed (Criminal Procedure Law 530.13[4] [iii]), allowing for any jail credit. *See* Penal Law 70.30[3]; *People v Harris*, \_\_ AD2d \_\_ (decided herewith). Judgment modified and as modified affirmed. (County Ct, Genesee Co [Noonan, JJ])

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

**People v Wright, 285 AD2d 984, 730 NYS2d 388  
(4th Dept 2001)**

The defendant pled guilty to felony driving while intoxicated under Vehicle and Traffic Law 1192(3) and 1193(1) (3) and first-degree aggravated unlicensed operation of a vehicle.

**Holding:** County court's refusal to suppress a half-gallon beer bottle seized from the defendant's vehicle was error. The arresting officer testified that his purpose in searching the vehicle was to look for contraband, illegal substances, drugs, and anything relating to criminal charges. The court properly found this was not an inventory search. *See gen People v Galak*, 80 NY2d 715, 718-719. There was no probable cause to believe that the car contained contraband (*People v Daniels*, 275 AD2d 1006 *lv den* 95 NY2d 962), so the court erred in upholding the warrantless search. It cannot be said that the erroneous ruling played no part in the decision to plead guilty, so the plea must be vacated. *People v Self*, 213 AD2d 998. Judgment reversed, plea vacated, suppression granted in part, matter remitted. (County Ct, Ontario Co [Henry, Jr., JJ])

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

**Reckless Endangerment (Elements  
(Evidence))** **RED; 326(10) (15)**

**Matter of Kysean D.S., 285 AD2d 994,  
728 NYS2d 323 (4th Dept 2001)**

**Holding:** The respondent was adjudicated a juvenile delinquent and placed on probation for 12 months. There was not legally sufficient evidence that the respondent committed what would constitute second-degree reckless endangerment (Penal Law 120.20) if he were an adult. The respondent lit a match, set a piece of paper on fire, and dropped it on the floor and stamped it out. There was no carpeting and no other students were nearby. There was no proof that the nearby wooden seats could have been set on fire by a single piece of burning paper. The respondent's conduct did not actually create a substantial risk of serious physical injury. Order reversed, petition dismissed. *People v Davis*, 72 NY2d 32, 36. ⚖

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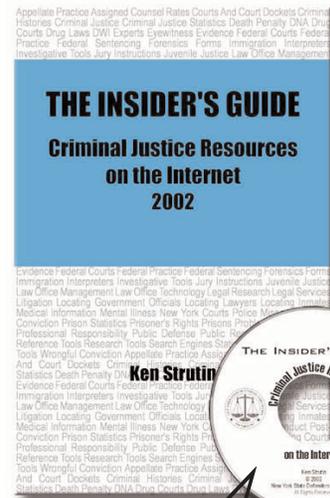
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