New York State Defenders Association

Public Defense Backup Center
REPORT

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Defender News

Public Defense State Funding Set for 2002

The completed New York State budget includes an increase in court fees expected to yield $20 million in revenue. In nearly two dozen states, such fees are used to fund legal services. (*American Bar Association Journal*, 6/02.) In New York, this money will be spent on museums and libraries, not to raise assigned counsel fees. (*New York Law Journal*, 5/28/02.) Legislative action on 18-B rates and the Public Defense Commission remained unresolved near the session's end. (*Times Union* [Albany], 5/17/02.) See p. 13.

The resolution of the budget means that NYSDA and other defense organizations receiving state funding will not have to wait eleven months, as they did in the 2001 Fiscal Year, to know what their budgets will be. Despite funding cuts, the Backup Center continues to provide training, technical assistance and backup support.

Assigned Counsel Rates Get Boost From Courts

Judicial activity is currently outpacing legislative efforts to resolve the public defense crisis. In recent decisions, New York courts exercised judicial power to deal with public defense fees, in most instances doing so to give assigned attorneys their due and protect the rights of indigent defendants.

NYCLA Injunction Yields $90 Interim Fees

Most notably, New York City assigned counsel are to receive $90 per hour pursuant to a preliminary injunction issued by the Supreme Court. In *New York County Lawyers' Association v State of New York*, No. 102987/00 (Sup Ct 1st Dept 5/3/02), the court found, according to news reports, "serious and imminent danger of ineffective assistance of counsel to indigent litigants in the New York City family and criminal courts resulting from the inadequate compensation rates paid to assigned counsel . . ." The court "issue[d] a mandatory preliminary injunction directing payment of an interim rate of $90.00 an hour for in and out-of-court work." This is commensurate with the federal law, effective May 1, requiring Criminal Justice Act attorneys to be paid $90 per hour. (*New York Law Journal*, 4/2/02.)

The State's motion to dismiss *New York County Lawyers' Association v State of New York* was denied. (*New York Law Journal*, 5/9/02.) On appeal, the First Department affirmed that decision. (*New York Law Journal*, 5/14/02.)

Above and Beyond the 18-B Cap

Meanwhile, upstate, the Broome County Supreme Court upheld the right of trial judges to award rate increases to assigned counsel. *Kraham v Mathews*, 2002-0413 (Broome Co Sup Ct 4/15/02). (*Press & Sun Bulletin*, 4/17/02.) Applying 18-B standards, a Chautauqua County Court judge ordered the payment of $30,000 to an assigned attorney, which was approved by the administrative judge. *People v. Osman*, No. 01-020A (Chautauqua Co Sup Ct 5/14/02). The lawyer spent

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512 hours in preparation for a complex homicide, satisfying the requirements for "extraordinary circumstances." (*Post-Journal*, 5/17/02.)

However, attempts in Madison County to judicially initiate an across-the-board rate increase to $75 per hour were interdicted, on questionable authority, by the administrative judge. Trial judges must continue to make determinations on a case-by-case basis. *Laura "HH" v Tyler "HH"*, No. V-277-2002 (Madison Co Sup Ct 5/13/02).

Capital Fees Still Court of Appeals Controlled

In *Mahoney v Pataki*, No. 42 (5/7/02) the Court of Appeals reaffirmed its authority to establish fee schedules for lawyers and paralegals assigned to represent capital defendants—despite the absence of express statutory language. The Governor and the Director of the State Division of the Budget had contended that the Appellate Division screening panels and the Court of Appeals exceeded their authority in setting a schedule of fees that included compensation for paralegal assistance and legal assistance beyond lead and associate counsel. (*New York Law Journal*, 5/7/02.) A summary of the opinion will appear in a future issue of the *REPORT*.

For the latest fee developments and more, visit the Assigned Counsel Rates page on the NYSDA web site, www.nysda.org. Some sites of web-accessible information about assigned counsel fees are also included in NYSDA's new publication, *The Insider's Guide: Criminal Justice Resources on the Internet 2002*, a softcover book with CD-ROM. See back cover for details.

Suspended Sentences Require Assignment of Counsel

The US Supreme Court has rejected the practice of not assigning counsel in cases resulting in suspended sentences. In *Alabama v Shelton*, No. 00-1214 (5/20/02), an indigent defendant had been tried on a misdemeanor offense without the assistance of counsel, convicted and sentenced to a suspended jail term. On review, the Court relied heavily on *Argersinger v Hamlin*, 407 US 25 (1972) and *Scott v Illinois*, 440 US 367 (1979), which mandated the assignment of counsel in cases leading to or involving "actual imprisonment." From these precedents, the court concluded that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (A summary of the opinion will appear in a future issue of the *REPORT*.)

In the wake of *Shelton*, Alabama will have to provide more funds for assigned counsel to represent indigent defendants accused of minor crimes. According to Bryan Stevenson, Executive Director of the Equal Justice Initiative, Alabama's provision of indigent defense is weak from top to bottom. "The state has to own up to its obligation to meet the needs of the poor who are accused of criminal offenses," he said. (*Birmingham News*, 5/22/02.)

In Michigan, the ACLU has sent letters to 98 district courts asking them to review cases where defendants were jailed for minor offenses without counsel. (*Detroit News*, 5/28/02.)

Fathers Get Counsel

Another recent decision disentangling the right to counsel from ill-considered policy and laws was issued by an Ulster County Family Court. In that case, the unfair situation addressed was the denial of assigned counsel to a man petitioning to have his paternity of a child recognized. The Family Court Act (FCA) provides for an award of attorney's fees to the prevailing party in a paternity action (FCA §536). There are provisions for assigned counsel for respondents (FCA §262[a][viii]), but petitioners were left out. The court exercised its power under FCA §262(b) to assign counsel in a situation where an award of attorney's fees could not be recouped from the respondent and the issues involved were too complex for a *pro se* petitioner. "Establishing the entitlement to parental rights should be no less constitutionally protected than defending against diminution of those rights, especially when, as here, there are legal challenges to be addressed before blood tests can even be ordered." *Clinton L.C. v. Lisa B.* (Fam Ct Ulster Co). (*New York Law Journal*, 5/7/02.)

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Independent Commission Legislation: Signpost and Epitaph

A meaningful right to counsel depends on sufficient funding to provide attorneys when needed, and regulation to assure the best quality representation. Funding without standards cannot guarantee effective representation. A recent editorial observed that "New York . . . needs to overhaul its public defense system and set standards of accountability, as recommended by the Committee for an Independent Public Defense Commission." (*Times Union* [Albany], 5/8/02.)

A short time ago, legislation promoted by the Committee was introduced to increase assigned counsel rates and create an Independent Public Defense Commission for New York. The bill, which 66 Assembly members have signed onto, has become a signpost pointing to a new era of effective indigent defense, and an epitaph for a system that is not living up to its promise. (*See Buffalo News*, 3/27/02.)

Justice on the Cheap

The case of a defense lawyer in Georgia illumines the need for real public defense oversight. After simmering for two decades, a Georgia contract public defense lawyer expressed his feelings about his work and clients. "I've done 20 years in hell and that's long enough." Responsible for representing indigent defendants in a five-county area, the lawyer made public statements expressing his belief that most of his clients were guilty and liars. Upon learning of the statements, the indigent defense committee of the Oconee Judicial Circuit cancelled the lawyer's contract. According to Stephen Bright, Director of the Southern Center for Human Rights, "This proves once again that the system for providing lawyers to people who can't afford them doesn't withstand public scrutiny. This was nothing more than justice on the cheap." He went on to recommend that a public defender's office be established in that circuit. (*Atlanta Journal-Constitution*, 4/30/02.)

Sentence First, Ask Questions Later?

The typical order in a criminal case is plea first, sentence later—but there have been unfortunate deviations. Two non-lawyer judges from Genesee County, Pavilion Town Justice Lawrence Reid and Alexander Town Justice Edwyn Hise, were recently censured for improper sentencing practices. (*Ithaca Journal*, 5/30/02.)

Justice Reid wrote an article about the problem of increased truck traffic in the Town of Pavilion. His article advocated the construction of a highway bypass for trucks and his hope to discourage truck drivers from using routes through the town which they were legally permitted to drive upon. He stated that fines for truck-related violations would continue to increase "until such time as trucking operators chose alternate routes around the town." In a significant number of cases, Justice Reid improperly imposed fines above the statutory maximum. The Commission on Judicial Conduct found that the judge's published statements "conveyed the appearance that he was biased against truck drivers and that he would not, and did not, consider each case individually on the merits in imposing an appropriate sentence, as he is required to do." (*NY State Commission on Judicial Conduct*, 5/17/02.)

Justice Hise presided over the case of a man charged with Accumulating Junk on Property, a code violation. The defendant proceeded without counsel and pled not guilty, while acknowledging that his property needed to be cleaned. After he failed to clean his property by the next court date, Justice Hise convicted him "notwithstanding that the defendant had pleaded not guilty, had not changed his plea to guilty and had not been provided with a trial in the matter." The court imposed a $350 fine and sentenced him to 10 days in jail. The Commission on concluded that "[a] judge who convicts a defendant without a trial or a knowing, voluntary guilty plea does not comply with the law and denies the defendant the opportunity to be fully heard." (*SCJC*, 5/17/02.) These and other determinations by the Commission can be found on their web site: www.scjc.state.ny.us.

Attorney-Client Privilege Survives Death of Client

For the first time in a criminal case, a New York judge has decided whether the attorney-client privilege survived the death of a client. More than 20 years after a homicide on Long Island, the police located the defendant, Amerigo Vespucci. He was one of two people seen with the decedent on the night of the incident. The other man, Dennis Carney, was indicted years before, but the case was dismissed—he had since died. Edward Galison, one of Carney's attorneys, contacted Vespucci's attorney, to inform him that he had exculpatory information, learned from Carney, connected to the case. The Nassau County Bar Association Committee on Professional Ethics advised Galison to tell the prosecutor and the defense but not to divulge the content of the information without a court order. A hearing was held, during which the defense submitted an affidavit from Carney's girlfriend indicating he took credit for the killing.

The court considered the full spectrum of theories from "absolute privilege" in *Swidler v United State*s 524 US 399 (1998) to the "balancing test" in the DC court's *Swidler* decision,124 F 3d 230 (DC Cir. 1997) and the termination of the privilege upon death approach. Applying the absolute privilege and balancing tests, Judge Belfi concluded that the privilege could not be violated. Among

the factors the court relied upon were the availability of the information from another source—the defense affidavit from Carney's girlfriend—and the hearsay nature of the statements. Vespucci is represented by Thomas Liotti. *People v Vespucci*, Nassau Co Ct. (*New York Law Journal*, 6/6/02). Reacting to the decision, attorney Galison remarked, "I think I should be able to testify in the interests of justice, even though it might be hearsay. When a guy is facing 25 years to life for a murder charge, sometimes you have to bend the rules." (*Newsday*, 6/1/02.)

Professional Responsibility is one of the categories of web resources in *The Insider's Guide: Criminal Justice Resources on the Internet 2002*, NYSDA's new softcover book with CD-ROM (see back cover for details). And for the latest developments and more, visit the Ethics page of the Hot Topics section of the NYSDA web site, www.nysda.org.

Drug Courts Proliferate

Push for a Court in Every NY County Continues

In almost every county in New York, drug courts have been established or are in the planning stages. Drug courts have begun operation in Nassau and Schulyer counties, and more are being planned for Chemung, Saratoga and Steuben counties. (*New York Law Journal*, 3/20/02; *Times Union* [Albany], 6/11/02.) "Drug courts save lives. Drug courts also save communities a lot of money," according to Kathi Chaplin, Project Manager for New York State Drug Treatment Courts, addressing a group of lawyers and judges in Chemung County. (*Star-Gazette*, 5/31/02.)

Several drug courts have received grants from the US Department of Justice. Schenectady, Washington, Queens, Westchester, and Wayne counties and the cities of Utica and Poughkeepsie will share in a $2.8 million award. The money will be disbursed over the next three years and allow the courts to expand their staff and services. (*Daily Gazette*, 6/11/02; *Finger Lakes Times*, 6/11/02.)

On the other hand, Seneca County's drug court is facing a financial crisis. Their judicial system is moving to a countywide misdemeanor court. The team in the Seneca Falls Drug Court are all volunteers. Conversion to the new court system will demand more time from the team, but without funding. The assistant prosecutor and defense lawyer staffing the court are not full-time county employees; already losing revenue from their private law practices, they will lose even more if they stay with the program. Already the drug court has reportedly saved the county about $60,000 by diverting people from jail. The funding question is under consideration by county officials. (*Finger Lakes Times*, 5/16/02.)

Drug Courts Topic of Recent Reports

The Vera Institute of Justice has published a report describing the experiences of the Manhattan Misdemeanor Treatment Court. It examined consensus building among the drug court team, coordination of treatment alternatives, and different approaches to misdemeanor and felony drug cases. Researchers interviewed drug court staff and participants, as well as observing proceedings. Themes that were presented in the report were: teamwork across agencies as a defining characteristic and a crucial achievement; the failure of the court to reach its target intake and resulting need to continue critical negotiations between the county prosecutor and the rest of the court team about expanding eligibility criteria; and the greater than anticipated treatment needs of the court's population forcing the court to confront the limits of coercion in providing needed treatment. *Supervised Treatment in the Criminal Court: A Process Evaluation of the Manhattan Misdemeanor Drug Court* (2002). (A link to this report can be found on the Drug Court page of the NYSDA web site.)

In another report, the US General Accounting Office discovered that the Department of Justice has not been able to complete its evaluation of federally funded drug court programs due to a lack of vital information and various administrative problems. *Drug Courts: Better DOJ Data Collection and Evaluation Efforts Needed to Measure Impact of Drug Court Programs* (2002). (*American Bar Association Journal*, 4/24/02.)

The lack of data demonstrating the long-term success of drug courts was a major theme in a law review article published two years ago by Colorado Judge Morris B. Hoffman. He expressed concern about a juggernaut of frustration and federal funds creating hundreds of new courts without intellectual criticism and debate. (Hoffman, "The Drug Court Scandal," 78 *North Carolina Law Review* 1480 [2000].) Despite his concerns, and the more recent GAO report indicating that reliable data continues to be unavailable, drug courts are proliferating. Nationwide there are more than 700 drug courts, and another 300 in the development stage.

Defense Role Stressed by National Group

A resolution adopted by the National Association of Drug Court Professionals on April 19 stresses the important role of public defenders in the growing number of drug courts. The need to fund indigent defense and assure defense participation in the planning stage are two key points in the resolution. It also focuses on the need for the courts to recognize "all traditional aspects of zealous defense representation are 'undiluted' and 'should not be usurped' in drug court." A copy of the resolution is available and other information, including links to the Vera and GAO reports described above, are on the Drug Court page of NYSDA's web site, www.nysda.org.

New Specialty Courts Appearing

The resolution described above was based on the *Ten Tenets of Fair and Effective Problem Solving Courts* prepared by the American Council of Chief Defenders. (*NLADA News*, 4/22/02.) As the name indicates, these principles were devised in an effort to bring a defense perspective not just to drug courts but to the expanding list of "specialty," "boutique," or "problem-solving" courts prompted by the popularity of drug courts.

On June 4, the New York State Bar Association and the Committee for Modern Courts hosted a panel discussing the experiment in Bronx, Rensselaer and Westchester counties moving all cases involving domestic violence to a single court, rather than dividing them among criminal and matrimonial parts of Supreme Court and Family Court. George Ceresia, Jr., the domestic violence court judge in Rensselaer County, said the system provides for consistent rulings and helps the court monitor defendants more closely. Handling the cases in one court means that more information is shared by the judge, prosecutor and attorneys, resulting in better advocacy by lawyers and more informed decisions, Judge Daniel Angiolillo of Westchester County said. (*Daily Gazette* [Schenectady], 6/5/02.)

Ruth Levine Sussman, who presides over the Bronx Domestic Violence Court, commented that the goal of complainants in domestic violence cases may not be incarceration of their partner, but only protection for themselves. In some instances, women may want only a Family Court order of protection, not to jail—and thereby terminate any financial support from—the alleged abuser. In those cases where a Family Court resolution may be more helpful, getting prosecutors to agree to pleas that will permit this, while retaining a way of imposing conditions on the defendant that will prevent further abuse, may be the result. However, when questioned by an audience member, Sussman indicated that she was not saying complainants were encouraged to seek only Family Court relief but rather to seek protection there ***and*** in criminal proceedings.

When introducing the panel, Chief Administrative Judge Jonathan Lippman acknowledged that the expanding "integrated" domestic violence courts pilot program is a constitutional end-run around the current court structure. Court reorganization requiring a constitutional amendment has long been a project of Chief Judge Judith Kaye.

Lynne Stewart Case Arouses the Defense Bar

A special master has been appointed by Judge Koeltl of the Southern District federal court to review client files taken from the office of defense attorney Lynne Stewart, who has been charged with federal crimes as a result of her representation of Sheikh Omar Abdel-Rahman. *United States v Stewart*, 02-CR-395 (SDNY 6/12/02). During a search of Stewart's office on April 9th, investigators took three boxes of documents, one box of audiotapes, 28 floppy disks and a hard drive shared with other defense attorneys. The court recognized that the "search of the law offices of a criminal defense attorney can thus raise Sixth Amendment concerns that would not otherwise be present in the search of the offices of a civil litigation attorney." The seized materials encompassed information about Stewart's other clients and the cases of other attorneys in the office. Out of concern for these clients and the importance of the attorney-client privilege, the court rejected the use of a prosecutor's "privilege team" to review the defense files. (*New York Law Journal*, 6/13/02.) The decision followed a hearing at which NYSDA member Susan Tipograph, one of Stewart's attorneys, claimed that the government had not taken sufficient safeguards to protect privileged information and work product concerning Stewart's other clients. (*New York Law Journal*, 6/3/02.)

Meanwhile, defense lawyers have closed ranks behind Stewart. At a gathering at the Cardozo School of Law, defense lawyers spoke out about the impact of the government's actions on the defense bar. According to the President of the Lawyer's Guild New York City Chapter the "warrantless monitoring, announced by Ashcroft last fall and now being used against the sheik, makes effective assistance of counsel impossible." A Committee to Defend Lynne Stewart has been formed to raise funds for her defense and increase public awareness about the threat to civil liberties. (*New York Law Journal*, 5/28/02.) See, on the web, www.lynnestewart.org. Earlier, Stewart remarked that "The government has to put up or shut [up] here—and I don't think they can put up. I'm going to continue to be a lawyer, hopefully, until they carry me out. I'm sincerely hoping it won't be the US government doing the carrying." (*Associated Press*, 4/11/02.)

For the latest developments, visit the Terrorism Laws page on the NYSDA web site, www.nysda.org.

Immigration Hearing Doors Swing Open

Federal judges in Michigan and New Jersey have slowed the erosion of civil rights in immigration hearings. (*New York Law Journal*, 6/7/02; *Chicago Tribune*, 4/19/02.) Lawsuits brought by the ACLU and the press challenged the government's blanket policy of closed-door deportation hearings in "special interest" (9/11) cases. Both courts granted injunctions against closure. "It is important for the public, particularly individuals who feel that they are being targeted by the government as a result of the terrorist attacks of Sept. 11, to know that even during these sensitive times the government is adhering to immigration procedures and respecting individuals' rights." *Detroit Free Press v. Ashcroft*, No. 02-70339 (EDMI 4/3/02.)

In the New Jersey case, the court stated, "Without an injunction, the government could continue to bar the public and press from deportation proceedings without any particularized showing of justification. This presents a clear case of irreparable harm to a right protected by the First Amendment." (*Associated Press*, 5/30/02.)

For other immigration news of special interest to criminal defense teams, see p. 8. See also the Immigrant Defense Project page on the NYSDA web site.

Surveillance to the Nth Degree

The US Attorney General has issued new guidelines significantly expanding FBI surveillance powers. The guidelines fall into four areas: General Crimes, Racketeering and Terrorism Investigations; FBI Undercover Operations; Confidential Informants; and Lawful, Warrantless Monitoring of Verbal Communications. The stated goal of the new rules is to remove barriers to investigating terrorism—shifting the FBI approach from reactive to proactive. Federal agents can cross the threshold of libraries, houses of worship and the Internet to follow leads. This step has drawn criticism from civil rights advocates. "You no longer have to do anything unlawful in order to get that knock on the door," according to Laura Murphy, Director of the American Civil Liberties Union's Washington office. "You can be doing a perfectly legal activity like worshiping or talking in a chat room, they can spy on you anyway." (*Washington Post*, 5/30/02.)

The ACLU's concern over the government's expanded powers is articulated in a new report, "Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11." It concludes that the government's anti-terrorism measures curtailed civil liberties without increasing safety in a significant way. "There is no proof that the incessant seizure of new powers by Congress and the Bush Administration does anything to increase safety," stated Murphy. "This report is an attempt to set the record straight and detail just how extensive this erosion of basic liberty in America has been." (*American Civil Liberties Union Press Release*, 5/28/02.)

New York defense attorney Frederick H. Cohn has filed a lawsuit challenging federal eavesdropping regulations. The suit arose in a case involving a suspect in the 1998 US Embassy bombing in Kenya. Cohn claimed that the regulations for warrantless attorney-client monitoring violated his client's 5th Amendment due process rights and 6th Amendment right to counsel. As stated in the complaint, "The monitoring of counsel's conversations with a client, whether on notice or without notice, chills the attorney-client relationship and deprives the plaintiff herein of the right to discuss any aspect of his case with his attorney and receive honest advice in return." The lawsuit, filed in Washington DC, asks the court to prevent the Department of Justice from monitoring conversations without a judicial determination of probable cause. Commenting on the monitoring rules, Cohn stated, "These things don't go away once you get them in place. They get expanded." (*New York Law Journal*, 5/9/02.)

Material Witnesses Cannot Be Detained for GJ Investigation

The federal government has been using the material witness statute, 18 USC 3144, to detain people for investigation related to terrorist activities. Shortly after 9/11, Osama Awadallah was arrested by federal agents as a material witness and kept in solitary confinement. In front of a New York federal grand jury he was questioned about his knowledge of the hijackers. Later, he was charged with perjury based on his testimony. (*New York Law Journal*, 5/1/02.)

Judge Scheindlin has ruled in Awadallah's case that a material witness cannot be detained unless a criminal charge has been filed and a trial pending: "In enacting this statute, Congress carved out a carefully limited exception to the general rule that an individual's liberty may not be encroached upon unless there is probable cause to believe that he or she has committed a crime. Properly read, the statute only allows a witness to be detained until his testimony may be secured by deposition in the pretrial, as opposed to the grand jury, context."

The judge observed that "no Congress has granted the government the authority to imprison an innocent person in order to guarantee that he will testify before a grand jury conducting a criminal investigation. A proper respect for the laws that Congress does enact—as well as the inalienable right to liberty—prohibits this Court from rewriting the law, no matter how exigent the circumstances." Due to the illegal detention, the court suppressed the grand jury testimony and dismissed the perjury charges. *United States v. Awadallah*, No. 01-CR-01026 (SDNY 4/30/02).

San Francisco Public Defenders in "Presumed Guilty"

A new documentary film chronicling "a year of trench warfare in jails, holding cells, courtrooms, law offices and police stations" in San Francisco has been released as part of KQED Public Television 9's acclaimed national Emmy Award-winning *Bay Window* series. According to a review by Terry Diggs in the San Francisco legal publication, *The Recorder* (2/27/02), the film reveals the importance of telling clients' stories: "[Story]telling is, after all, the only real function of the trial—not to locate an inviolable truth in fixed facts but to arrive, through the recounting of

detail, at the certainty of who we are and how we live and what we value." More information on the film, and what it reveals about public defense, is available at the station's web site, www.kqed.org. Screenings have already been scheduled in New York City (Pioneer Theater July 10-16; call 212-254-3300 or go to www.twoboots.com/pioneer).

Gant's Gone But Batcheller's Back

The Backup Center announces that Isaiah "Skip" Gant, who became a Staff Attorney and Director of NYSDA's incipient Wrongful Conviction/Innocence Project last year, has left to serve as a federal death penalty resource attorney. This sad event is paired with the good news that Stephanie Batcheller, who left the Backup Center as a result of the funding crisis of 2001, has rejoined the legal staff. ⚖

Job Opportunity

THE PUBLIC DEFENDER FOR WASHINGTON COUNTY seeks two **associates**. Required: admitted to practice in NY, have interest and one year experience in family law and/or criminal defense, and willing to work as an Assistant Public Defender. Must consider moving to Washington County, NY (approx. 45 minutes north of Albany, 20 minutes south of Lake George). Salary DOE. Send resumes to: Joseph H. Oswald, Esq., Oswald & McMorris, PO Box 328, Fort Edward, N.Y. 12828. Web site: www.oswaldmcmorris.net. ⚖

Conferences & Seminars

Sponsor: Northwestern University School of Law
Theme: 45th Annual Short Course for Defense Lawyers in Criminal Cases
Dates: July 22-26, 2002
Place: Chicago, IL
Contact: Executive & Professional Education, Northwestern University School of Law, 357 East Chicago Ave., Chicago IL 60611-3069; tel (312)503-8932; fax (312)503-2930; web site www.law.northwestern.edu/contexec/defense/information_02.htm

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; web site 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

Sponsor: National Association of Criminal Defense Lawyers
Theme: Annual Meeting and Seminar
Dates: July 31-August 3, 2002
Place: San Francisco, CA
Contact: Gerald Lippert: tel (202)872-8600 ext 236; fax (202)872-8690; web site www.nacdl.org

Sponsor: Santa Clara University School of Law, California Attorneys for Criminal Justice, California Public Defenders Association, and ABA Death Penalty Representation Project
Theme: Bryan R. Schechnmeister Death Penalty College
Dates: August 10-15, 2002
Place: Santa Clara, CA
Contact: CACJ: (323)933-9414; seminar web site www.scu.edu/law/dpc

Sponsor: Indiana Public Defender Council
Theme: Death Penalty Defense
Dates: September 12-13, 2002
Place: Indianapolis, IN
Contact: Teresa Campbell (317) 232-2490; e-mail campbell@pdc.state.in.us; web site www.state.in.us/pdc/about/training.html

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Dates & Places: September 27, 2002 New York City
October 19, 2002 Albany, NY
Contact: NYSACDL: tel (212) 532-4434; e-mail nysacdl@aol.com; web site 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: NYSACDL: tel (212) 532-4434; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor: National Legal Aid and Defender Association
Theme: Justice in Action: 2002 NLADA Annual Conference
Dates: November 13-16, 2002
Place: Milwaukee, WI
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; web site www.nlada.org ⚖

Immigration Practice Tips

Defense-Relevant Immigration News

By Manuel D. Vargas*

Any state drug felony may now be deemed an aggravated felony for immigration purposes

Under a new precedent decision issued by the Board of Immigration Appeals (BIA) on May 13, 2002, there is now a significantly greater risk that conviction of any state felony drug offense will be considered an "aggravated felony" for immigration law purposes. *See Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002). This decision retreats from prior BIA precedents that held that first-time simple possession convictions, no matter how classified by the state, could not be deemed to be aggravated felonies. At the same time, this decision and another BIA decision issued the next day make clear that there is now an improved prospect that conviction of certain state misdemeanor drug offenses that are now sometimes considered aggravated felonies by the Immigration and Naturalization Service (INS) will not be found to be aggravated felonies. *See id and Matter of Santos-Lopez,* 23 I&N Dec. 419 (BIA 2002).

In general, these BIA decisions mean that a state's classification of a drug offense as a felony or misdemeanor will now often be determinative of whether conviction of the offense will be deemed an aggravated felony for immigration purposes. Prior BIA precedent decisions had provided that state drug offenses would be deemed aggravated felonies only if they would be treated as felonies under federal law. *See, eg, Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995); *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

On the one hand, the prior BIA precedents meant that all state sale or intent to sell offenses would be deemed aggravated felonies–no matter how the state classified the offense–because such offenses are always treated as felonies under federal law. *But see Steele v Blackman,* 236 F3d 130 (3d Cir. 2001) (holding that New York misdemeanor marijuana sale offense could not be deemed an aggravated felony because the offense could include transfer of a small amount of marijuana without compensation). In addition, the INS argued that these precedents meant that second or subsequent state possession offenses—again no matter how the state classified the offense—should be deemed aggravated felonies because such offenses could be prosecuted as felonies under federal law.

On the other hand, the prior precedents also meant that first-time possession offenses would not be deemed aggravated felonies because first-time possession offenses (except for offenses involving possession of more than five grams of crack cocaine) are treated as misdemeanors under federal law. The US Court of Appeals for the 2nd Circuit here in New York has deferred to the BIA precedents on this point in the immigration context. *See Aguirre v INS*, 79 F3d 315 (2d Cir. 1996) (deferring to the BIA interpretation in *Matter of L-G-*, and holding that a conviction of the New York felony of criminal possession of a controlled substance in the second degree with a sentence of eight years to life is not an aggravated felony for immigration purposes). The 3rd Circuit applied the *L-G-* approach to find that even a felony conviction of a second possession offense could not be deemed an aggravated felony when the prior conviction did not have to be proven as part of the second prosecution, as would have been required under federal law for the second conviction to be treated as a felony. *See Gerbier v Holmes*, 280 F3d 297 (3d Cir. 2002).

Nevertheless, at least in the illegal reentry federal criminal sentencing context, several federal circuit courts, including the 2nd Circuit, have differed with the BIA's approach of basing the aggravated felony determination on how the offense would have been treated under federal law. *See, eg, US v Pornes-Garcia,* 171 F3d 142 (2d Cir.), *cert den*, 528 US 880 (1999) (acknowledging the 2nd Circuit's following of the BIA's interpretation in the immigration context in *Aguirre* but, nevertheless, reaffirming prior circuit decisions holding that a state felony possession offense would be considered an aggravated felony for purposes of the sentence enhancement for illegal reentry after removal subsequent to an aggravated felony conviction); *compare with US v Hernandez-Avalos,* 251 F3d 505 (5th Cir.) (also holding that a state felony offense could be deemed an aggravated felony even if it would have been treated as a misdemeanor under federal criminal law, but rejecting the notion that the aggravated felony term may be interpreted differently in immigration and criminal cases).

In the recent *Matter of Yanez-Garcia* decision, the BIA retreated from its prior precedent decisions in *Matter of K-V-D- and Matter of L-G-* and announced that immigration judges and the BIA will now follow the precedent decisions of the relevant federal circuit court of appeals (or, if there is no applicable circuit authority, the interpretation of the majority of the federal circuit courts). And, in its decision the next day in *Matter of Santos-Lopez,* the BIA applied this new approach to find that a second Texas possession offense was not an aggravated felony under the 5th Circuit's *Hernandez-Avalos* precedent because Texas classified the second offense as a misdemeanor, even though the second offense could have been prosecuted as a felony under federal law.

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The BIA's new approach of applying relevant circuit law, which may have arisen outside of the immigration context, creates a confusing picture for New York immigrants and their lawyers for two reasons. First, uncertainty is created because New York immigrants may wind up being detained and having their Immigration Judge hearings in other states (such as Louisiana, Pennsylvania, and New Jersey). Thus, it is often impossible to know in advance which circuit's law will be applicable in a particular individual's case.[1] Second, even if an individual might know in advance that his or her hearing would likely take place here in the 2nd Circuit, additional uncertainty is caused by the fact that the 2nd Circuit may itself at some point soon retreat from its following of *Matter of L-G-* in *Aguirre* based on the BIA's own departure from the *L-G-* approach.

In any event, the trend in federal court decisions makes it safe to say that it is now significantly more likely that the determination of whether a particular New York State drug offense will be deemed an aggravated felony for immigration purposes will depend on how the offense is classified under New York law, rather than on how the offense would be treated under federal law. This is tremendously important for criminal lawyers and immigrant advocates counseling noncitizens in criminal or immigration proceedings to know. Conviction of an aggravated felony has many very harsh potential consequences, including likely mandatory deportation, ineligibility for asylum, ineligibility to return legally to the US after deportation, and enhanced sentencing for illegal return.

The bottom line: Defense lawyers should warn their noncitizen clients that pleading guilty to virtually any state *felony* drug offense will now be much more likely to result in an aggravated felony finding triggering these very harsh negative immigration consequences, even where the offense is a first-time possession offense. In addition, defense lawyers should be aware that a plea to a *misdemeanor* drug charge will also usually trigger deportability, but should generally avoid the additional negative consequences of an aggravated felony conviction–even when the defendant has prior misdemeanor drug conviction(s).

Post-September 11 law enforcement targeting of immigrants continues

In recent months, federal, state, and local law enforcement efforts have continued post-September 11th targeting of immigrants, especially those of Middle Eastern or Muslim country origins. Recent such law enforcement developments include:

- In March, 2002, the US Justice Department (DOJ) announced plans to question an additional 3,000 noncitizens mostly from Middle Eastern or Muslim countries to add to the close to 5,000 earlier called in for questioning.

According to DOJ last year, when questioning of the first group was announced, these names were compiled from INS and State Department records identifying males aged 18-33 from 20 Middle Eastern and European countries who entered the country on non-immigrant visas since January 1, 2000. The more recent group includes additional recent arrivals. Lawyers counseling immigrants called for questioning should warn such clients about a DOJ memorandum. It instructs US attorneys and members of the Anti-Terrorism Task Forces conducting the interviews, "You should specifically ask to see the individual's passport and visa, and you should take note whether he appears to be residing in the United States within the time period allowed by the visas." It goes on, "[I]f you suspect that a particular individual may be in violation of the federal immigration laws, you should call the INS representative on your Anti-Terrorism task Force or the INS officials at the closest Law Enforcement Support Center. These officials will advise you whether the individual is in violation of the immigration laws and whether he should be detained." The INS sent out its own memorandum directing its agents to detain suspected immigration violators identified by the interview project without the possibility of release on bond, if they are requested to do so by the federal investigators doing the interviewing. Of the over 2,261 young men interviewed as of March 20, 2002, about 20 had been arrested, most for immigration violations and none on charges involving terrorism.

- In March 2002, DOJ announced new initiative to track down and deport an estimated 6,000 immigrants from Arab and other Muslim countries who have pre-September 11 deportation orders but who have not been deported.

The immigrants on which this initiative focuses comprise fewer than 2 percent of the total number of 320,000 so-called "alien absconders" reported by the INS.

- In April 2002, the INS announced a new interim rule putting limits on the public disclosure by any state or local government entity or by any privately operated facility of the name or other information relating to any immigration detainee being housed or otherwise maintained or provided service on behalf of the INS. (Published at 67 Fed Reg. 19508-19511, amending 8 CFR 236 and 241, effective April 17, 2002.)

(Continued on page 31)

[1] Venue for a petition for review to challenge a finding of deportability is in the circuit court of appeals in which the Immigration Judge hearing takes place.

Legislative Update

By Al O'Connor*

SEX OFFENDER REGISTRATION ACT (2002 Amendments) QUICK REFERENCE CHART—see pp. 11-12.

SORA Amendments

Significant amendments to the Sex Offender Registration Act were signed into law by Governor Pataki on Mar. 11, 2002. (L. 2002 Chap. 11 - S.6263-a). The amendments are largely compelled by federal requirements for sex offender registration laws and are designed to ensure that New York retains its full share of Byrne Formula grant funding. Several new offenses have been added to the list of crimes covered by Megan's Law, including the following:

- **Felonies** (including attempts): *Persistent sexual abuse* (Penal Law § 130.53); *Aggravated sexual abuse in the fourth degree* (Penal Law § 130.65-a); F*acilitating a sex offense with a controlled substance* (Penal Law § 130.90); and *Disseminating indecent material to minors in the first degree* (Penal Law § 235.22); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).
- **Misdemeanors** (including attempts): *Sexual Misconduct* (Penal Law § 30.20); *Sexual abuse in the third degree* (Penal Law § 130.55); and where the victim is under age 18, or the defendant has a prior sex offense conviction: *Forcible touching* (Penal Law § 130.52); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).

Some federal crimes have also been designated as Megan's Law offenses[1] and more foreign convictions will now be covered by the Act, which now applies to out-of-state misdemeanors as well as felonies with New York statutory counterparts, or any out-of-state crime that requires registration in the foreign jurisdiction. The law also includes registration requirements for persons in New York State to attend college or for employment purposes.

- **Effective date:** Registration requirements will apply prospectively to offenses committed on or after Mar. 11, 2002. However, in some limited circumstances the amendments will apply retroactively if the defendant was convicted of a newly added felony offense (including designated federal offenses) and was still serving the sentence on Mar. 11, 2002.
- **New Reporting Requirements:** The Sex Offender Registration Act now requires lifetime registration for three new categories of offenders (in addition to Risk Level 3). Regardless of a defendant's risk level assessment, lifetime registration will be required for **sexual predators, sexually violent offenders** and **predicate sex offenders**. Sexual predators will also be required to personally verify their addresses every 90 days for life. A "sexual predator" is a person who stands convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent acts. A "sexually violent offender" is a sex offender who stands convicted of a sexually violent offense [Correction Law § 168-a (3)]. A "predicate sex offender" is a person convicted of a sex offense or a sexually violent offense who has a previous conviction for one or more of such crimes.
- **Effective date for new categories:** These three new categories will apply at risk level assessment hearings conducted on or after Mar. 11, 2002. However, the new categories will not apply to hearings conducted after Mar. 11, 2002 if the defendant was previously classified in an administrative or judicial risk level assessment proceeding conducted prior to Jan. 1, 2000, or was included in the plaintiff class in *Doe v Pataki*, 3 FSupp 2d 456 (SDNY 1998). Offenders classified after Mar. 11, 2002 as a sexual predator, sexually violent offender, predicate sex offender or Level 3 sex offender will be permanently ineligible to petition the court for relief from the duty to register pursuant to Correction Law § 168-0. Level 3 sex offenders who were classified prior to Mar. 11, 2002 may petition for such relief after 13 years. ⚖

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[1] *Sexual exploitation of children* (18 USC § 2251); *Selling or buying children* (18 USC § 2251A); *Certain activities relating to material involving the sexual exploitation of minors* (18 USC §2252); *Certain activities relating to material constituting or containing child pornography* (18 USC § 2252-A); *Production of sexually explicit depictions of a minor for importation into the United States* (18 USC § 2260)

SEX OFFENDER REGISTRATION ACT (2002 Amendments)
QUICK REFERENCE CHART

DESIGNATION	REGISTRATION PERIOD	PERSONAL VERIFICATION REQUIRED?	ELIGIBLE TO PETITION FOR RELIEF?	EFFECTIVE DATE
Sex Offender			*Duty to Register*	
Convicted of a sex offense (see list)	10 years (unless classified Risk Level 3)	No (unless classified as Risk Level 3)	No	Applies to offenses committed on or after March 11, 2002. However, registration requirements apply retroactively to defendants convicted of newly added *felony* offenses (see list in ***bold italics***) who were still serving sentences on March 11, 2002.
Sexual Predator				
Convicted of a sexually violent offense (see list) and suffers from a mental abnormality or personality disorder that makes defendant likely to engage in predatory, sexually violent offense	Life (regardless of risk level)	Yes—every 90 days (regardless of risk level determination)	No	Sexual predator designation will apply at hearings conducted on or after March 11, 2002 (except where defendant has already been classified under old law and is covered by the injunction in *Doe* v *Pataki*).
Sexually Violent Offender				
Convicted of a sexually violent offense (see list)	Life (regardless of risk level)	No (unless classified Risk Level 3)	No	Sexually violent offender designation will apply at hearings conducted on or after March 11, 2002 (except where defendant has already been classified under old law and/or is covered by the injunction in *Doe* v *Pataki*).
Predicate Sex Offender				
Previously convicted of a sex offense or sexually violent offense	Life (regardless of risk level)	No (unless classified Risk Level 3)	No	Predicate sex offender designation will apply at hearings conducted on or after March 11, 2002 (except where defendant has already been classified under old law and/or is covered by the injunction in *Doe* v *Pataki*).
Risk Level 1	10 years	No	*Risk Level Downgrade* NA	
Risk Level 2	10 years	No	Yes	
Risk Level 3	Life	Yes—every 90 days	Risk level downgrade—yes. Duty to register—no, unless classified as Level 3 before March 11, 2002. If so may petition for relief after 13 years	

SEX OFFENDER REGISTRATION ACT OFFENSES

Note: Offenses in **bold** are newly added as of March 11, 2002.
Offenses in *italics* are felonies.

SEX OFFENSES (includes attempts)

Where victim is under age 18, or, regardless of the age of victim, where defendant has a previous sex offense conviction, including PL § 130.52 or PL § 130.55:

Forcible touching (P.L. § 130.52)
Sexual Abuse in the 3rd degree (P.L. § 130.55)

Sexual misconduct (P.L. § 130.20)
Rape in the 3rd degree (P.L. § 130.25)
Rape in the 2nd degree (P.L. § 130.30)
Sodomy in the 3rd degree (P.L. § 130.40)
Sodomy in the 2nd degree (P.L. § 130.45)
Sexual abuse in the 2nd degree (P.L. § 130.60)
Disseminating indecent material to minors in the 1st degree (P.L. § 235.22)
Sexual Performance by a Child (P.L. Act. 263)
Patronizing a prostitute in the 3rd degree (P.L. § 230.04)
(where person patronized is, in fact, less than 17)
Patronizing a prostitute in the 2nd degree (P.L. § 230.05)
Patronizing a prostitute in the 1st degree (P.L. § 230.06)
Promoting prostitution in the 2nd degree [P.L. § 230.30(27)]
Promoting prostitution in the 1st degree

Where victim is under age 17:

Unlawful imprisonment in the 2nd degree (P.L. § 135.05)
Unlawful imprisonment in the 1st degree (P.L. § 135.10)
Kidnapping in the 2nd degree (P.L. § 135.20)
Kidnapping in the 1st degree (P.L. § 135.25)

Any of the above offenses, or attempts thereof, committed as a hate crime (P.L. § 485.05) or as a crime of terrorism (P.L. § 490.25)

SEXUALLY VIOLENT OFFENSES (includes attempts)

Persistent sexual abuse (P.L. § 130.53)
Aggravated sexual abuse in the 4th degree (P.L. 130.65-a)
Facilitating a sex offense with a controlled substance (P.L. § 130.90)

Rape in the 1st degree (P.L. § 130.35)
Sodomy in the 1st degree (P.L. § 130.50)
Sexual abuse in the 1st degree (P.L. § 130.65)
Aggravated sexual abuse in the 3rd degree (P.L. § 130.66)
Aggravated sexual abuse in the 2nd degree (P.L. § 130.70)
Aggravated sexual abuse in the 1st degree (P.L. § 130.70)
Course of sexual conduct against a child in the 1st degree (P.L. § 130.75)
Course of sexual conduct against a child in the 2nd degree (P.L. § 130.80)

Any of the above offenses, or attempts thereof, committed as a hate crime (P.L. § 485.05) or as a crime of terrorism (P.L. § 490.25)

Specifically Designated Federal Offenses

Sexual exploitation of children (18 USC § 2251)
Selling or buying children (18 USC § 2251A)
Certain activities relating to material involving the sexual exploitation of minors (18 USC §2252)
Certain activities relating to material constituting or containing child pornography (18 USC § 2252-A)
Production of sexually explicit depictions of a minor for importation into the United States (18 USC § 2260)

Out-of-State and Federal Convictions

For a *crime* that includes all of the essential elements of any of the above New York offenses.

For a felony in foreign jurisdiction where defendant is required to register as a sex offender in that jurisdiction.

From My Vantage Point*

By Jonathan E. Gradess

The 90/90 Train is Headed Your Way

New York's public defense system is at once on the brink of collapse and reform. It has seen more attention and action in the last two years than in the last twenty. State trial courts upstate and down, as well as federal court, are addressing New York's stagnant assigned counsel rates. Concerned citizens and editorial boards are demanding change. Legislators have introduced bills, but none have passed.

Legislative Lethargy Continues

One wonders if the Legislature understands the implications of non-action.

I write this 24 hours from the end of the legislative session. Bills to create an Independent Public Defense Commission (S6789-A and A10075-A) languish. A one-house Assembly bill to raise rates (A.11862), introduced a few days ago, would raise rates to $60 for misdemeanors and $75 for felonies effective next April. It raises caps and creates a fund to collect revenue to assist localities to pay for public defense services.

This is too little too late.

The new bill wouldn't raise enough revenue. It provides no distribution formula and no structure for passing the money to counties. It creates no standards to protect clients. It will pass only one house, if at all. Given the crisis ripping at the right to counsel—unrepresented defendants, delayed Family Court proceedings, and frustrated panel members—this bill is not much to applaud. It also will not stop the train that is heading toward Albany at $90/90 miles an hour.

Courts Are Overriding Statutory Rates

Courts looking at New York fees are concluding that justice requires rates of $90 per hour, instead of $40/25 (in-court/out-of-court). This corresponds to the recent raise for federal Criminal Justice Act lawyers.

The lawsuit brought by the New York County Lawyers' Association (NYCLA) in February 2000 is moving forward. On May 3, 2002, New York County Supreme Court Judge Lucindo Suarez issued a preliminary injunction setting rates at $90 per hour. Trial has been set on the permanent injunction for July 29. Meanwhile Federal District Court Judge Jack Weinstein has ordered, in a class action, $90 per hour for lawyers representing battered women who are respondents in Family Court (*Nicholson v Scoppetta EDNY*). These cases present a clear rationale for filing vouchers at $90 per hour for assigned counsel work. While each case appears limited, geographically or to a subclass of plaintiffs, both were litigated in terms of what it takes to run a law office in this state.

In the past year or more, as fees stagnated and these cases moved forward, judges in a dozen or more jurisdictions began to take action to ensure representation in their courts. Finding extraordinary circumstances in the hemorrhaging of qualified attorneys from panels, burgeoning caseloads and the lack of available lawyers to fulfill the rights of clients, trial judges allowed fees above current statutory hourly rates. [See the Assigned Counsel Rates page in the Hot Topics section of our web site, www.nysda.org, for a list of cases and decisions.] These developments met OCA resistance. Chief Administrative Judge Jonathan Lippman amended Rule 127.2 on April 16, 2001 to permit administrative judges unilaterally to reduce these trial court orders.

Lawsuits challenging this *ultra vires* rule are burgeoning across the state. Unsuccessful Article 78 challenges initially dismissed by the First and Fourth Departments have now been converted into declaratory judgment actions. Initially brought *pro se* by the lawyers given enhanced rates, these cases are now in the hands of Hale and Dorr and Nixon Peabody. These firms have joined Davis Polk and Paul Weiss in recognizing the constitutional crisis and placing their resources in the service of indigent clients and their lawyers. Numerous bar associations and legal organizations including NYSDA, NYSACDL, NACDL, NYCLA and the Association of Justices of the Supreme Court have filed *amici* briefs in these fee cases and in actions brought by Broome County to prevent trial court judges from ordering extraordinary fees.

Recently, Madison County Family Court judge Dennis McDermott *sua sponte* ordered increased rates across the board in 12 Family Court cases. The lawyers had not sought extraordinary fees, making it hard to see how the order could be within the scope of the *ultra vires* administrative rule. Nevertheless, the administrative judge for the district summarily reduced the amounts ordered by Judge McDermott. No doubt this order too will be challenged.

NYSDA has tried to help localities solve the public defense crisis by advocating for the state to increase funding for defense services. So far, we have been unsuccessful. Faced with reduced lawyer pools, higher caseloads, and a lack of financial aid from New York State, counties now see the $90/90 railroad heading toward them. I fear they will change their defense services plans to stretch limited resources by diminishing an already-deficient public defense system. Many municipalities, preparing for the arrival of the $90/90 train, will look to establish cheaper delivery systems with no guarantees of quality and justice.

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

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

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

Habeas Corpus (Federal) **HAB; 182.5(15)**

Stewart v Smith, No. 01-339, 12/12/01

After being sentenced to death for first-degree murder in Arizona, the respondent filed a federal petition for a writ of habeas corpus alleging that his trial and appellate counsel were ineffective for failing to challenge various trial errors. He had previously made the same allegation in a petition for state postconviction relief pursuant to Arizona Rule of Criminal Procedure 32. The Arizona court found the claims waived, as the respondent had failed to raise them in two previous hearings. The federal court held the claims barred by the state procedural ruling, and rejected the argument that a conflict caused by appellate and Rule 32 counsels' allegiance to the public defender office was cause for the procedural default. The 9th Circuit reversed, holding that the state procedural default was not independent of federal law and so did not bar federal review.

Holding: *Certiorari* is granted, and the following question is certified to the Arizona Supreme Court. "At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of 'sufficient constitutional magnitude' to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3) . . . depend upon the merits of the particular claim, see *State v French*, 198 Ariz. App. 119, 121-122 (2000) . . . or merely upon the particular right alleged to have been violated, see *State v Espinosa*, 200 Ariz. App. 503, 505 (2001)?"

Prisoners (Access to Courts and Counsel) (Conditions of Confinement) (Rights Generally) **PRS I; 300(2) (5) (25)**

Porter v Nussle, No. 00-853, 2/26/02

A federal inmate brought suit alleging that his 8th Amendment rights had been violated when correction officers beat him. The district court dismissed the action under the Prison Litigation Reform Act (PLRA) of 1995, which says that prison condition suits cannot be brought until administrative remedies are exhausted. 110 Stat. 1321-73, *as amended*, 42 USC 1997e(a). The 2nd Circuit Court of Appeals reversed, holding that 1997e(a) only governs conditions affecting prisoners generally, not single incidents affecting specific prisoners, citing *eg Hudson v McMillian* (503 US 1 [1992]).

Holding: The 1995 act strengthened the exhaustion requirement for prisoners bringing civil rights complaints with respect to "prison conditions" by making exhaustion mandatory rather than allowing courts the discretion to determine if exhaustion is necessary. *See Booth v Churner*, 532 US 731, 739 (2001). Congress failed to define "prison conditions." In *McCarthy v Bronson*, 500 US 136 (1991), the petitioning prisoner challenged a Judicial Code provision authorizing district judges to nonconsensually refer to magistrate judges "petitions challenging conditions of confinement." 28 USC 636(b)(1)(B). The *McCarthy* petitioner unpersuasively argued that this provision did not apply to complaints concerning isolated incidents of excessive force that were not ongoing conditions. Reading the provision "in its proper context" failed to suggest a congressional intent to divide prisoner petitions into categories. Similarly, the PLRA exhaustion provision is captioned "Suits by prisoners," undercutting the argument that Congress meant to bisect the realm of prisoner suits. *Hudson* created evidentiary distinctions, not threshold distinctions, between conditions of confinement and excessive force complaints. Prisoners bringing both types of complaints must first exhaust any available administrative remedy. Judgment reversed.

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

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

United States v Vonn, No. 00-773, 2/26/02

Early in the case, the defendant was advised of his right to counsel at all stages. He eventually pled guilty. The court advised him of his rights but failed to mention his right to counsel if he went to trial. Eight months later, he unsuccessfully attempted to withdraw one plea, without raising that failure. On appeal, he sought to set aside all of his pleas based on that claim. The court reversed.

Holding: The language of Rule 11(h) of the Federal Rules of Criminal Procedure is similar to that of Rule 52(a), which (upon *timely* objection) imposes on the prosecution the burden of showing that any error was harmless. Under Rule 52(b), when an objection is untimely, the "plain-error" rule replaces "harmless error," requiring the defendant to demonstrate that the error was harmful. The defendant argues that Rule 11(h) expresses a congressional intent to exclude the plain-error standard, thus excusing an untimely objecting defendant from plain-error review. The interpretive canon that expressing one item of a commonly associated group excludes an unmentioned one is only a guide, whose inapplicability can be shown

through other, contrary indications. Where Rule 52 is to be applied to all portions of the trial proceeding, interpreting Rule 11(h) as the defendant does would result in a partial repeal of Rule 52(b) by implication. This is a disfavored result when interpreting code. *See Ruckelshaus v Monsanto Co.*, 467 US 986, 1017 (1984). Logic allows an interpretation that a defendant who failed to object to Rule 11 errors would have no right to review on appeal. In *McCarthy v United States* (394 US 459 [1969]), a court reversed a conviction on Rule 11 grounds based solely on the judge's failure to conform to the Rule despite failure to object at trial. However, *McCarthy* did not discuss plain error or harmless error, or Rule 52. It is doubtful that the expression of a harmless-error standard in Rule 11(h) carries any relevant implication.

The Advisory Committee did not mean to limit the record to be reviewed strictly to the plea proceedings. Here, the defendant's initial appearance and arraignment are relevant, because there he was advised of his right to counsel at trial. Judgment reversed and remanded.

Dissenting: [Stevens, J] The burden of demonstrating that a Rule 11 violation is harmless is placed upon the prosecution.

Housing (General) **HOS; 186(15)**

Narcotics (General) **NAR; 265(27)**

Department of Housing and Urban Development v Rucker; Oakland Housing Authority v Rucker, Nos. 00-1770; 00-1781, 3/26/02

The Oakland Housing Authority (OHA) instituted eviction proceedings against respondents-tenants of public housing units based on their leases. The leases were in accordance with a United States Department of Housing and Urban Development (HUD) regulation administering 42 USC 1437d(l)(6), making "any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control" cause for termination. HUD regulations give local public housing authorities discretion to evict in situations where the tenants did not know of, foresee, or control behavior by other occupants of the unit. 56 Fed. Reg. 51560, 51567 (1991). The respondents commenced actions, arguing that 1437d(l)(6) does not require lease terms authorizing the eviction of tenants without knowledge of criminal activities or is unconstitutional. The court enjoined termination of leases when tenants lacked knowledge of drug-related activity. The 9th Circuit Court of Appeals affirmed *en banc.*

Holding: Congress has directly spoken to the precise question at issue. *Chevron U.S.A. Inc. v Natural Resources Defense Council. Inc.*, 467 US 837, 842-843 (1984). Section 1437d(l)(6) unambiguously requires lease terms providing discretion to evict tenants for the drug-related activity of household members regardless of knowledge. Congress's failure to impose any statutory qualification, combined with its use of the term "any" to modify "drug-related criminal activity" precludes any knowledge requirement. *See United States v Monsanto*, 491 US 600, 609 (1989). The Government is not attempting to criminally punish or civilly regulate the respondents as members of the public but is acting as a landlord, 14th Amendment issues do not arise. Judgment reversed.

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

Mickens v Taylor, No. 00-9285, 3/27/02

The petitioner was sentenced to death. He filed a writ of habeas corpus alleging ineffective assistance of counsel because his court appointed lead trial attorney represented the decedent at the time of the murder. The attorney did not disclose this to the court, co-counsel, or the petitioner. The decedent's case was dismissed upon his death. The same judge appointed the attorney to the petitioner's case the following business day. The 4th Circuit Court of Appeals *en banc* upheld the denial of habeas relief.

Holding: When assistance of counsel has been denied entirely or during a critical stage of the proceeding, a defendant need not show a reasonable probability that but for counsel errors there would have been a different result. *See United States v Cronic*, 466 US 648, 658 (1984). Cases fitting this exception are automatically reversed. *In Holloway v Arkansas* (435 US 475 [1978]), the automatic reversal rule was held to apply only where defense counsel is forced to represent codefendants over counsel's timely objection. Automatic reversal does not extend to cases absent an objection, unless the defendant demonstrates that the conflict actually affected the adequacy of his representation. *Cuyler v Sullivan*, 446 US 335 (1980). A judge is required to inquire into the propriety of multiple representation only when it "knows or reasonably should know that a particular conflict exists . . ." Counsel did not protest his inability to represent the petitioner. The trial court's failure to make the *Sullivan*-mandated inquiry does not reduce the petitioner's burden of proof; it was at least necessary, for the petitioner to show that the conflict adversely affected counsel's performance. Judgment affirmed.

Concurrence: [Kennedy, J] The constitutional question must turn on whether counsel had a conflict of interest, not on whether the judge should have been more diligent in taking measures to prevent possible conflict.

Dissent: [Stevens, J] Reversal is dictated by precedent, and is the only remedy that responds to the real possibility that the petitioner would not have received the death penalty if he had been represented by a conflict-free counsel. The legal profession universally condemns representing conflicting interests without full disclosure and

US Supreme Court *continued*

consent. Only reversal can maintain public confidence in the fairness of capital cases.

Dissent: [Souter, J] The court found that the trial judge knew or should have known that obligations stemming from the lawyer's prior representation of the decedent potentially conflicted with duties entailed in representing the petitioner, and was obligated to look into the extent of the risk further.

Dissent: [Breyer, J] "[T]his is the kind of representational incompatibility that is egregious on its face . . . is exacerbated by the fact that it occurred in a capital murder case . . ." and was created by the state. Such a breakdown in the criminal justice system creates an appearance that the proceeding was not reliable and the resulting punishment not fair.

Speech, Freedom Of (General) **SFO; 353(10)**

Ashcroft v Free Speech Coalition, No. 00-795, 4/16/02

The Child Pornography Prevention Act of 1996 (CPPA), retains the prohibition on child pornography and further prohibits additional categories of speech. 18 USC 2251 *et seq*. Section 2256(8)(B) prohibits any visual depiction that "is, or *appears to be*, of a minor engaging in sexually explicit conduct" (emphasis added). Section 2256(8)(D) defines child pornography to include any sexually explicit image that is promoted "in such a manner that *conveys the impression*" it depicts "a minor engaging in sexually explicit conduct" (emphasis added). The respondents alleged that these provisions are overbroad and vague, chilling the production of works protected by the 1st Amendment. The court granted summary judgment to the government. The 9th Circuit reversed.

Holding: Obscenity and pornography produced with real children are not protected by the 1st Amendment. *See Simon & Schuster, Inc. v Members of N.Y. State Crime Victims Bd.*, 502 US 105, 127 (1991) (Kennedy, J, concurring). The speech prohibited in the contested sections of the CPPA does not fit into these unprotected categories. *Miller v California* (413 US 15 [1973]), says a work is obscene if it, "taken as a whole, appeals to the prurient interest, is patently offensive in light of community standards, and lacks serious literary, artistic, political, or scientific value." The CPPA extends the "obscene" label to all images that *appear* to depict a minor engaging in sex, without regard to *Miller*.

Child pornography may be banned without regard to the literary value of the work, because the state has an overriding interest in stamping out images which are the *product* of child sexual abuse without any regard to its content. *New York v Ferber*, 458 US 747, 761(1982). The CPPA prohibits works that are not the product of child sexual abuse; *Ferber* does not apply. The CPPA bans works that the government claims pedophiles may use to seduce children, but speech within the rights of adults to hear may not be silenced completely to shield children from it. *See Sable Communications of Cal., Inc. v FCC*, 492 US 115 (1989). Virtual child pornography is said to whet the appetites of pedophiles and encourage illegal conduct, but the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it. Legislation cannot be premised on the desire to control private thoughts. *See Stanley v Georgia*, 394 US 557, 566 (1969). Sections 2256(8)(B) and 2256(8)(D) are unconstitutional. Judgment affirmed.

Concurrence: [Thomas, J] If technology evolves so that it becomes impossible to differentiate between images of real children and computer generated ones, narrowly drawn virtual child pornography regulations should not be banned.

Dissent (in part): [O'Connor, J] Invalidating a statute due to overbreadth is an extreme remedy. The concern that defendants will evade liability by claiming images are computer-generated is reasonable. The prohibition of virtual-child pornography should be upheld as covering material "virtually indistinguishable" from child pornography.

Dissent: [Rehnquist, J] While potentially impermissible applications of the CPPA may exist, it is doubtful that they would be "substantial . . . in relation to the statutes' plainly legitimate sweep. . . . "

New York Court of Appeals

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

People v Williams, No. 20, 3/14/02

The defendant sought to introduce expert psychiatric evidence to support his justification defense for first-degree manslaughter. The court requested an offer of proof. The defense indicated that the expert would testify that, "at the time of the murder [defendant] demonstrated paranoid delusional thinking and behavior" and "believed the victim of the murder was going to rob him of thousands of dollars." The court denied the request. The Appellate Division affirmed.

Holding: Generally, "the admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court." *People v Lee*, 96 NY2d 157, 162. The Appellate Division was correct to the extent that it found the trial court had properly exercised its discretion. Order affirmed.

Sentencing (Enhancement) (Restitution) **SEN; 345(32) (71)**

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

NY Court of Appeals *continued*

People v Horne, No. 24, 3/14/02

After receiving $16,000 in benefits based on inaccurate information provided to the Department of Social Services (DSS), the defendant was convicted of offering a false instrument for filing, and was acquitted of grand larceny, welfare fraud, and misuse of food stamps. Her motion to set aside the verdict as repugnant was denied and the jury discharged in the defendant's absence. She was sentenced to five years probation and $18,575.13 restitution. The Appellate Division reduced restitution to $16,942.25.

Holding: The sentencing court was empowered by Penal Law 60.27 to consider restitution over the $15,000 statutory cap so long as the sum was for return of DSS property. PL 60.27(5)(b). Acquittal of some charges here does not impugn the legality of the sentence, as the term "offense" in the restitution statute includes both a conviction and any offense that is part of the same criminal transaction. Penal Law 60.27(4)(a). Acquittal doesn't mean that the jury found that DSS did not suffer any losses. An acquittal does not equal a finding of innocence. *Reed v State of New* York, 78 NY2d 1, 7. It only shows the jury was not convinced beyond a reasonable doubt of the defendant's guilt. See *gen People ex rel Matthews v New York State Div. of Parole*, 58 NY2d 196, 203 (1983).

Reversal is not warranted by *Apprendi v New Jersey* (530 US 466 [200]). While the sentence was predicated on factual determinations made by the judge, restitution orders fall within the range of sentences available for any offense. This is not analogous to the enhancement statute addressed in *Apprendi*. A defendant's presence is not required where a proceeding, like the post-trial proceeding here, involves only questions of law or procedure. *See People v Rodriquez*, 85 NY2d 586, 591. Order affirmed.

Juries and Jury Trials (Challenges) (Selection) — **JRY; 225(10) (55)**

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

People v Brown, No. 14, 3/19/02

The defendant was charged with selling drugs near school grounds. Arrested soon after an alleged sale to an undercover police officer but found with no pre-recorded buy money or drugs, she raised a misidentification defense. She objected to expert testimony from a police sergeant about street-level drug transactions. The court instructed that the testimony was not offered as evidence of what actually happened but only how drug operations work. The sergeant testified that a narcotics operation tries to "save money by moving it, secreting it somewhere else, getting it off the street before [the police] get there. . . ." The conviction was affirmed.

Holding: It is within a trial court's discretion to decide, on the facts of each case, whether proffered expert testimony would be helpful in aiding a jury to reach a verdict. *See People v Lee*, 96 NY2d 157, 162. It cannot be said that the average juror is aware of the specialized terminology used in narcotics street sales or the intricacies of how drugs and money are handled to prevent their seizure by police. Expert testimony may aid in understanding such evidence and resolving material issues. *See State v Berry*, 140 NJ 280, 302 (1995). It is not necessarily proper in every drug sale case involving a misidentification defense. Paired with appropriate limiting instructions, it was proper where the undercover officer detailed the sequence of events and interactions of the various individuals around the time of the cocaine sale.

The defendant met the first prong of the *Batson* test (*Batson v Kentucky*, 476 US 79 [1986]), by showing that the prosecution's exercise of peremptory challenges removed seven of 15 African-Americans. She failed to allege facts to support a finding that the challenges had been used to exclude potential jurors because of their race. *See People v Childress*, 81 NY2d 263, 266 (1993). Order affirmed.

Concurrence: [Kaye, J] *Batson* experience shows that peremptory challenges should be, if not entirely eliminated (as many urge), significantly reduced.

Dissent: [Smith, J] The expert testimony was unfairly prejudicial, tying the defendant, without evidence, to a drug organization. It replaced the presumption of innocence with a one of guilt, with the jury being given information on how the defendant got rid of marked money and drugs. A *prima facie Batson* case may be established by statistics alone. The prosecutor should have been required to give race-neutral reasons for its exclusions.

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

People v Chambers, No. 23, 3/19/02

During *voir dire*, a prospective juror acknowledged that in his view, "trained police officers are good observers" and that he "would tend to believe police testimony to some degree." When asked by defense counsel whether he would give police testimony any more weight that anyone else the juror responded, "I would try not to let it affect that. I don't think it would be a problem." and "No, I don't think so." Defense counsel's cause challenge was denied; counsel then used a peremptory challenge and later exhausted all peremptories. The defendant's conviction was affirmed.

Holding: The defendant argues that by using the word "think" in his response, the prospective juror answered equivocally. "Think" is not an automatically equivocal, talismanic word. *See People v Blyden*, 55 NY2d 73, 78. Taken in context, this juror's statements were unequivocal. Denial of the challenge for cause was proper. Order affirmed.

NY Court of Appeals *continued*

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

Guilty Pleas (Alford Plea) (Withdrawal) **GYP; 181(5) (65)**

People v Alexander, No. 22, 3/21/02

The indictment charging the defendant with beating his girlfriend included a count of criminal contempt for violating an order of protection. The defendant entered an *Alford* plea (*North Carolina v Alford* (400 US 25 [1970]) to contempt. Before sentencing, he moved to withdraw his plea claiming that he had not been competent. A psychiatric examination report concluded that he required medication but was neither "incapacitated" nor suffering from psychosis or impaired cognition and was fit to proceed. The examining physicians indicated that the defendant was "emotionally distraught" when he entered the plea. At sentencing, the defense unsuccessfully renewed the motion to withdraw. The defendant's conviction was later affirmed.

Holding: At the plea, the defendant showed no indication of being uninformed, confused or incompetent. The record fails to show that his history of mental illness so stripped him of orientation or cognition that he lacked the capacity to plead. That he was "emotionally distraught" at the plea provides no basis for its withdrawal. *See People v Green*, 75 NY2d 902. His familiarity with the criminal justice system indicates that he was "schooled in the nature of criminal proceedings." *People v Frederick*, 45 NY2d 520, 525. His protestations of innocence have no bearing, as an *Alford* plea does not involve a recitation of guilt. That the victim no longer wished to proceed with the charges does not justify withdrawal, especially in a domestic violence context. Order affirmed.

Dissent: The court should not have accepted the plea without assuring itself that the defendant was competent and without some indication of the prosecution's proof against the defendant. This issue is reviewable on appeal without preservation as the issue goes to the validity of the proceeding itself. *See Cancemi v People*, 18 NY 128, 138.

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

People v Orengo, No. 60 SSM 5, 3/21/02

Holding: The court "properly determined that the sentencing court did not base its determination upon inaccurate information. Here, the record indicates that the sentencing court did not consider any of the prosecutor's inaccurate assertions in its sentencing determination, but predicated that sentence on the nature and details of the particular crime of which defendant was convicted. Moreover, the Appellate Division correctly determined that, as a matter of law, defendant's counsel was not ineffective (*see People v Benevento*, 91 NY2d 708, 713-714 [1998])."

[As found in the Appellate Division opinion at *People v Orengo*, 286 AD2d 344, the prosecution had alleged at sentencing that the defendant had prior convictions. The defendant asserted that these convictions were his cousin's (with whom he shared the same name). This was confirmed by the defendant's probation report. The 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, all right, I'm going to base it upon, this sentence, based upon the crime that was charged."] Order affirmed.

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

Matter of Barron, No. 35, 3/26/02

Holding: "On consideration of the continuation of this Court's January 22, 2002 suspension of Victor I. Barron from the office of Justice of the Supreme Court of the State of New York, Second Judicial District, it is determined that the suspension is continued, without pay, effective immediately (*see Matter of Brennan*, 65 NY2d 564). . . ."

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

Matter of Gibbons, No. 59, 3/26/02

Holding: "On the Court's own motion, based upon Justice Gibbons' representation that he 'will take a voluntary suspension without pay from [his] duties as Town Justice,' it is determined that Kenneth W. Gibbons is suspended, without pay, effective immediately, from the office of Justice of the Glenville Town Court, Schenectady County, pending disposition of his request for review of a determination by the State Commission on Judicial Conduct."

Motor Vehicles (Driver's License) (General) **MVH; 260(5) (17)**

Matter of Brady v Department of Motor Vehicles, No. 41, 4/25/02

The petitioner was charged by the Department of Motor Vehicles with violating Vehicle and Traffic Law (VTL) 392 which provides it is a misdemeanor to deceive in connection with any VTL examination. After a hearing, an Administrative Law Judge (ALJ) determined that the petitioner had deceived when he left a testing area with a portion of a driver's license test. His license was suspended for 60 days. When the petitioner brought an Article 78 proceeding, the court annulled the ALJ's determination. The Appellate Division reversed.

NY Court of Appeals *continued*

Holding: Drivers' licenses may generally be suspended or revoked for any violation of the VTL. A court conviction is not necessary to sustain a revocation or suspension. VTL 510[7]. While the petitioner was not criminally convicted of violating Section 392, the ALJ found that he had engaged in deception. This constituted a violation of 392 and established the predicate for administrative suspension of his license. Because the petitioner failed to submit a copy of the administrative hearing transcript, the issue of whether substantial evidence supported the determination cannot be reviewed. *See Matter of Richmond Hill Serv. Sta. v New York State Dept. of Motor Vehicles*, 92 AD2d 688, 688-689. Order affirmed.

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

People v Abad, No. 44, 4/25/02

Pursuant to the voluntary Taxi/Livery Robbery Inspection Program (TRIP), a police officer stopped cab in which the defendant was riding. Under TRIP, decals are placed on the exterior and interior of a cab providing notice that police may stop and visually inspect the vehicle at any time. Police who briefly stop and inspect a cab bearing such decal may, if the driver consents, open the passenger doors. Occupants may not be removed unless independent factors cause fear for the officer's safety, nor may police demand identification, or detain passengers wishing to leave, in the absence of reasonable suspicion. Police are required to maintain detailed activity logs of all TRIPS stops. The trial court found the program constitutional and its judgment was affirmed.

Holding: Suspicionless vehicle stops may be upheld if found reasonable after balancing "the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown v Texas*, 443 US 47, 50 (1979). In *Muhammad F.* (94 NY2d 136) a predecessor program to TRIP was found unconstitutional under the three-part *Brown* balancing test. Under that program, stops were wholly within the officers' discretion with no written guidelines or log of stops, there was no proof that less intrusive or discretionary means were unavailable to protect drivers, and the steps allowed were very intrusive. Officers' discretion is significantly restricted under TRIP; they can only stop participating vehicles. They must complete detailed activity logs for every TRIP stop, affording the possibility for "post-stop judicial review." *US v Martinez-Fuerte*, 428 US 543, 559 (1976). Consent alone can satisfy 4th Amendment concerns. *See eg Florida v Jimeno*, 500 US 248 (1991). Constructive, rather than actual, notice is sufficient. The challenge based on the location of the decals is rejected. Order affirmed.

Evidence (Hearsay) — **EVI; 155(75)**

Identification (General) — **IDE; 190(17)**

People v Maldonado, No. 45, 4/25/02

Two months after a shooting, the complainant met with a police artist who created a composite sketch of the non-shooter accomplice. This was shown to people who knew the shooter. They referred police to the defendant. He was placed in a line-up and was picked out by the complainant, who then identified him at trial. On cross-examination, the complainant twice identified pictures of the defendant's brother as being of the assailant. The prosecution offered the composite sketch to rehabilitate the witness; a defense objection was sustained. On cross-examination of a detective, the defendant attacked the completeness of the investigation. The prosecution again offered the sketch, arguing that the defense opened the door. Over objection, the court admitted the sketch. The defendant was convicted, and the judgment was affirmed.

Holding: Composite sketches may be admitted as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication. *See People v Coffey*, 11 NY2d 142, 145. Sketches may not be admitted to bolster an identifying witness's testimony or counteract evidence that casts doubt on the reliability of a complainant's identification. *See People v Falterman*, 74 AD2d 584. The defense attack on the completeness of the police investigation here did not suggest that testimony had been fabricated. Therefore, the defense did not open the door to the sketch. Where there was only one witness, the fingerprints found did not match the defendant's, and the gun could not be linked to him, the evidence against the defendant was far from overwhelming; the harmless error doctrine does not apply. Order reversed.

Flight (General) — **FLI; 170(6)**

Search And Seizure Arrest/Scene of the Crime Searches [Probable Cause (Furtive Conduct)]) (General) (Motions to Suppress [CPL Article 710]) — **SEA; 335(10[g(i)]) (42) (45)**

People v Woods, No. 48, 4/25/02

Police received reports about a gunpoint robbery involving three African-American men. One report stated that the complainant, dressed all in white, was waiting on a street corner for assistance. Less then a minute after that report, police arrived at the location, observed the defendant, who was an African-American male dressed all in white, and inquired about his well being. The defendant fled and the officers, now believing he might have been a perpetrator, pursued. The defendant threw his jacket

NY Court of Appeals *continued*

before being caught. Police found a gun and 20 bags of marijuana. The court denied the defendant's motion to suppress the gun and marijuana. His resulting conviction was affirmed.

Holding: The determination of whether reasonable suspicion existed involves mixed questions of law and fact. The findings of the court below are binding if there is evidence in the record to support them. *See People v Martinez*, 80 NY2d 444, 448.

Flight, combined with other specific circumstances, can give rise to reasonable suspicion supporting police pursuit. *See People v Sierra*, 83 NY2d 928, 929. The closeness in time between the reported robbery and the officers' arrival on the scene, the matching description indicating the defendant's involvement in the reported incident, and his flight, provide record support for the determination below. Order affirmed.

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

Sentencing (Delay) **SEN; 345(25)**

People v Campbell, No. 43, 4/30/02

The defendant pled guilty to third-degree attempted sale of drugs. His plea colloquy included a comprehensive discussion of the waiver of the right to appeal, and he executed written waivers. He failed to appear for sentencing. After he was paroled on another offense, he was returned on bench warrants in this case. He unsuccessfully moved to vacate his plea and dismiss the indictment due to the two-year delay, claiming loss of jurisdiction to sentence. The Appellate Division affirmed based only on the waiver of appeal.

Holding: *People v Seaberg* (74 NY2d 1 [1989]) did not exclude the possibility that in certain circumstances, an appellate claim could be reviewed despite a waiver of appeal. Challenges to the legality of a sentence address the power of the court to impose sentence. *People v Callahan*, 80 NY2d 273, 281. A meritorious claim of undue delay under Criminal Procedure Law 380.30(1) affects the legality of sentence and survives a general waiver of the right to appeal. This ruling "should not be construed as impeding the Appellate Division in this case from affirming Supreme Court's factual determinations, which found the delay was due solely to defendant's intentional misrepresentations and conduct." The defendant was found to have missed court appearances, and to have used four aliases, nine dates of birth, and five places of birth, resulting in four different NYSID identifying numbers. Order reversed, matter remanded.

Informants (General) **INF; 197(20)**

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

People v Farrow, No. 58 (4/30/02)

Based on information received from a confidential informant, police went to a location and observed the defendant deliver crack cocaine to another person. The police were unable to produce the informant for a *Darden* hearing (*People v Darden*, 34 NY2d 177). The trial court refused to suppress the evidence recovered. The Appellate Division reversed.

Holding: This case is distinguishable from *Darden*, where a carrier of drugs from New York City was arrested at the Rochester airport based on an informant's testimony that a large shipment of drugs was coming in from New York City. Also distinguishable is *People v Adrion* (82 NY2d 628), in which an informant said that stolen luggage could be found at a specified location and the defendant was arrested when police saw him there with boxes. In those cases, probable cause did not exist without the information provided by the informant. Given that probable cause could be established by the independent observations of police, no *Darden* hearing was necessary. Order reversed, case remitted.

Second Department

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

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

People v Jackson, No. 1996-07218, 2nd Dept, 9/10/01

Holding: The determination whether there was a *de facto* arrest is based on what a reasonable person, innocent of any crime, would have thought when in the defendant's position. *See People v Hicks*, 68 NY2d 234 240. The defendant was stopped on the street under suspicion of a crime six days earlier, taken in a police car to the station, had his wallet searched for identification, and was not informed that he would be released if he were not arrested. When he denied involvement in the crime, he was place in a locked cell until the complainant could arrive for a show-up identification. The arrest was not based on probable cause. The subsequent identification by the complainant should have been suppressed. The complainant's in-court identification of the defendant should have been prohibited, in the absence of a pretrial independent source hearing. *See People v Riley*, 70 NY2d 523. The error was not harmless. *See People v Gethers*, 86 NY2d 159. Judgment reversed, suppression granted, and new trial ordered. (Supreme Ct, Kings Co [Martin, J])

Second Department *continued*

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

People v James, No. 1998-02311, 2nd Dept, 9/17/01

Holding: The motion of assigned counsel to be relieved is granted and new appellate counsel is assigned to raise any appropriate issues. An arguable issue does exist concerning the excessiveness of the sentence. *See People v Taylor,* 235 AD2d 508. The original assigned counsel indicated that the defendant suggested that an issue relating to the sentence be raised on appeal. Counsel concluded in the brief that the sentence was not excessive, thereby disparaging the defendant's claim and precluding the defendant from effectively presenting it in a *pro se* brief. *See People v Herrera,* 282 AD2d 472. Motion granted. (Supreme Ct, Kings Co [Gary, J])

Accomplices (General) **ACC; 10(22)**

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

People v Bell, No. 1999-03244, 2nd Dept, 9/24/01

Holding: "A person is guilty of criminal facilitation in the second degree 'when, believing it probable that he is rendering aid to a person who intends to commit a class A felony, he engages in conduct which provides such person with means or opportunity for the commission thereof and which in fact aids such person to commit such class A felony' (Penal Law § 115.05)." Facilitators must also believe that they are probably rendering assistance to someone who intends to commit a class A felony at the time aid is given. *See People v Gordon,* 32 NY2d 62, 64-65. Here, the prosecution failed to prove each and every element of the crime charge beyond a reasonable doubt, because there was no evidence from which to rationally infer that the defendant believed he was rendering aid to a person intending to commit an A felony. Judgment reversed. (Supreme Ct, Kings Co [Lott, J])

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

Juveniles (Detention) (General) **JUV; 230(35) (55)**

O'Neal v Archdioceses of New York, No. 2000-08362, 2nd Dept, 9/24/01

Holding: The plaintiff was a resident in a non-secure facility for youths. The defendant punched the plaintiff in the face, breaking his jaw. Three facility staff members in the cafeteria observed the incident. The respondent facility was under a duty to provide adequate supervision to the youths placed in their care to protect them from foreseeable injuries proximately caused by the acts of fellow residents of the facility. *See Mirand v City of New York,* 84 NY2d 44. The respondents, who are not insurers of residents' safety, established *prima facie* that the defendant's impulsive action could not reasonably have been anticipated; the plaintiff acknowledged that he had not had any previous confrontations with the defendant resident. The incident occurred in so short a time span that any lack of supervision was not the proximate cause of the injury. *See Convey v City of Rye School Dist.,* 271 AD2d 154, 160. "The plaintiffs failed to present evidence sufficient to raise a triable issue of fact with respect to the respondents' liability." Summary judgment was properly granted. Judgment affirmed. (Supreme Ct, Queens Co [LaTorella, J])

Dissent: [Crane, J] The facility had notice that the defendant resident presented a danger. Prior conduct need not have been directed against the plaintiff; acts of violence against others may suffice. *See Moores v City of Newburgh School Dist*., 237 AD2d 265. The defendant and plaintiff residents argued for several minutes before the punch.

Double Jeopardy (Mistrial) **DBJ; 125(20)**

Sentencing (Excessiveness) **SEN; 345(33)**

People v Boone, No. 1998-07335, 2nd Dept, 10/1/01

Holding: After finding out that his 14-year old daughter had been sexually assaulted, the defendant searched for one of the two alleged assailants and killed him. At trial, the prosecutor elicited evidence that was irrelevant and possibly prejudicial to the defendant. There is no indication that the prosecution had a bad-faith intent to provoke a mistrial. *See Oregon v Kennedy*, 456 US 667 (1982). Absent bad-faith intent, the misconduct does not constitute the type of prosecutorial overreaching that requires the barring of reprosecution on double jeopardy grounds. *People v Copeland*, 127 Ad2d 846, 847. The seven-to-fourteen-year sentence should be reduced to four to eight years. The defendant, a 42-year-old gainfully employed father who committed the act after visiting his daughter in the hospital, has consistently expressed remorse, cooperated with the police, and was shown to have acted under extreme emotional disturbance. Judgment modified and as modified, affirmed. (Supreme Co, Kings Co [Gerges, J])

Dissent: [Smith, J] The sentence imposed was appropriate. The defendant got a gun and hammer from his apartment, sought the decedent, and when the decedent turned to flee, shot him in the back and them beat him with the hammer until he was dead. This court should not be seen to condone a vigilante response.

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

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

Second Department *continued*

People v Owens, No. 2001-01349, 2nd Dept, 10/1/01

The complainant accused the defendant of physically assaulting her in his apartment. He was convicted of third-degree assault.

Holding: Admitted into evidence was a tape-recorded call to 911, on which the defendant admitted to beating the complainant. At trial, the defendant denied beating the complainant. He claimed that she was drunk and was injured from falling. The defendant testified that the complainant left threatening messages on his answering machine the day after the incident. He wanted to have the complainant arrested for aggravated harassment and gave that tape to the police, but before any requests for the return of the tape by the defendant, the police destroyed it. The defendant moved to dismiss the indictment as a sanction for the destruction of the tape. The tape was destroyed after the defendant stated he would not press charges, so the destruction was not done in bad faith. Dismissal was properly denied. *See People v Haupt*, 71 NY2d 929. The defendant also contended that the prosecutor's removal of the 911 tape admitted into evidence to review it in preparation for summation was misconduct warranting reversal. Even if removing the tape was improper, there is no showing of prejudice to the defendant or deprivation of his right to a fair trial. *See* CPL 280.10; *People v MaGee*, 254 AD2d 825. The sentence of one year was excessive and is reduced to six months. Judgment modified. (County Ct, Putnam Co [Miller, J])

Jails (Guards) **JAL; 212(15)**

Westchester County Correction Officers Benevolent Association, Inc, v County of Westchester, No. 06839, 2nd Dept, 10/15/01

Holding: As a result of various acts of sexual misconduct perpetrated by male corrections officers on female inmates, the respondents replaced male corrections officers in the housing areas of facilities for female inmates with female corrections officers. The petitioners claimed that the replacement violated a 1995 order of the Supreme Court, confirming an arbitration award upholding the rights of corrections officers to select their assigned posts pursuant to the provisions of a collective bargaining agreement. The Supreme Court denied the application to hold the respondents in contempt. "The 1995 order did not address the instant controversy and thus the new same-sex policy was not violative thereof (*see, Ketchum v Edwards*, 153 NY 534)." The respondents' alleged contractual right to limit positions to a particular sex was not relevant to whether the 1995 order was violated, and it is not addressed. Judgment affirmed. (Supreme Ct, Westchester Co [Coppola, J])

Defenses (Battered Spouse Syndrome) (General) **DEF; 105(4) (31)**

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

People v Lovelace, No. 1998-05471, 2nd Dept, 10/22/01

Holding: The defendant killed his stepfather and asserted a justification defense. The stepfather had physically abused the defendant, his mother, and his stepbrother for several years. As a result, the family had been seeing a social worker who, along with the defendant's expert, a psychologist, testified at trial. Although the defendant was allowed to introduce some testimony about general manifestations of "battered child/post-traumatic stress syndrome," he was precluded from introducing the social worker's records into evidence. Refusing to admit into evidence the social work records related to diagnosis and treatment was error. *See People v Kohlmeyer*, 284 NY 366. The error was not harmless under the circumstances of this case. The court improperly exercised its discretion in limiting defense redirect examination of two witnesses. *See People v Barksdale*, 188 AD2d 538. Not allowing the defendant's expert witness and the social worker to testify that the defendant suffered from "battered child syndrome" was also error, though unpreserved. *See People v Taylor*, 75 NY2d 277. Permitting the defendant to elicit testimony regarding the general manifestations of "battered child syndrome," but prohibiting testimony regarding the examination and diagnosis of the defendant, was error. *People v Cronin*, 60 NY2d 430. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [D'Emic, J])

Concurrence in Part, Dissent in Part: [McGinity, J] The errors were harmless.

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

People v Butler, No. 1999-11608, 2nd Dept, 10/22/01

Holding: "Where there is evidence that the state of mind of a prospective juror is likely to preclude him or her from rendering an impartial verdict (*see*, CPL 270.20[1][b]), the juror must state a personal, unequivocal assurance that he or she will be able to render verdict based solely on the evidence adduced at trial (*see*, *People v Arnold*, 96 NY2d 358; *People v Torpey*, 63 NY2d 361). Here, one of the prospective jurors gave equivocal responses when questioned by counsel as to whether the fact that the defendant had a prior felony conviction would prevent her from being fair and impartial. The trial court failed to obtain a personal, unequivocal declaration or assurance of impartiality from that prospective juror. Therefore, because of the possible predisposition of that prospective juror against the defendant, the defendant

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was not assured of his right to a fair trial before an unbiased fact-finder (*see. . . People v Johnson*, 94 NY2d 600)." Judgment reversed. (Supreme Ct, Queens Co [Latella, J])

Juries and Jury Trials (General) (Jury System) — **JRY; 225(37) (44)**

Matter of Taylor v People, No. 2001-07813, 2nd Dept, 10/22/01

Holding: "Proceeding pursuant to Judiciary Law § 509, by the petitioner, a defendant in a criminal action entitled *People v John Taylor*, pending trial, *inter alia*, for murder in the first degree under Queens County Indictment No. 1012/2001, to direct the New York State Office of Court Administration and the Commissioner of Jurors of Queens County to disclose to the petitioner's counsel all juror qualification questionnaires and a record of persons who were found not qualified or disqualified or who were exempted or excused, and the reasons therefor, for Queens County, from 1991 to the present, or, in the alternative, to direct the Commissioner of Jurors of Queens County and the New York State Office of Court Administration to provide these materials to the court, and seal the materials for appellate review." Petition denied, matter dismissed.

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

People v Truss, No. 1998-02091, 2nd Dept, 10/29/01

Holding: Assigned counsel submitted an *Anders* brief (*Anders v California*, 386 US 738), stating that his review of the record revealed "no meritorious issues which could be raised on appeal." The test, however, is whether any issues to be raised would be "wholly frivolous." *People v Stokes*, 95 NY2d 633, 636. Moreover, the brief submitted was insufficient, as it contained no reference to the facts but only a conclusion on the ultimate merit of the defendant's appeal. A "thorough, lawyer-like piece of work that reveals counsel's conscientious examination of the facts and law involved in appellant's case" is required for *Anders* dismissal. *People v De Vito*, 188 AD2d 544, 545. Independent review of the record discloses arguable issues with respect to, *inter alia*, whether the sentence imposed was excessive, which cannot be considered wholly frivolous. Motion granted, counsel relieved, new counsel assigned. (County Ct, Westchester Co [LaCava, J])

Accomplices (Accessories) — **ACC; 10(5)**

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

People v Carr-El, No. 1998-03907, 2nd Dept, 10/29/01

Holding: The defendant contended that the prosecution failed to prove second-degree robbery beyond a reasonable doubt. He alleged that the evidence was insufficient to show that he was actually present when the codefendant threatened to use force against the complainant or that he shared the codefendant's intent to commit a forcible theft. Evidence showed that the defendant and the codefendant entered a train where the complainant was sleeping. While the defendant acted as a lookout, the codefendant sliced open the complainant's pocket and stole a beeper. The complainant woke up and approached the defendants demanding his property. The codefendant threatened to hit him. Undercover officers arrested the defendant and codefendant. The codefendant's threat of physical force, aided by the defendant's being actually present, raised the crime to second-degree robbery. Penal Law 160.00[1], Penal 160.10[1]. The prosecution must prove that an accessory possessed the mental culpability necessary to commit the crime charged and acted in some way to further the commission of the crime. *See* Penal Law 20.00, *People v Allah*, 71 NY2d 830. The jury here could have reasonably concluded that the defendant shared a community of purpose to use or threaten force to retain stolen property. Proof of a defendant's role as a lookout has been held sufficient to establish accessorial liability. *See People v Coulter*, 240 AD2d 756. Judgment affirmed. (Supreme Ct, Queens Co [Finnegan, J])

Concurrence in Part, Dissent in Part: [McGinity, J] There is no evidence that the defendant intended to use or threaten force or was present when his codefendant spoke.

Alibi (General) — **ALI; 20(22)**

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

People v Delarosa, No. 1998-11716, 2nd Dept, 10/29/01

Holding: The defendant claimed he was talking to his then fiancée at the time of the charged robbery. He submitted phone records to defense counsel that showed a six-minute call from the defendant's home to his fiancée's office. Counsel was aware of the defendant's contention as early as December 1996, but served no notice of alibi until June 1997. The prosecution moved to preclude alibi testimony due to untimely service. After the defendant was convicted and sentenced, he unsuccessfully moved to vacate the judgment for ineffective assistance of counsel. A pretrial colloquy before the court suggested that counsel failed to realize that evidence about the call to the fiancée constituted alibi evidence. A single, substantial error which seriously compromises a defendant's right to a fair trial constitutes ineffective representation. *See People v Hobot*, 84 NY2d 1021, 1022. The court erred in

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summarily denying the motion. *See People v Thomson*, 279 AD2d 644. Order reversed, matter remitted for a hearing. (Supreme Ct, Queens Co [Cooperman, J])

Dissent: [Adams, J] Given the uncertain value of the proposed alibi evidence and counsel's vigorous pursuit of a misidentification defense, it cannot be said that the preclusion of alibi evidence was a result of ineffective assistance of counsel.

Instructions to Jury (Witnesses) **ISJ; 205(55)**

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

People v Singh, No. 03672, 2nd Dept, 10/29/01

Holding: After the prosecutor's summation, the defense objected to the presence in the courtroom of one of the police witnesses, and requested an interested-witness charge about that person. The prosecutor argued that the police officer had an absolute right to attend the proceedings because both the trial and the courtroom were open to the public. The trial court *sua sponte* closed the courtroom over the defendant's objection, stating that the "'public part of this trial is over.'" After the jury rendered its verdict, the defendant moved under CPL 330.30 to set aside the verdict. He argued that he had been deprived of his constitutional right to a public trial when the judge closed the courtroom before charging the jury until after the announcement of the verdict. The closure was manifest error. *See Waller v Georgia*, 467 US 39 (1984); *People v Tolentino*, 90 NY2d 867, 869. The interested-witness charge is disapproved. It departed from the Criminal Jury Instructions "and engrafted a concept that the defendant is 'the most' interested witness." Judgment reversed, new trial ordered.

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

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

People v Vann, No. 2000-10791, 2nd Dept, 10/29/01

The defendant collected unemployment benefits while working part-time from October 1995 to January 1996. He was charged with grand larceny three years later, based on information from the Department of Labor. The defendant contended in a motion to dismiss the indictment that his right to due process was violated by the delay. The motion was denied.

Holding: "'[A] suspect's primary protection against protracted delay in being brought to bar ordinarily is the Statute of Limitations, but delay in arresting or lodging charges over a lesser period of time may, in special circumstance, impair the right to a fair trial' (*People v Fuller*, 57 NY2d 152, 159)." The prosecution is not chargeable with the time that the Department of Labor spent investigating this case. The defendant's claim has been examined in light of the factors set forth in *People v Taranovich* (37 NY2d 442, 445), and he was not denied the right to a speedy trial. Judgment affirmed. (Supreme Ct, Westchester Co [Rosato, J])

Sentencing (Concurrent/ Consecutive) (Modification) **SEN; 345(10) (55)**

People v Romain, Nos. 1998-00224, 2000-11368, 2nd Dept, 11/5/01

The defendant was convicted of two counts of first-degree murder for killing one person and one count of second-degree murder for killing another, after he stabbed both decedents during a burglary. He was initially sentenced to consecutive indeterminate terms of 25 years to life on each first-degree murder count. These terms were to run concurrently with the term imposed for second-degree murder. The Supreme Court granted the defendant's motion to vacate the consecutive sentences. The sentences were modified so that those imposed for first-degree murder ran concurrently, but were to be served consecutively to the second-degree murder sentence. The original direction that the sentence for second-degree murder was to run concurrently with the terms imposed for first-degree murder was legal. The direction that the two first-degree murder terms were to run consecutively was illegal. Once that illegality was corrected, "there was no other defect to rectify (*see, People v Yannicelli*, 40 NY2d 598.)" The court had no authority to modify the already-commenced, legal concurrent sentence for second-degree murder. *See People v Vasquez*, 88 NY2d 561, 580-581. Sentence modified so that all terms of imprisonment run concurrently, and as modified, affirmed.

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

People v Innis, No. 1999-10300, 2nd Dept, 11/5/01

Holding: The defendant's contentions as to the confirmatory nature of a pretrial identification and sufficiency of the evidence are rejected. Resentencing is required, as noted in the codefendant's appeal, *People v Ramsey*, __ AD2d ___. "[T]he remarks by the sentencing court demonstrated that it improperly considered crimes of which the codefendant was acquitted as a basis for sentencing (*see, People v Santiago*, 277 AD2d 258; *People v Grant*, 191 AD2d 297). The sentencing court committed the same error in sentencing the defendant. Although the defendant did not raise this issue on appeal, in the exercise of our interest of justice jurisdiction, we grant him the same relief granted to his codefendant." Judgment modified, sentence vacated, matter remitted for resentencing before a different Justice.

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Jurisdiction (General) **JSD; 227(3)**

Search and Seizure (Search Warrants [Suppression]) **SEA; 335(65[p])**

People v Chrysler, No. 1999-08856, 2nd Dept, 11/13/01

A City of Newburgh detective sought a warrant from a judge in the City Court to search the defendant's premises in the Town of New Windsor. The defendant was charged with a felony, second-degree possession of marijuana, based on the quantity found. The warrant application did not specify an amount of marijuana.

Holding: The City Court lacked geographical jurisdiction over offenses in the Town of New Windsor. County Court upheld the search warrant on the basis that the City Court had preliminary jurisdiction over the offense(s) alleged in the application. That premise was incorrect. "A city court does not have preliminary jurisdiction to issue a search warrant for premises outside its territorial borders, where the underlying offense was also committed outside its borders, merely because that offense was a felony." The prosecution's reliance on Criminal Procedure Law 100.55(6) was misplaced. That section, providing that felony complaints may be filed with any town or village court when the felony was allegedly committed in some town of the county, is not applicable to city courts. There is no comparable provision in CPL 100.55. A city court may issue a warrant if the town court having jurisdiction is not available, which was not claimed here. An accusatory instrument may be filed in a city court for offenses outside the city if the conduct had or was likely to have a particular effect on the city, and was committed with knowledge of that effect. CPL 20.40(2)(c); *and see* CPL 20.50. The detective's application indicated that investigation of drugs in the City of Newburgh had led to the discovery of the defendant's activities. It could be inferred that a search of the defendant's premises would uncover evidence of drug sale and possession in the city. Judgment affirmed.

Unlawful Imprisonment (Evidence) **UNI; 377(15)**

Murnane v State of New York, No. 2000-06510, 2nd Dept, 11/13/01

Holding: The claimant's murder conviction was reversed due to legally insufficient evidence. He had served five and a half years. He brought suit under Court of Claims Act 8-b, alleging unjust conviction and imprisonment. While he had presented an alibi defense, he did not unequivocally account for his whereabouts during the time the crime occurred. The credibility of alibi witnesses and the truth of their testimony is for the trier of fact. *See Robinson v State of New York*, 228 AD2d 52. The Court of Claims properly found that the claimant failed to show by clear and convincing evidence that he was innocent and did not contribute to his conviction. *See Taylor v State of New York* 266 AD2d 385. He had eluded police for three days after he knew they wished to question him, and gave a statement bordering on an admission, affirmatively contributing to his conviction. Judgment affirmed.

Admissions (Interrogation) (Spontaneous Declaration) **ADM; 15(22) (37)**

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

People v Facciolo, No. 1999-01139, 2d Dept, 11/19/01

The defendant was charged with second-degree manslaughter for a shooting that occurred eight years before his arrest. After being read his *Miranda* rights, he said he did not want to say anything and wanted to speak with his lawyer. Before his attorney arrived, a detective questioned him about where he had gone after the shooting. The defendant replied that he had "thought of turning himself in, that the eight years after the shooting had been difficult, and that he had not seen members of his family for years."

Holding: Once the defendant was taken into custody and requested the assistance of counsel, he should not have been questioned in counsel's absence. *See People v Davis*, 75 NY2d 517, 521. The limited spontaneous statements exception to this rule does not apply here. By introducing the topic of how the defendant lived after the shooting, the detective induced, provoked, or encouraged the defendant's statements, making them neither genuine nor spontaneous. *See People v Maerling*, 46 NY2d 289, 302-303. Admission of these statements was not harmless since the prosecution relied upon the statements to show consciousness of guilt.

Reversal is also warranted because the prosecutor repeatedly implied during summation that the four prosecution witnesses were reluctant to testify because they were threatened by the defendant. These comments were not within the "four corners of the evidence" and highly prejudicial. *See People v Ashwal*, 39 NY2d 105, 109; *see also People v Heppard*, 121 AD2d 466, 468. While challenge to these comments was not preserved for review, the issue is reached in the interest of justice. Judgment reversed. (Supreme Ct, Kings Co [Marrus, J])

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

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

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People v Santiago, Nos. 1999-04749, 1999-04751, 1999-04752, 2d Dept, 11/19/01

The defendant pled guilty to attempted second-degree assault, two counts of first-degree contempt, and two counts of second-degree contempt.

Holding: "The transcript of the defendant's plea proceeding does not indicate that he was told, and it cannot be implied therefrom that he understood, that if he contacted the complainant, the Supreme Court could impose harsher sentences than those promised. Accordingly, although the defendant contacted the complainant and thereby violated an order of protection, the Supreme Court could not impose sentences greater than those for which the defendant had bargained, without first affording him an opportunity to withdraw his pleas (*see, People v Curcio*, 276 AD2d 639. . .)." Judgment reversed. (Supreme Ct, Kings Co [D'Emic, J])

Felonies (General) **FEL; 168(7)**

Sentencing (Enhancement) **SEN; 345(32)**

People v Ferdinand, No. 1999-03247, 2d Dept, 11/26/01

The defendant's status as a predicate felon was based upon his conviction of escape in Tennessee.

Holding: To use an out-of-state felony conviction as a predicate for enhanced sentencing, it must be established that the out-of-state conviction is a felony in New York. *See People v Sailor*, 65 NY2d 224 *cert den* 474 US 982. The Tennessee escape statute criminalizes a number of different acts, some of which are felonies in New York, others that are misdemeanors. The court did not specify which Penal Law section it found comparable to Tennessee's escape statute. Appeal held in abeyance, matter remitted for a hearing to determine if the Tennessee conviction is sufficient to serve as a predicate felony. *See People v York*, 133 AD2d 130. (Supreme Ct, Kings Co [Ruchelsman, J])

Assault (Evidence) **ASS; 45(25)**

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

People v McFarlane, No. 1999-07396, 2d Dept, 11/26/01

The defendant was convicted of second-degree assault and other charges.

Holding: "To sustain a conviction for assault in the second degree pursuant to Penal Law § 120.05(3) there must be proof beyond a reasonable doubt that the defendant 'with intent to prevent * * * police officer * * * from performing a lawful duty * * * cause[d] physical injury to such a * * * police officer'. Physical injury is defined as an 'impairment of physical condition or substantial pain' (Penal Law § 10.00[9]). The evidence adduced was legally insufficient to establish physical injury, i.e., that the police officer suffered substantial pain within the meaning of Penal Law § 10.00(9) (*cf., Matter of Philip A.*, 49 NY2d 198). Moreover, no evidence was adduced that the officer suffered any impairment of physical condition. Consequently, the conviction of assault in the second degree must be vacated." Judgment modified, and as modified, affirmed. (Supreme Ct, Queens Co [McDonald, J])

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

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

People v Smith, No. 2000-02945, 2d Dept, 11/26/01

Holding: The defendant objected to many of the prosecutor's comments in summation. Some objections were not properly preserved for review but are reviewed in the interest of justice. The prosecutor repeatedly made unqualified pronouncements of the defendant's guilt such as, "of course he did it. This isn't an issue of who did it," injecting her personal views. The prosecutor improperly vouched for the witnesses' credibility (*see People v Bailey*, 58 NY2d 272), She improperly appealed to the sympathy of the jury (*see People v Robinson*, 260 AD2d 508) by commenting that the victim was "courageous" for going to the police and that the victim was "ill" but still appeared. Referring to the evidence as "uncontroverted' was a veiled and improper reference to the defendant's failure to testify and improperly shifted the burden of proof. *See People v Torres*, 223 AD2d 741. While none of these remarks by itself would warrant a new trial, their cumulative effect deprived the defendant of a fair trial. *See People v Calabria*, 94 NY2d 519. The evidence was not overwhelming in this one-witness identification case, so the error cannot be deemed harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, J])

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

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

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

People v Gioeli, No. 2000-07853, 2d Dept, 11/26/01

At a jury trial, the defendant was convicted of second-degree rape, second-degree sexual abuse, and endangering the welfare of a child.

Holding: The verdict was against the weight of the evidence. *See* CPL 470.15[5]. The credibility of the complainant was severely impeached. She testified that she was raped on or around August 30, 1996. On August 28, 1996, the defendant had undergone surgery to reduce swelling in his right testicle. The complainant alleged that she was raped by the defendant in September 1995, but later testimony revealed that the defendant had back sur-

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gery on Aug. 16, 1995 and wore a brace for three months. The complainant had been seen at two hospitals for vaginal bleeding on Jan. 3 and 4, 1993, less than a month after the first alleged rape, at which time she had normal genitalia with no bruising or swelling. "Even assuming the verdict was not against the weight of the evidence, pursuant to our interest of justice jurisdiction (*see*, CPL 470.15[3][c]), we would reverse . . . because the evidence in this case leaves us 'with a very disturbing feeling that guilt has not been satisfactorily established; that there is a grave risk that an innocent man has been convicted.' (*People v Crudup*, 100 AD2d 938, 939)." Judgment reversed, indictment dismissed. (Supreme Ct, Suffolk Co [Mullin, J])

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

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

Matter of Weinstock, No. 2001-00633, 2d Dept, 11/26/01

Holding: The court erroneously denied a petition to authorize assisted outpatient care for the respondent. The burden of establishing by clear and convincing evidence that the respondent "had a history of noncompliance with treatment, resulting in one or more acts, attempts, or threats of 'serious violent behavior'" in the preceding 48 months was met. *See* Mental Hygiene Law § 9.60[c][4][ii]. The respondent's treating psychiatrist testified that the respondent had a history of not taking his medication whenever possible, of showing no medication in his blood, of boasting that he would not take medication when he was released, and of decompensating, becoming paranoid and violent, when not medicated. The psychiatrist testified to two violent events occurring while the respondent was unmedicated, an assault on his sister in 1997 and the stabbing of an employee in 1999. Contrary to the respondent's position, Mental Hygiene Law 9.60(c)(4)(ii) does not eliminate from consideration violent acts committed during hospitalization. The record establishes the respondent's need for assisted outpatient treatment by clear and convincing evidence. The court could not have arrived at its determination on any fair interpretation of the evidence. *See* Mental Hygiene Law 9.60(j)(3); *Matter of Manhattan Psychiatric Center*, 285 AD2d 189. Judgment reversed, petition granted, matter remitted for an order for assisted outpatient treatment. (Supreme Ct, Kings Co [Cutrona, J])

Witnesses (Confrontation of Witnesses) (Cross Examination) (Experts) **WIT; 390(7) (11) (20)**

People v Baranek, No. 1999-01682, 2d Dept, 12/3/01

The defendant was convicted of charges including burglary, trespass, and robbery based on alleged encounters with the complainant, who had a 20-year psychiatric history. Records from her most recent hospitalization indicated that her symptoms included auditory hallucinations and "'[p]ersecutory delusions'" that someone had been breaking into her home. At a pretrial hearing, a forensic psychiatrist testified for the defense that the complainant was not competent to testify. The court disagreed, but noted that the defense would not be precluded from cross-examination as to her condition. At trial, a different judge ruled that the complainant's medical condition and medical records were inadmissible unless they related to the time of the incident. The hospital records were not admitted, nor was the defendant allowed to call its expert.

Holding: While the defendant did not properly preserve all claims (CPL 470.05[2], appellate review is warranted in the interest of justice. *See* CPL 470.15[6][a]. The defendant was constitutionally entitled to confront the witnesses against him, by showing that the primary prosecution witness's capacity to perceive and recall events was impaired by a psychiatric condition. *See People v Rensing*, 14 NY2d 210. The restrictions imposed kept the defendant from presenting his theory of the case. *Cf People v Sobers*, 272 AD2d 418. Disallowing introduction of the complainant's hospital records was error (*see People v Davis*, 225 AD2d 449, 451), as was precluding expert testimony regarding the complainant's condition. *See People v Parks*, 41 NY2d 36, 47. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Kohm, J])

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

Misconduct (Defense) **MIS; 250(5)**

Matter of Kudisch, No. 2000-01637, 2d Dept, 12/10/01

Holding: In a disciplinary hearing instituted by the Grievance Committee, the special referee properly sustained all of the following charges. Charge One: the respondent engaged in conduct involving fraud, dishonesty, deceit, and misrepresentation in violation of DR 1-102(A)(4) of the Code when he failed to notify the court that he had been retained by the mother of a client who had assigned counsel appointed to him. He failed to submit any motions or prepare a brief on the client's behalf and failed to reimburse him any portion of his unearned legal fee until this complaint was filed. Charge Two: the respondent neglected a legal matter entrusted to him in violation of DR 6-101(A)(3) by failing to answer numerous inquires from the mother of the above client concerning the status of her son's appeal. Charge Three: the respondent engaged in conduct involving fraud, dishonesty, deceit, and misrepresentation, in violation of DR 1-102(A)(4) when he failed to timely file a note of issue with

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the court but told his client that he had and misrepresented the status of a pending motion. Charge Four: the respondent failed to properly withdraw from a litigated matter and return a client's file in violation of DR 2-110(A)(2), (B) when he, believing a client's case no longer viable, failed to move to be relieved as counsel and ignored numerous requests from his clients for copies of their file. The respondent's disciplinary history consists of three admonitions and one letter of caution. He is suspended from the practice of law for two years.

Bail and Recognizance (General) (Right to) — **BAR; 55(27) (40)**

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

Matter of Catterson, No. 2001-09126, 2d Dept, 12/13/01

Holding: On Oct. 11, 2001, the defendant pled guilty to a class B and a class D felony for offenses against a child. The respondent Justice of the County Court deferred formal acceptance of the plea until Jan. 3, 2002 to allow the defendant to remain free through the holidays. This CPLR article 78 petition in the nature of mandamus was brought to compel the Justice to immediately remand the defendant. As amended effective Feb. 1, 2001, CPL 530.40(3) provides that "a superior court may not order recognizance or bail, or permit a defendant to remain at liberty pursuant to an existing order, after he [or she] has been convicted of: . . . any class B or class C felony . . . committed . . . against a person less than eighteen years of age. In [such] case the court must commit or remand the defendant to the custody of the sheriff." The record shows that the defendant entered a valid and enforceable plea at the time of allocution to a class B felony involving a person less than 18 years of age. The respondent Justice had no authority to circumvent the automatic remand provisions of CPL 530.40(3). Petition granted, the respondent directed to comply.

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

Identification (Show-ups) (Suggestive Procedures) — **IDE; 190(40) (50)**

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

People v Dubinsky, No. 1998-09204, 2d Dept, 12/17/01

Holding: Police stopped the defendant following a robbery. He was alone, walking toward the scene of the crime that had occurred 15 minutes earlier. The two robbers had been described as white males 15 to 16 years old, wearing dark blue or black jackets. The arresting officer said he saw other white male teenagers in the busy commercial district but did not recall if any were wearing blue or black jackets. His testimony showed that he stopped the defendant because he recognized him as someone who had been arrested before. There was no reasonable suspicion to stop the defendant, and the resulting identification testimony should have been suppressed. *See People v Choy*, 173 AD2d 883. The showup that followed was unduly suggestive (*see People v McLaughlin*, 132 AD2d 712), where the arresting officer told the witness to look in the "general direction" of the defendant while a spotlight was shining on him. Before the defendant's new trial, the prosecution is entitled to a chance to show that the witness's in-court identification resulted from independent recollection. *See gen US v Crews*, 445 US 463 (1980). Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Dowling, J])

Alibi (General) — **ALI; 20(22)**

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

People v Evans, No. 1998-11060, 2nd Dept, 12/17/01

Holding: The trial court precluded testimony by the defendant's father that the defendant had called him collect from Virginia approximately 10 hours after the shootings with which the defendant was charged. Because this evidence would not have accounted for the defendant's whereabouts during or shortly after the crime, it was not alibi evidence. The defense was not required to disclose the father's name on an alibi notice. *See People v Bennet*, 128 AD2d 540. The evidence against the defendant not being overwhelming, the error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Hanophy, J])

Guilty Pleas (General) (Vacatur) — **GYP; 181(25) (55)**

Sentencing (Addiction, Effect on Sentencing) (Alternatives to Incarceration) — **SEN; 345(2) (7)**

People v Rodriguez, No. 1999-02731, 2nd Dept, 2/24/01

The defendant was warned when he pled guilty to burglary that if he failed an inpatient drug treatment program, he would be sentenced to seven years imprisonment. He was returned to court for having relapsed and been discharged from the program. He told the court that the program was in disarray and he was looking for another. Defense counsel said at a subsequent hearing that a counselor in the program had been selling drugs to the patients and was incarcerated, and that counsel had not had an opportunity to investigate allegations of pervasive drug problems in the program. The court found

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that the defendant's relapse alone constituted a failure to fulfill the plea agreement.

Holding: Implicit in the a promise of treatment as an alternative to incarceration is access to a facility that will provide a reasonable opportunity to deal with addiction and complete a program designed to that end. Proof of an unfulfilled promise warrants vacating the plea or honoring the promise. *People v Jackson*, 272 AD2d 342, 343. The defendant's allegations raised an issue as to whether he had received what he had bargained for. This is analogous to *People v Outley* (80 NY2d 702, 713), which said that when a defendant is alleged to have violated a "no arrest" condition before sentencing, and challenges the legitimacy of the post-plea arrest, there must be an inquiry of sufficient depth to satisfy the court that there was a legitimate basis for the arrest. Here, there must be a proper inquiry of whether the defendant was afforded the benefit of his bargain and breached the plea agreement. *Cf People v Craig*, 281 AD2d 429. Judgment reversed, matter remitted. (Supreme Court, Kings Co [Barbaro, J])

Admissions (Co-defendants) ADM; 15(5)

Misconduct (Prosecution) MIS; 250(15)

People v James, Jr., No. 1999-06860, 2nd Dept, 12/24/01

Holding: After a prosecution admonition not to relay the substance of any conversations with a codefendant, a police detective revealed on direct examination that the detective had accompanied the codefendant to the station, issued *Miranda* warnings (*Miranda v Arizona*, 384 US 436 [1966]), and arrested him. The prosecutor then immediately asked if there had come a time that the detective had another suspect, and he identified the defendant. Such questioning, designed to create the impression that the codefendant had implicated the defendant, was error. *See People v Cruz*, 100 AD2d 882. The impropriety was harmless in light of the overwhelming evidence of the defendant's guilt. Judgment affirmed. (Supreme Ct, Queens Co [Spires, J[)

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

People v Peirrot, No. 1999-10412, 2nd Dept, 12/24/02

Holding: The defendant raised a *Batson* objection to a prosecutorial peremptory challenge of a prospective juror. *Batson v Kentucky*, 476 US 79 (1986). The trial court erroneously accepted the prosecutor's explanation that juror had been excused "because, as a result of her job as a corporate trainer in the affirmative action program of her employer, a construction company, and her background in equal opportunity, she might be sympathetic to the defendant." The prosecutor failed to relate concerns about the juror's employment to the facts, as required. *People v Dabbs*, 192 AD2d 932.

The only fact of the case to which this explanation related was the defendant's race, which was the same as the juror's, making the challenge clearly race-based. Reversal being required, the close question of whether denial of a defense challenge for cause of a juror who acknowledged difficulty in remaining impartial because she lived in the neighborhood where the crime occurred and knew of prior robberies there (*see People v Arnold*, 96 NY2d 358, 362) need not be reached. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Demakos, J])

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

People v Tejada, No. 2000-02166, 2nd Dept, 12/24/01

Holding: The prosecution correctly concedes that the court denied the defendant his constitutional right to present his own defense by denying without a proper inquiry the defendant's unequivocal and timely request to represent himself. *See Faretta v California*, 422 US 806 (1975); *People v McIntyre*, 36 NY2d 10, 15. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co (Kreindler, J])

Speedy Trial (Statutory Limits) SPX; 355(45)

People v Blancero, No. 2001-03262, 2nd Dept, 12/24/01

Holding: When the Court of Appeals dismissed the prosecution's appeal and denied a motion to reargue the denial of the Appellate Division order directing a new trial, that order became final. The prosecution failed to reannounce readiness for trial within the statutory period under the Criminal Procedure Law (CPL 30.30(a)(b); 30.30(5)(1). The court dismissed the indictment. That the case involved a retrial following an earlier conviction did not relieve the prosecution from compliance with that statement of readiness rule. *See People v Contrearas*, 227 AD2d 907. Order affirmed. (Supreme Ct, Kings Co [Chambers, J])

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

People v Kearse, No. 2000-06296, 2nd Dept, 12/24/01

Evidence showed that the defendant removed a set of keys and a pocket knife from the complainant's pocket after her accomplice restrained the complainant and demanded his money. The accomplice cut the complainant with the knife, and the defendants fled without taking money or jewelry. At trial, three counts were sub-

Second Department *continued*

mitted to the jury: first-degree robbery (Penal Law 160.15[3]), second-degree robbery (PL 160.10[1]), and second-degree assault (PL 120.05[1]). The jury acquitted the defendant of robbery charges but convicted her of assault.

Holding: The issue of whether a verdict is repugnant (*see People v Tucker*, 55 NY2d 1) must be determined solely on the basis of the jury charge. The critical concern is that a defendant not be convicted of a crime of which the jury found the defendant had not committed an essential element. *People v Johnson*, 133 AD2d 175 *affd* 70 NY2d 964. The court erroneously and gratuitously instructed the jury that second-degree assault required a finding "that 'the defendant, acting in concert, forcibly stole property from [the complainant] using a knife,' intending to, and causing serious physical injury." Thus, the jury was told that the robbery was an element of assault. The prosecutor did not object, and so was bound to meet the burden charged. *See People v Malagon*, 50 NY2d 954. Under this charge, acquittal on the robbery charges was clearly irreconcilable with and repugnant to conviction of assault as charged. Judgment reversed, indictment dismissed. (Supreme Ct, Kings Co [Gerges, J])

Parole (Release [Consideration for]) **PRL; 276(35[b])**

Matter of Marino v Travis, Nos. 2001-05236; 2001-06952, 2nd Dept, 12/24/01

Holding: "The Parole Board's finding that there was a reasonable probability that, if released, the petitioner would not remain at liberty without violating the law is without support in the record and, therefore, is irrational and bordering on impropriety (*see, Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69; *cf, Matter of Thomas v New York State Div. of Parole*, 285 AD2d 393." The court properly annulled the board's determination. Amended judgment affirmed. (Supreme Ct, Queens Co [Posner, J])

Alibi (General) **ALI; 20(22)**

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

People v Dawkins, Nos. 1998-08403; 1998-08404, 2nd Dept, 12/24/01

Holding: County court granted the prosecution's request to preclude the defendant from testifying as to his whereabouts at relevant times due to the defense failure to provide notice of an alibi defense. *See* Criminal Procedure Law 250.20. This was error. The statute's preclusive provisions do not apply to a defendant's testimony. Defendants have the absolute right to testify on their own behalf. *See People v Rakiec*, 289 NY 306. Judgements reversed, new trial ordered. (County Ct, Suffolk Co [Weber, J])

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

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

Matter of Rosina W., No. 1999-04909, 2nd Dept, 12/31/01

Holding: The father appeals from a Family Court fact-finding and disposition order which found, after a hearing, that he had abused the child in question. Assigned counsel submitted an *Anders* brief (*Anders v California*, 386 US 738 [1967]) seeking to be relieved of assignment. Independent review of the record reveals a nonfrivolous issue as to whether the record supports the finding of abuse. Counsel is relieved. New appellate counsel appointed. *See People v Gonzalez*, 47 NY2d 606. Motion granted, counsel relieved and directed to turn over all papers to new counsel, assigned. (Family Ct, Kings Co [Grosvenor, J])

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

Juveniles (Delinquency-Procedural Law) (Disposition) **JUV; 230(20) (40)**

Matter of Dewayne B., No. 2000-08862, 2nd Dept, 12/31/02

Holding: The respondent was found to be a juvenile delinquent and was ordered placed in a secure facility for one year. The order included the following language: "No extensions." "In the event that the Office of Children and Family Services [Office] is unable to place the child in accordance with the direction hereof, or . . . placement with the authorized agency is discontinued, the Office . . . shall apply to the Court for an order to stay, modify, set aside, or vacate such directive. . . ." These portions of the order were improper. While the dispositional order has expired, the issues raised are likely to recur and so are reviewed despite the mootness doctrine. *See Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714. The court here impermissibly diverged from the legislatively determined statutory scheme. Once a juvenile is remanded for placement, the Office has been given certain discretion and authority to alter or discontinue the placement. *See* Family Court Act 353.3[3]; Executive Law 504(4). The statutes do not give the court authority to compel the Office to return to the court before it modifies or discontinues a placement. *See Matter of Lavar C.*, 185 AD2d 36. Order modified by deleting "No extensions" and the sentence beginning with "In any event." (Family Court, Suffolk Co [Freundlich, J]) ⚖

Immigration Practice Tips *continued*

(Continued from page 9)

- News sources have recently reported that, earlier this year, an internal legal ruling by the DOJ Office of Legal Counsel cleared the way for the Attorney General to give state and local police departments the power to enforce federal immigration laws.

If this opinion becomes official DOJ policy, it may encourage local police departments to consider and negotiate immigration law policing partnerships with the Justice Department. A 1996 DOJ legal opinion had found that state and local police could temporarily detain or arrest noncitizens for violating the criminal provisions of the Immigration and Nationality Act, but not stop and detain them solely on suspicion of civil deportability. Florida will soon become the first jurisdiction to enter a policing partnership with DOJ. Others, including New York State, are considering it.

Immigrant Defense Project adds two new staff members

Defense lawyers contacting NYSDA's Immigrant Defense Project for backup support will soon encounter two new Project staff members.

On May 28, 2002, new staff attorney Saadia Aleem started work with the Project. Ms. Aleem will, among other tasks, take primary responsibility for the Project's new initiative to screen cases of immigrants facing deportation (see *Backup Center REPORT* Vol XVI, No. 5). She will recruit, train, and mentor *pro bono* law firm attorneys to provide legal representation in initiative cases raising important legal issues. She will also be a new resource person for Association members and others contacting the Project's Tuesday and Thursday hotline number. Ms. Aleem comes to the Project from the Washington offices of Morgan, Lewis & Bockius, where she did *pro bono* deportation defense work. She is a 2001 graduate of New York University Law School, where she was a Root-Tilden-Kern Public Service Scholar, as well as a Robert McKay Academic Scholar. Ms. Aleem's hiring was made possible by grants from the Open Society Institute and the New York Foundation.

On August 1, 2002, former Project intern Aarti Shahani will begin a two-year New Voices Fellowship with the Project. Ms. Shahani's fellowship work as an organizer/advocate will include: holding clinics for immigrants and their families affected by the harsh impact of current immigration laws and policies; developing immigrant self-help materials; preparing and distributing newsletters; organizing advocacy events and public forums; and improving Project information management and administrative technologies. Ms. Shahani, who herself has family members affected by the harshness of the current immigration laws, is a 2002 graduate of the University of Chicago and interned with the Project during the summer of 2001. She and the Project were awarded a New Voices Fellowship by the Academy for Educational Development under a grant from the Ford Foundation. ⚖

From My Vantage Point *continued*

(Continued from page 13)

Low Bid Not the Way for Localities to Lower Cost

Already we see localities looking for ways to lower costs. A bill allowing the County of Tioga to contract directly with private lawyers, eliminating the assigned counsel system, passed the Senate on June 20 but has thus far stalled in the Assembly. This bill deleted from the county law the requirement that the services of private counsel be rotated and coordinated by an administrator, and permitted the county to develop and approve a contract with private lawyers.

I don't expect this to be the last effort to abandon assigned counsel in favor of low bid contracting. Organized defenders and assigned counsel practitioners should join to oppose low bid alternatives that fail to serve clients.

Nor should the role of the private bar in handling criminal cases be abandoned as a cost saving measure. We must recognize that efforts to shift resources from assigned counsel plans to overburdened Legal Aid Societies and Public Defenders are not the answer; what is needed is more resources for all forms of public defense.

Need for Standards and Commission Clear

The recent history of public defense in New York State shows clearly that we need standards that protect clients, and an Independent Public Defense Commission to provide guidance to counties as they explore alternatives. At this extraordinary moment, as we all bring change to a system on the brink of collapse, it is critical that we protect the values that underlie what we are trying desperately to reform. ⚖

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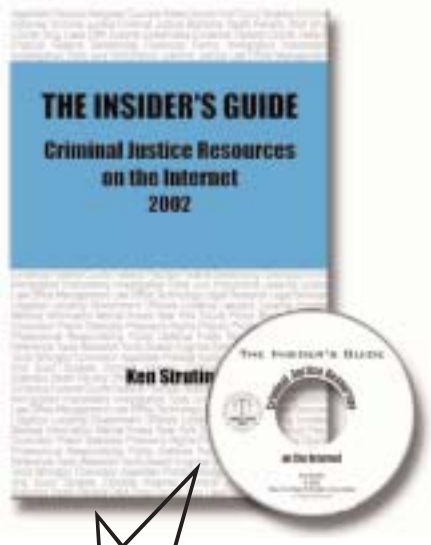
by Ken Strutin



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