New York State Defenders Association

Public Defense Backup Center
REPORT

Volume XVII Number 5 September-October 2002

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Defender News

Nassau County Judge Orders $75 AC Rate for Attorney

The Nassau County Court has joined the ranks of other criminal courts ordering assigned counsel fees above the statutory rate. Attorney Richard Barbuto, President-Elect of the New York State Association of Criminal Defense Lawyers, submitted a voucher to Judge DeRiggi in the amount of $8,602.50 for representing a difficult defendant on first-degree rape and sexual abuse charges. Mr. Barbuto spent more than 100 hours working on the case, including research into complex DNA issues. The court acknowledged, "the statutory rates for assigned counsel in New York State are woefully inadequate. Attorneys are leaving the assigned counsel panel in droves and many, not all, of those remaining are inexperienced." *People v Pruitt*, No. 2310N-99 (Dist Ct Nassau County 9/6/02). Finding "extraordinary circumstances," Judge DeRiggi approved payment in full. In reaction to the decision, Mr. Barbuto said: "I think it's a terrific decision and a long time coming . . . It's been recognized by the judiciary that the rates are too low and unless they come up, we will lose more and more people from the panel, which means the quality of justice will suffer." (*Newsday*, 9/11/02.)

Common Law DWI Can Be Proved Despite Low BAC Reading

A common law DWI prosecution was not precluded by a low blood alcohol content (BAC) reading according to the Court of Appeals. In *People v Blair*, No. 169 SSM 13 (NY 9/17/02), the defendant was stopped for a traffic infraction and appeared to have glassy eyes, impaired speech and motor coordination, and smelled of alcohol. He failed the field sobriety tests and admitted drinking five or six beers. The breathalyzer test showed .08% BAC. The defendant's motion to dismiss the DWI complaint based on VTL 1195(2)(c) was granted, and affirmed on appeal. The Court of Appeals reversed finding that 1195(2)(c) created a rebuttable presumption that a person with less than 1.0% BAC was not intoxicated. Therefore, the complaint stated sufficient facts for common law DWI under VTL 1192(3). A summary of the opinion will appear in a future issue of the *REPORT*.

Hearing Required Promptly After Seizure of Vehicles in NYC

New York City's forfeiture law, NYC Code § 14-140, empowered police to take the cars of DWI and other defendants upon arrest. Seized vehicles were kept until a civil forfeiture hearing was held, usually after the completion of the criminal case. The law did not provide an immediate due process hearing to challenge the seizure. Seven defendants challenged the law as unconstitutional in federal court. The District Court dismissed their complaint finding a probable cause arrest and eventual forfeiture proceeding sufficient safeguards. On appeal, the 2nd Circuit vacated the decision, holding that "promptly after their vehicles are seized under NYC Code § 14-140 as alleged instrumentalities of crime, plaintiffs must be given an opportunity to test the probable validity of the City's deprivation of their vehicles *pendente lite*, including probable cause for the initial warrantless seizure." *Krimstock v Kelly*, No. 00-9488 (2nd Cir 9/18/02); (*NYLJ*, 9/18/02.)

DOCS Cannot Challenge Court-Ordered Sentence of Concurrent Time

In 1996, Ricky Murray was convicted on drug charges and sentenced to seven and one-half to 15 years. A year later, he pled guilty to manslaughter and was sentenced to seven and one half to 15 years consecutive to the drug sentence. On appeal, the drug conviction was reversed. In lieu of a retrial, Murray accepted the prosecutor's offer of concurrent time with the

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manslaughter sentence. When Murray inquired about parole, the Department of Correctional Services (DOCS) advised him that his sentence was 12 to 24 years, relying on the consecutive manslaughter sentence the defendant had begun serving. CPL 430.10. Murray challenged their assessment through an article 78 proceeding, and the court ordered DOCS to recalculate the sentence as concurrent. DOCS did not have the power to unilaterally rewrite the court's sentence order. On appeal, the Appellate Division, First Department upheld the court's finding, and added that third parties, such as DOCS, did not have standing to challenge sentences—this right is reserved to the defendant and the district attorney. CPL 450.20[4], 450.30[2], [3]; Correction Law 601-a; *Murray v Goord*, 2002 NYSlipOp 06716 (1st Dept 10/1/02); (*NYLJ*, 10/2/02.)

NYSDA Active in Sponsoring and Cosponsoring CLE

Providing affordable, relevant Continuing Legal Education for criminal defense lawyers is a major NYSDA goal. In addition to its regular regional and statewide trainings, NYSDA has been increasing the number of events it co-sponsors with other entities, including courts, other defense organizations, and programs or agencies from other disciplines. If you do not currently receive announcements of upcoming NYSDA trainings, contact the Backup Center and ask to be added to the list.

Mental Health Issues in Criminal Justice Examined

NYSDA recently cosponsored *Bridges and Barriers: Integrating Community Mental Health and the Criminal Justice Systems for Adults with Severe Mental Illness*, an innovative one-day program at the University of Rochester. The University of Rochester Department of Psychiatry and Project Link, a pilot project funded to create a rehabilitation program for individuals with mental illness caught up in the criminal justice arena, hosted the program with the Monroe County Office of Mental Health.

A qualified mix of professionals and lay people, all of whom have been or will become involved in a case where a mentally ill person was being processed through the criminal justice system, attended this Sept. 27, 2002 event. The Rochester Police Department, the Monroe County Sheriff's Office, the courts, the public defense bar, the probation department, mental health service providers, and family members of potential offenders participated. (One keynote speaker commented on the disappointing absence of anyone from the prosecutor's office.) Continuing professional education credits were awarded to most attendees, with NYSDA as the legal CLE provider.

Plenary sessions with two keynote speakers and a panel discussion began the day. After lunch, the large group broke down into workshops, each participant choosing two of six focus groups concentrating on distinct aspects of a criminal prosecution of a mentally ill person. Topics included: mental health courts, family and community impact, the role of the criminal justice courts, and supervision and treatment plans.

The convening breathed life into a compelling issue that has haunted the practice of criminal defense for many years. (For example, as to the consequences of a successful insanity defense, *see Re Application of Stone,* digest, p. 29.) Project Link leaders assured those attending that the dialogue would continue as issues were defined and solutions designed. NYSDA looks forward to future collaborations working toward fair and compassionate dispositions in cases involving mental health issues.

Fourth Department Appellate Training Provided

Continuing a long tradition of providing training with the Appellate Division, Fourth Department, NYSDA co-sponsored Mandatory Eligibility Training in Rochester on Sept. 14, 2002. Participants learned about appellate practice from a variety of speakers. From the nuts and bolts of practice and procedures in the Fourth Department to successful appellate issues and strategies, attorneys garnered the information they needed not just to receive appointments as assigned appellate counsel but to provide high quality representation on appeal.

High Tech Court Brings Future Into Focus

In late September, lawyers in the Albany area took a trip five minutes into the future—where documents are filed at midnight from a desktop, and trial exhibits dis-

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played to juries by remote control in a movie theater setting. The United States District Court for the Northern District of New York and NYSDA presented the first *Courtroom Technology Seminar* for federal practitioners. Chief Deputy Clerk John Domurad introduced lawyers to the court's new presentation equipment and previewed the Case Management/Electronic Case Files (CM-ECF) system. (For more information, visit www. uscourts.gov/cmecf/cmecf.html.) Federal litigators can show print materials or handle real evidence on the courtroom's big screen (and smaller screens for the judge, counsel, and jury), and use a touch-screen highlighter to annotate any object or document. Domurad urged lawyers who practice in the Northern District to seek help from the Clerk's Office to learn the system before a trial or hearing at which it might be used. After a hands-on demonstration, the training participants watched a presentation on *PowerPoint for Litigators*, which illustrated the benefits of creating inexpensive electronic trial exhibits.

Ken Strutin, NYSDA's Legal Information Consultant, presented this portion of the training. The author of *The Insider's Guide: Criminal Justice Resources on the Web 2002* [available from the Backup Center], he has also presented other recent NYSDA trainings on *New Legal Resources on the Internet.* In early October, members of the Onondaga County Assigned Counsel panel sat in familiar surroundings—Justice Brunetti's courtroom—as they learned about the growing number of free and low-cost legal research resources online. Many were eager to take advantage of free case law databases, inmate locators and downloadable sections of the CJI. A similar presentation was given to appeals practitioners in the office of Appellate Advocates, headed by Lynn Fahey, in New York City in August.

Videoconferencing and Imitation Due Process

One capability of the new, electronic courtroom described above is bringing a witness or other participant into court by way of telecommunication. Videoconferencing is a courtroom technology causing some concern, since it can curtail appearances by defendants, witnesses and lawyers. Regardless of the purpose, substituting virtual presence for real attendance threatens due process. Credibility, demeanor, and the ineffable value of having a judge, lawyers, witnesses and the jury in the same room cannot be fully realized on a television screen. "The American Immigration Law Foundation has issued a practice advisory to immigration attorneys across the nation, advising them on how to handle what it sees as the inherent procedural due process problems in the use of videoconferencing." (*NLJ*, 9/30/02.) Recently, a federal appeals court acknowledged the inherent technical hazards of videoconferencing and the risks to a fair proceeding and the right to be heard. *Rusu v INS*, 296 F3d 316 (4th Cir 2002). For more information, visit NYSDA's "Video Arraignment" page under Hot Topics at www. nysda.org.

Revised Table of Lesser Included Offenses
Courtesy of the NY Defender Digest—
at Center Insert
(Available in Printed Copies Only, Not on the NYSDA Web Site)

Videotaping Police Interrogations

In a different setting, video cameras may provide protection to criminal defendants. The reliability of confessions derived from police interrogations has been questioned by many DNA exonerations. In light of developments in the Central Park Jogger case, in which DNA evidence has pointed to a new suspect, the New York Civil Liberties Union requested the New York City Police Department (NYPD) to begin taping its interrogations. "The videotaping of custodial interrogations would provide critically important information about the validity of subsequent confessions. On the one hand, if defendants in fact are coerced, documentation of this would be available so as to provide a basis for barring improper reliance upon such confessions. It also would provide important information to the NYPD so it could take appropriate steps to eliminate improper interrogation practices. On the other hand, the videotaping of custodial interrogations would provide the Department and prosecutors with persuasive evidence to rebut unfounded charges of coercion by defendants, which also would substantially benefit the criminal-justice system." (*Letter From NYCLU to NYPD Commissioner Ray Kelly*, 9/17/02.) A bill has been submitted to the New York City Council to achieve the same end. (*Int. No. 027-2002, 9/25/02*.) More information can be found on the "NYSDA Innocence/Wrongful Conviction Project" page at www.nysda.org.

Old Evidence Rules Meet New Technology

But will those videotapes play? That will depend on both technology and legal rules. As courtroom technology careers ahead, rules of evidence from a simpler time still channel the flow of innovations. Few courtrooms are wired, and fewer still have experience with presentation technology. A dazzling PowerPoint slide show might never be seen unless counsel is prepared to lay the foundation or counter objections. The rules for admitting photographs and blow ups will have to be reinterpreted for

video animation and computer-generated slides. Whether defense attorneys use presentation technology or not, they must be prepared to respond when prosecutors do. Fairness, accuracy, and prejudice versus probity are still valid objections in the electronic age. (*ABAJ*, 8/02.)

NYSDA Represented on Criminal Law & Procedure Committee

Backup Center Staff Attorney Al O'Connor has been appointed to the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure. The Committee recommends changes and improvements to the Penal Law and Criminal Procedure Law. Al hopes to bring the concerns of public defense lawyers to the attention of the committee and to help enact constructive legislation. If you have a practical, and relatively uncontroversial, idea about how the Penal Law or the Criminal Procedure Law could be amended to better serve your clients, please contact Al at the Backup Center.

Public Defense Lawyers Move

Several position and location changes occurred recently within The Legal Aid Society. Russell Neufeld has been named the new Attorney-in-Charge of the Criminal Defense Division (CDD), while Colleen Brady will be Acting Attorney-in-Charge of the Capital Defense Unit. They will be located, with others including Executive Director and Attorney-in-Chief Daniel Greenberg and CDD Deputy Attorney-in-Charge Susan Hendricks, at new offices at Battery Park Plaza. Irwin Shaw is now the Attorney-in-Charge of the Manhattan CDD office on Thomas Street. David Clarke will be Acting-Attorney-in-Charge of the Bronx CDD. Michele Maxian is returning to the Special Litigation Unit.

The position of Public Defender for Jefferson County is vacant, following the departure of David Renzi. The Acting Public Defender is Julie Hutchins. In Lewis County, Daniel R. King has replaced Joanne Kohler Smith as Public Defender. For current contact information for these and other Chief Defenders across New York, see the "NYS Chief Defenders" page at www.nysda.org.

(continued on page 43)

Conferences & Seminars

Sponsor: National Alliance for Mentally Ill-NYS
Theme: Twenty Years of Families Helping Families: NAMI-NYS Annual Educational Conference and 20th Anniversary Celebration
Dates: October 25–27, 2002
Place: White Plains, NY
Contact: (800) 950-3228 (toll free within NYC) or (518) 462-2000; web site: www.naminys.org/events.htm

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Sponsor: New York State Bar Association
Theme: The Basics of Local Criminal Court Practice
Dates and Places: November 1, 2002 New York City
November 20, 2002 Albany
December 6, 2002 Syracuse
Contact: NYSBA: tel (800) 582-2452; fax (518) 487-5618; web site www.nysba.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Mental Health Issues
Date: November 8, 2002
Place: New York City
Contact: NYSACDL: tel (212) 532-4434; e-mail info@nysacdl.org; web site www.nysacdl.org

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Sponsor: National Legal Aid and Defender Association
Theme: Justice in Action: 2002 NLADA Annual Conference
Dates: November 13–16, 2002
Place: Milwaukee, WI
Contact: Aiyana Bullock: tel (202) 452-0620 x207; fax (202) 872-1031; e-mail a.bullock@nlada.org; web site www.nlada.org

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Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Mid-Hudson Trainer
Date: November 15, 2002
Place: Poughkeepsie, NY
Contact: NYSACDL: tel (212) 532-4434; e-mail info@nysacdl.org; web site www.nysacdl.org

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Sponsor: California Attorneys for Criminal Justice & California Public Defenders Association
Theme: Capital Case Defense Seminar
Dates: February 14–17, 2003
Place: Monterey, CA
Contact: CACJ: web site www.cacj.org; CPDA: (916) 362 1686; e-mail cpda@cpda.org; web site www.cpda.org ⚖

Job Opportunities

Prisoners' Legal Services of New York (PLS) is seeking applicants for a **staff attorney** position in our Central Intake Unit, in Ithaca, NY. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. PLS does both service work and impact litigation, handling cases involving mental health and medical care; prison disciplinary matters; excessive use of force; conditions of confinement; sentence calculations; jail time credit and first amendment issues. PLS has been very successful in providing high quality effective legal services and in establishing important rights for its clients. PLS recently went from a regional to a centralized intake system. This position offers the opportunity to work with a dedicated team in developing an effective intake system. Required: energetic and creative attorney with a demonstrated commitment to providing high quality legal services to clients; minimum of two years experience. The attorney will work with and supervise two paralegals. Responsibilities include: screen client intake; analyze legal issues, counsel and advise clients, brief service; refer cases to regional offices; assist with legal research and writing to provide *pro se* form materials to clients. Competitive salary, outstanding benefit package including health, dental, long term disability and life insurance, as well as generous leave policy. EOE; PLS seeks to be a well balanced multi-cultural organization; people of color, women, and people with disabilities encouraged to apply. We have a serious need for staff who are fluent in Spanish. Send letter, resume and list of three references to: Maria McGuinness, Human Resources Manager, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca, NY 14850; (607) 273-2283; e-mail mmcguinness@plsny.org (Word or WP).

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

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

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

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

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

The Osborne Association seeks a full-time **Family Services Specialist** for Family Works—Family Resource Center (Brooklyn). The Osborne Association, Inc. is a non-profit criminal justice organization providing services to the accused, prisoners, ex-prisoners, and their families; with its subsidiary, Osborne Treatment Services, Inc., it operates programs and offices in the Bronx, Brooklyn, Queens, Rikers Island and at several NYS Correctional Facilities. Position Responsibilities: assist in organization and coordination of the Family Resource Center for prison families; conduct outreach for informational materials to place in the Center clearinghouse; assist in supervision of Center hotline and volunteer staff; provide case management service to families of incarcerated and post-release individuals; facilitate information/support groups for families of inmates and recently released inmates; supervise day-to-day operations of the Center and a Family Resource Center Associate position. Requirements: BS/BA degree (Masters a plus); minimum of two years' experience working with at-risk families; excellent writing and organizational skills; ability to work well under pressure and undertake multiple projects in fast paced atmosphere; minimum of 1 year supervisory experience. Work some evenings and occasional weekend. Basic knowledge of the criminal justice system, child development and community resources for former prisoners, and families preferred. Knowledge of New York City resources a plus. Salary competitive with excellent benefits package, including 4 weeks vacation. Send cover letter, resume and salary requirements to: Frederick Feliciano–Employment Manager, The Osborne Association, Inc., 36-31 38th Street, Long Island City, NY 11101; fax (718) 707-3315.

The Brennan Center for Justice at New York University School of Law seeks an **Attorney** for their Democracy Program. The Program strives to bring the ideal of representative self-government closer to reality through collaboration, working in areas such as campaign finance reform, voting rights, ballot access, and judicial elections. Activities will include litigation, writing public education materials, drafting legislation, advising officials and activists, organizing conferences, scholarship, and policy analysis. Qualifications: At least 5 yrs litigation experience; excellent legal research, analysis, and writing skills; initiative, imagination, and versatility; organizational skills; ability to deal with diverse clients and work effectively in coalition. Preferred experience: lobbying, legislative drafting, public education, or scholarship. Familiarity with issues of democracy, practical political experience, political science graduate work, or demonstrated commitment to public interest advocacy a real plus. Salary CWE. EO, AA employer, actively recruiting women, people of color, persons with disabilities, and lesbians and gay men. Deadline 11/1/02. Send cover letter, resume, two writing samples, and the names and telephone numbers of 3 references to: Democracy Program Attorney, Brennan Center for Justice, 161 Avenue of the Americas, 12th Fl, New York, NY 10013. No phone calls please.

Jefferson County seeking a skilled individual to **administer** the **office of the Public Defender**. The position responsibilities include supervising and participating in the investigation, preparation, and counsel of indigent defendants. The Public Defender establishes priorities, policies and procedures for office operations, supervises personnel, prepares the annual budget, coordinates assigned counsel activities, prepares and processes appeals, and plans and implements records management and reports. Minimum Qualification: licensed to practice law in NY, 3 years experience in criminal defense work. Deadline 10/25/02. Submit resume and letter of application stating salary requirements to: Jefferson County Department of Human Resources, County Office Building, 175 Arsenal Street, 2nd Floor, Watertown, NY 13601. ⚖

Book Review

Village, Town and District Courts in New York

By Hon. James E. Morris, Hon. Robert G. Bogle, Hon. Thomas F. Liotti, Maryrita Dobiel and Lorraine R. Miller
West Group, 2001

by Ken Strutin*

Local courts—village, town and, in some counties, district courts—are some of the busiest courts in the state. More than 2000 justices (mostly non-lawyers) conduct arraignments and probable cause hearings, preside over small claims and misdemeanor trials, oversee plea bargains, impose sentences, and perform many other duties. Limited to misdemeanor and pre-indictment felony jurisdiction, local courts hear and decide cases with widespread impact within their communities. Defense attorneys practicing in these courts appreciate the unique and informal ways they operate, and are always conscious that they must administer the same rules of law.

In *Village, Town and District Courts*, West has created a single-volume reference work (about 1,000 pages) of enormous value for local court practitioners. The authors, including lawyers, justices, and court attorneys, understand that local courts encounter the widest array of issues and legal problems. Defense counsel traveling, usually at night, from town to village need a solid reference work to answer thorny legal questions or explain complex rules to judges and prosecutors. A one-volume book covering the full range of local court practice is a welcome addition to staple reference books like the Criminal Procedure Law, Penal Law and Vehicle and Traffic Law.

* ***Ken Strutin*** *is a legal information consultant for the New York State Defenders Association.*

To order *Village, Town and District Courts in New York,* contact Cathy Erlien at West Group:

1-800-328-9352 Ext. 77331

cathy.erlien-fendler@westgroup.com

List price: $190.00
20% DISCOUNT for NYSDA Members until 12/31/02

Updated annually or as needed;
contact publisher for more information.

This encyclopedic work is well organized and comprehensive. It covers jurisdiction, right to counsel, criminal proceedings from arraignment through appeal, civil proceedings, and alternative dispute resolution. There are sections on judicial ethics, duties, and recusal. Each chapter begins with a scope note and research references to West treatises, digests, ALRs, and other publications. Legal analysis is succinct and replete with statutory and case law references. Peppered throughout the publication are *Practice Tips*, *Views From the Bench* and *Judicial Advisories* that draw on the authors' insights and experiences. Form motions and legal documents appear in various chapters—the publication's only drawback is that the forms are not available on a companion diskette. This work is very accessible and includes an array of detailed indexes: *Table of Laws and Rules, Table of Cases, Index to Forms,* and *Index to Subjects.*

Attorneys will find it a handy resource to answer the widest range of questions about local court civil and criminal actions. The authors have done a great service by focusing attention on local court law. Whether the question concerns filing a motion, setting bail, or appealing from a judgment, *Village, Town and District Courts* can help. ⚖

Pro Bono Counsel Needed for Death Row Prisoners

Over 3,700 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The **ABA Death Penalty Representation Project** seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Robin M. Maher, Director, ABA Death Penalty Representation Project, 727 15th Street NW, 9th Floor, Washington, DC 20005; e-mail: maherr@staff.abanet.org; tel 202-662-1738. For information, also see the Project's web site: **http://www.probono.net** (Death Penalty Practice Area).

Defense Practice Tips 1

Tailored Police Testimony at Suppression Hearings

by Joel Atlas*

Introduction

Whether a court must suppress evidence typically turns on the conduct or observations of the police officer who discovered the evidence. By falsely testifying to the facts surrounding the discovery of the evidence, a police officer may validate a blatantly unconstitutional search. New York courts have long recognized that police officers sometimes fabricate suppression testimony to meet constitutional restrictions.[1] Indeed, the Appellate Division has rejected police testimony at suppression hearings where the officer's testimony appears to have been "patently tailored to nullify constitutional objections."[2] Although, to be sure, rejections are rare and their number appears to be declining, the appellate courts' ability to so rule has not changed. This article will explore the various circumstances under which the Appellate Division has discredited police testimony at suppression hearings.

General Principles of Credibility

The Court of Appeals has held that, at a suppression hearing, the prosecution has the burden to go forward to show the legality of the police conduct—to show "that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest or . . . that no search at all occurred . . ."[3] To meet this burden, the prosecution must present evidence that is credible.

The determination of a witness's credibility is primarily for the hearing court.[5] That court has the "peculiar advantages of having seen and heard the witnesses"[6] and is therefore "in a superior position with respect to [credibility] than an appellate court[,] which reviews but the printed record."[7] Accordingly, an appellate court must afford "much weight" to a hearing court's credibility determinations.[8]

Nevertheless, the Court of Appeals has noted that the Appellate Division may "effectively curtail the alleged abuses" of false testimony by overturning a hearing court's credibility findings.[9] Indeed, deference to a hearing court must yield, and the Appellate Division will deem testimony incredible as a matter of law, when the hearing court's fact findings are "manifestly erroneous or so plainly unjustified by the evidence that the interests of justice necessitate their nullification"[10] or where the testimony "has all appearances of having been patently tailored to nullify constitutional objections."[11] In making this determination, the Appellate Division must employ "common sense and common knowledge"[12] and review the totality of the circumstances.[13]

The Appellate Division has ruled that testimony is impossible of belief when, even if uncontradicted, it is "manifestly untrue, physically impossible, contrary to experience, or self-contradictory."[14] Each of these four grounds has spawned its own line of cases.

Specific Theories for Discrediting Police Testimony

A. "Manifestly Untrue"

The first of the categories, testimony that is "manifestly untrue," is the broadest and is perhaps best viewed as a catch-all ground for discrediting police testimony that does not fall within another ground. The Appellate Division has held testimony to be "manifestly untrue" where an officer testified to, but could not substantiate, reliance on third-party information or where an officer's testimony was belied by other evidence.

In several cases, the Appellate Division found inadequate support for an officer's claim to have received information supportive of intrusive conduct.[15] For example, the Appellate Division discredited an officer's testimony that he had arrived at the arrest scene in response to a radio run, given that no tape of the communication could be located.[16] Similarly, the court determined that the police lacked reasonable suspicion to stop the defendant where, although the stop had allegedly been predicated on a radio run, the officer who had been instructed to send the radio run could not remember having done so, the defendant's subpoena of the radio run revealed nothing, and the prosecution failed to bolster the existence of the radio run with testimony from the complainant.[17] The Appellate Division also disbelieved testimony that an officer, while pursuing a suspect to whom the officer had allegedly been alerted by a "kid in the street," had discovered contraband in plain view.[18]

Contradiction of an officer's testimony with other evidence has also regularly supported suppression. The Appellate Division determined in one case that a photograph and disinterested defense witnesses cumulatively discredited an officer's testimony that he had seen a bulge in the defendant's shirt.[19] Likewise, in another case, "other, more credible evidence at the hearing" belied an officer's testimony that he had seen the outline of a gun in the defendant's pocket.[20] Also rejected was an officer's attempt to justify a search based on his alleged observation of a bulge in the defendant's shorts and the defendant's attempt to flee, where these claims were contradicted by evidence that the defendant had worn baggy jeans and had been cooperative.[21] Finally, the Appellate Division discredited an officer based on discrepancies between his testimony about the radio run of a robbery pursuant to which he stopped the defendant and the actual Sprint reports of the transmissions regarding the robbery.[22]

* ***Joel Atlas*** *is a Senior Lecturer, Cornell Law School and a former Supervising Attorney at The Legal Aid Society, Criminal Appeals Bureau.*

B. "Physically Impossible"

Testimony falls within the category of "physically impossible" when it describes an observation or conduct that defies human abilities. Most of the cases within this category involve the scope of an officer's powers of observation. The Appellate Division has held incredible, for example, officers' claims to have observed small objects from large distances, such as:

- "a 2-inch glass vial with a dark top, from a distance of approximately 74 feet, from a moving patrol car, after dark";[23]
- a two-inch crack vial from a sharp angle and from at least 200 feet away, through binoculars, at dusk;[24]
- a waistband bulge, from approximately 50 feet away and while in a taxi at 11:00 P.M.;[25] and
- a small burlap bag, the size of a "bank bag," which was behind the driver's seat in a car, while looking through the driver's window.[26]

The Appellate Division, however, has accepted testimony that an officer could observe a person "passing a white glassine envelope of heroin to a buyer from a distance of approximately 75 feet on a clear[,] sunny day with nothing obstructing [the officer's] view";[27] "a two-inch long holster clip in defendant's waistband from a distance of about 23 feet while driving along a four-lane street even though defendant was wearing several layers of loose[-]hanging winter clothing";[28] and, from 30 to 40 feet away, a defendant deliver to another a clear, plastic bag containing white powder.[29]

The Appellate Division disbelieved testimony that an officer could see from a public sidewalk the lack of tax stamps on individual cigarette packs "in cartons and encased in unopened boxes in the back of an unlighted garage" or make "a similar observation through a convenient tear in a carton in an open bag as [the officer] passed the defendant on the street some two to four feet from him."[30] The Appellate Division also rejected testimony that, at 1:20 A.M., as another vehicle passed by, an officer noted that the driver of that vehicle appeared to be under the legal driving age.[31]

The "physically impossible" test is not limited to the scope of possible observations by the police. Indeed, the alleged conduct of a defendant may be "physically impossible" as well. For example, the Appellate Division has discredited testimony that a defendant reached under a couch to obtain a gun although his hands were cuffed behind his back.[32]

C. "Contrary to Experience"

Testimony is "contrary to experience" when it describes human conduct—by either the police or the defendant—that is so empirically unlikely as to be unworthy of belief. In this regard, police claims that they acted on radio communications that a suspect was armed have been rejected in light of evidence that the officers did not have their guns drawn upon their approach of the suspect.[33] Similarly, the Appellate Division rejected an officer's assertion that he feared that the defendant was armed because of allegedly furtive movements given that the officer "did not communicate his observation to his sergeant, crossed in front of the defendant's potential line of fire, . . . did not direct the defendant to freeze," and did not arrest or handcuff the defendant at the scene of the stop.[34] An officer's decision to take a dinner break before having back-up officers arrest the defendant, whom the officer had allegedly seen sell drugs, contributed to the court's rejection of his testimony as contrary to experience.[35]

The alleged behavior of the defendant may also contradict experience. The Appellate Division has refused to credit testimony that a defendant has engaged in behavior that "only a moron would have committed . . ."[36] More specifically, appellate courts have discredited assertions that a defendant:

- threw away narcotics in sight of an approaching police officer;[37]
- left "a cake of marijuana with some strands sticking out" on the front of a car illegally parked on a main street;[38]
- exited his vehicle and left the driver's door open with a loaded gun visible on the front seat although aware that he was under surveillance;[39]
- left a scale and tinfoil packets containing powder in plain view prior to voluntarily admitting at least three police officers into apartment;[40]
- reached for his waistband as the arresting officer approached in the face of a large-scale show of police force;[41]
- consented to a search of an apartment in which a substantial amount of cocaine had been stored in plain view;[42]
- said "[l]et's get out of here" to a fully secured arrestee and, later, threw himself on the floor during a chase;[43] and
- left an open box, protruding from his shirt pocket, envelopes containing white powder.[44]

The Appellate Division will not discredit police testimony that describes behavior by a defendant that is merely surprising or unusual. Indeed, the court has accepted testimony that a defendant, in plain view of uniformed officers, withdrew a loaded gun and placed it in a box on top of an ice machine outside of a store into which he entered;[45] opened her purse and displayed to another, in plain view, a clear bag containing white powder while seven to 30 feet from the police;[46] held out his open hand and offered another a small envelope containing vials of cocaine while an officer approached from behind in the vicinity of Port Authority bus terminal;[47] held out a bag and stated that "it was just marijuana" after the police

stopped his car for his erratic driving;[48] and "spontaneously turned and placed himself up against the wall," assuming a frisk position, after being asked by the police whether he lived in the building and answering that he did not.[49]

D. "Self-Contradictory"

In several cases, the Appellate Division has rejected police testimony on the ground that it was "self-contradictory"—that the testimony was contravened by other statements of the same witness. An officer who testified regarding his observation of drugs inside a box was fatally impeached with his own "incident report," which contained a different version of the officer's observation with respect to the box.[50]

Disparities between an officer's testimony and prior statements regarding the content of an informant's accusation, and between his testimony and his statements at an interview regarding the recovery of a weapon, likewise led the Appellate Division to reject his testimony.[51] The Appellate Division also rejected testimony where there were inconsistencies between the officer's hearing and grand jury testimony regarding the relayed description of the defendant and where the officer had failed to record in his memo book or arrest report the supposed receipt of information from witnesses at the scene of arrest.[52] Notably, not merely self-contradiction, but inconsistencies between the testimony of different officers, has also led to suppression. For example, the prosecution did not meet its initial burden to go forward with credible evidence where the testimony of its three police witnesses "disclose[d] confusion, contradictions, uncertainty and conflicting versions of what took place," including on the key question of whether the search preceded or followed the arrest.[53] The Appellate Division also discredited police testimony where one testifying officer not only contradicted himself in many regards but was contradicted by the other testifying officer on the questions of why the officers had, for a time, followed but not stopped the defendant's car and which officer had removed a bag containing narcotics from the glove compartment.[54]

Conclusion

It is an unfortunate but well-recognized fact that, to justify their conduct, police officers sometimes falsely testify about their observations, the information upon which they acted, or the conduct of the defendant.[55] An officer's testimony at a suppression hearing is "patently tailored to nullify constitutional objections"[56] and therefore incredible as a matter of law when it is "manifestly untrue, physically impossible, contrary to experience, or self-contradictory."[57] In such circumstances, the prosecution has failed to meet its burden to present credible evidence to validate the police conduct and the court must suppress the evidence in issue. When a trial court refuses to do so,[58] appellate courts must be asked to step in.[59] ⚖

Endnotes

1. *See People v Garafolo*, 44 AD2d 86, 88 (2d Dept 1974); *see generally People v Berrios*, 28 NY2d 361, 368 (1971) ("Some police officers . . . may be tempted to tamper with the truth"). In fact, a New York City Mayoral Commission concluded that police perjury was "a serious problem" and noted that, within the police department, falsification by police even had its own nickname: "testilying." *Report of Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department*, July 7, 1994, at 36.
2. *People v Garafolo*, 44 AD2d at 88.
3. *People v Berrios*, 28 NY2d at 367-68; *see People v Malinsky*, 15 NY2d 86, 91 n.2 (1965).
4. *People v Berrios*, 28 NY2d at 369; *People v Quinones*, 61 AD2d 765, 766 (1st Dept 1978).
5. *People v Prochilo*, 41 NY2d 759, 761 (1977).
6. *Id.*
7. *People v Wright*, 71 AD2d 585, 586 (1st Dept 1979); *see People v Cohen*, 223 NY 406, 422-23 (1918).
8. *People v Prochilo*, 41 NY2d at 761.
9. *People v Berrios*, 28 NY2d at 369. Notably, "credibility is a factual issue which is not generally within the competence of [Court of Appeals] review." *People v Concepcion*, 38 NY2d 211, 213 (1975); *see People v Rivera*, 68 NY2d 786 (1986)(holding that, despite inconsistencies between officer's hearing testimony and prior accounts, testimony was not "so flawed that [the] findings as to [the] witness's credibility made from the unique perspective of the trier of fact must be overridden"). Thus, it is the Appellate Division, which possesses full factual-review power, that generally reviews hearing courts' credibility determinations.
10. *People v Garafolo*, 44 AD2d at 88.
11. *People v Garafolo*, 44 AD2d at 88; *see also People v Carmona*, 233 AD2d 142, 144 (1st Dept 1996); *People v Miret-Gonzalez*, 159 AD2d 647 (2d Dept 1990).
12. *People v Garafolo*, 44 AD2d at 88; *see People v Lewis*, 195 AD2d 523, 523 (2d Dept 1991).
13. *People v Carmona*, 233 AD2d at 145 (ruling that the "combination of circumstances" "strain[ed] the officer's credibility beyond the breaking point").
14. *People v Garafolo*, 44 AD2d at 88 (quoting 22 NY Jur. § 649); *see People v Burns*, 281 AD2d 704, 705 (3d Dept 2001); *People v Carmona*, 233 AD2d at 144; *People v Lebron*,184 AD2d 784, 785 (2d Dept 1992); *People v Shedrick*, 104 AD2d 263, 274 (4th Dept 1984), *aff'd*, 66 NY2d 1015 (1985).
15. This line of cases is consistent with the caution of the Court of Appeals that the use of anonymous information as the basis for police intrusions "should be subject to the most careful and critical scrutiny . . .". *People v Taggart*, 20 NY2d 335, 343 (1967).
16. *People v Quinones*, 61 AD2d at 766.
17. *People v Moses*, 71 AD2d 930, 931 (2d Dept 1979).
18. *People v Smith*, 77 AD2d 544, 546 (1st Dept 1980).
19. *People v Auletta*, 88 AD2d 867 (1st Dept 1982).
20. *In re Pierre N.*, 224 AD2d 243, 244 (1st Dept 1996).
21. *In re Bernice J.*, 248 AD2d 538, 539 (2d Dept 1998).
22. *People v Nunez*, 126 AD2d 576 (2d Dept 1987).
23. *People v Heath*, 214 AD2d 519, 520-21 (1st Dept 1995).
24. *People v Carmona*, 233 AD2d at 144.

25. *People v Otero*, 51 AD2d 705, 706 (1st Dept 1976).
26. *People v Feingold*, 106 AD2d 583, 584 (2d Dept 1984).
27. *People v Rivera*, 221 AD2d 157 (1st Dept 1995).
28. *People v Rodriguez*, 205 AD2d 453 (1st Dept 1994).
29. *People v Maylor*, 184 AD2d 371 (1st Dept 1992).
30. *People v Garafolo*, 44 AD2d at 88-89.
31. *People v Lewis*, 195 AD2d at 524.
32. *People v Void*, 170 AD2d 239, 241 (1st Dept 1991).
33. *People v Moses*, 71 AD2d at 931; *People v Quinones*, 61 AD2d at 766.
34. *People v Guzman*, 116 AD2d 528, 530-31 (1st Dept 1986).
35. *People v Carmona*, 233 AD2d at 143-44.
36. *People v Sanders*, 49 AD2d 610, 611 (2d Dept 1975) (reviewing sufficiency of trial evidence, court discredited testimony that defendant openly sold heroin in front of two persons known to him as police officers).
37. *People v Quinones*, 61 AD2d 765 (2d Dept 1978). Although in *Quinones* the court's rejection of the testimony relied on multiple factors, the court did note that so-called "dropsy" cases, in which the police claim that a defendant dropped contraband upon their approach, have been "criticized frequently as attempts to legitimize searches and seizures. . . ." *Id.* at 766.
38. *People v Rivera*, 48 AD2d 305, 307 (1st Dept 1975).
39. *People v Lastorino*, 185 AD2d 284, 285 (2d Dept 1992).
40. *People v Flores*, 181 AD2d 570, 572 (1st Dept 1992)
41. *People v Addison*, 116 AD2d 472, 474 (1st Dept 1986).
42. *People v Void*, 170 AD2d at 241.
43. *In re Carl W*., 174 AD2d 678, 680 (2d Dept 1991).
44. *People v Salzman*, 1999 WL 1034760 (Appellate Term, Ninth and Tenth Judicial Districts, Oct. 5, 1999).
45. *People v Rodriguez*, 205 AD2d at 453.
46. *People v Fryer*, 186 AD2d 405 (1st Dept 1992).
47. *People v Ellis*, 198 AD2d 90, 90-91 (1st Dept 1993).
48. *People v Davis*, 233 AD2d 148 (1st Dept 1996).
49. *People v Vasquez*, 217 AD2d 466, 467, 468 (1st Dept), *app dismd*, 87 NY2d 894 (1995). The Appellate Division remarked that the defendant's action, "while unusual[,] was not incredible under the circumstances," in which the defendant may have been "seeking a break."
50. *People v Miret-Gonzalez*, 159 AD2d 647, 648-49, 650 (2d Dept 1990).
51. *People v Lebron*, 184 AD2d at 785-86.
52. *People v Addison*, 116 AD2d 472 (1st Dept 1986).
53. *People v Pepitone*, 48 AD2d 135, 136 (1st Dept 1975), *affd for reasons stated by the majority below*, 39 NY2d907 (1976).
54. *People v Martinez*, 71 AD2d 905 (2d Dept 1979).
55. For further reading, see the following law review articles: David N. Dorfman, *"Proving the Lie: Litigating Police Credibility,"* 26 AM. J. CRIM. L. 455 (1999); Gabriel J. Chin and Scott C. Wells, *"The 'Blue Wall of Silence' as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury,"* 59 U. PITT. L. REV. 233 (1998).
56. *People v Garafolo*, 44 AD2d at 88.
57. *Id.*
58. Examples of recent trial court decisions that *have* found officers incredible include:
- *People v. Brown*, NYLJ, 7/22/02, at 22, col. 2 (Sup. Ct. Bronx Co): "I found the police officers' testimony in large measure not to be creditworthy. Their recitation of the events in question were bereft of those details that lend credibility to a witness. Moreover, their answers were often evasive and they failed to recall many significant aspects of their encounter with the defendant."
- *People v Felder*, 2001 NY Misc LEXIS 430 (Sup Ct NY Co 5/16/01): "The Court finds the testimony of the police officers to be both not credible and tailored to nullify constitutional objections."

59. Just this year, the Appellate Term, Second and Eleventh Districts, cited the seminal case involving incredible suppression hearing testimony when reversing a civil case on the ground that the plaintiff's testimony "was incredible as a matter of law." *Bonanno v Loungecraft American Red Ball*, No. 2001-365 Q C, 2002 NY Slip Op 40069U; 2002 NY Misc LEXIS 290 (2nd and 11th Districts 1/23/02) (citing *People v Garafolo*, 44 AD2d 86).

Pretext Stops and Racial Targeting Claims after People v Robinson

by Brooks Holland*

In the past, defendants in New York often moved to suppress under a "pretext" theory: the police impermissibly used a traffic infraction, or some other basis for police action, as a subterfuge "to accomplish an otherwise unlawful investigative search or seizure."[1] The U.S. Supreme Court rejected this pretext argument in 1996, when it ruled in *Whren v US* that "[s]ubjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."[2] Last year, the New York Court of Appeals adopted *Whren* in *People v Robinson*,[3] upholding pretext stops under the state constitution,[4] if "a police officer has probable cause to believe that the driver of an automobile has committed a traffic infraction."[5]

Robinson and *Whren* thus have closed the book on most 4th Amendment pretext claims.[6] These decisions also assure that defendants in New York possess no federal or state 4th Amendment remedy for racial targeting—the selection of individuals for investigation due to their race—so long as the police can offer some objective pretext for their actions. The Court of Appeals in *Robinson* did proclaim that "[d]iscriminatory law enforcement has no place in our law."[7] But, the Court concluded, "the answer to such action is the Equal Protection Clause of the Constitution," not the 4th Amendment.[8]

Yet, neither the Court of Appeals nor the Supreme Court has held that the Equal Protection Clause affords the remedy of suppression in a criminal proceeding.[9] Indeed, in *Robinson*, the Court of Appeals discussed the Equal Protection Clause only insofar as "a plaintiff has a cause of action."[10] This express reference solely to civil remedies may indicate that the Court perceives no role for the Equal Protection Clause in criminal proceedings analogous to the 4th Amendment and its exclusionary rule.

In *State v Segars*,[11] however, the New Jersey Supreme Court recently embraced the notion of an equal protection exclusionary rule, and further suggested the type of facts necessary to obtain this remedy. Coming from the high court of our sister state, *Segars* may provide strong guiding precedent to New York practitioners and courts.

Racial Targeting and Equal Protection: New Jersey Takes the Lead

A police officer ran Segars' vehicle license plate as Segars used a bank ATM machine.[12] The officer approached Segars after he later stopped at a Quick Stop, and arrested him for driving with a suspended license.[13] Segars moved to suppress, contending that the officer, a Caucasian, ran his plates only after observing that Segars was an African American.[14] Segars further contended that when the officer testified he ran Segars' plates randomly, "he was covering up for having checked Segars's plates because of his race."[15]

Before analyzing whether the evidence supported Segars' factual contentions, the New Jersey Supreme Court addressed the issue of remedy, concluding: "The rationales that support the suppression of evidence under [search and seizure provisions], namely, deterrence of impermissible investigatory behavior and maintenance of the integrity of the judicial system, apply equally, if not more so, to cases of racial targeting."[16] Thus, the Court held, "if race is the sole motivation underlying [a police investigation], it is illegal and the evidence resulting from a subsequent stop must be suppressed."[17]

In concluding that the Equal Protection Clause includes a suppression remedy, *Segars* does not break entirely new ground. Rather, it draws upon earlier 6th Circuit Court of Appeals authorities that invoked the Equal Protection Clause concerning "pre-contact" investigations and "consensual encounters," where the police investigate or question an individual short of effecting any 4th Amendment seizure.

For example, in *US v Avery*,[18] police officers at the Cincinnati airport questioned Avery, an African American, after he boarded his plane, subsequent to tailing him at the airport.[19] Avery had no formal identification, and gave incomplete or inconsistent answers to the police about his travel plans, prompting them to request permission to search him and his bag.[20] Avery agreed only to a search of his person, which yielded nothing illegal.[21] The police advised Avery that they would seize his bag and attempt to obtain a search warrant, although they allowed Avery to continue his journey to Washington, D.C. After a search of his bag revealed cocaine, Avery was arrested and indicted by a federal grand jury.

At the suppression hearing, the police testified that while they did not have specific information connecting Avery to criminal activity before questioning him, they targeted him for several reasons, including the classic cash purchase of a one-way ticket. Avery conceded that the police did not seize him when they questioned him on the airplane, and the Court concluded that the police lawfully seized his bag under the 4th Amendment.[22] Avery argued that the police nevertheless violated his equal protection rights when they investigated and questioned him, because they targeted him due to his race.[23]

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The 6th Circuit ultimately rejected this argument, but only because Avery failed to prove that the police investigated him solely because of his race,[24] not because the Equal Protection Clause offered no remedy. On the contrary, the Court never doubted that the Equal Protection Clause plays a supervisory role over law enforcement, independent of the 4th Amendment:

> Although Fourth Amendment principles regarding unreasonable searches and seizures do not apply to consensual encounters, an officer does not have unfettered discretion to conduct an investigatory interview with a citizen. The Equal Protection Clause of the Fourteenth Amendment provides citizens a degree of protection independent of the Fourth Amendment protection against unreasonable searches and seizures. This protection becomes relevant even before a seizure occurs.[25]

The Court consequently extended the protections of the Equal Protection Clause to include "pre-contact" investigations, far short any 4th Amendment encounter:

> A citizen's right to equal protection of the laws . . . does not magically materialize when [he or she] is approached by the police. Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion . . . The Fourteenth Amendment guarantee of equal protection does not fit neatly into the various stages of Fourth Amendment search and seizure analysis . . . The "stage" of the investigation [thus] is not relevant under a true equal protection analysis.[26]

The Court thus held: "If law enforcement adopts a policy, employs a practice, or in a given situation takes a step to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a violation of the Equal Protection Clause has occurred."[27]

Nevertheless, the 6th Circuit in Avery did not hold that suppression represents the proper remedy for such an equal protection violation. The Court did cite approvingly to *US v Jennings*,[28] a prior, unreported 1993 decision by the 6th Circuit, in which it held that "evidence seized in violation of the Equal Protection Clause should be suppressed."[29] But, *Avery* arguably leaves some degree of ambiguity on the question of remedy.[30]

In *Segars*, the New Jersey Supreme Court made explicit what the 6th Circuit at least had implied: the exclusionary rule applies to equal protection violations in the criminal context. Only one court appears to have held expressly to the contrary. In *State v Richardson*,[31] an Ohio Court of Appeals held that no "substantively based Fourteenth Amendment right through the Equal Protection Clause invokes the exclusionary rule."[32] *Richardson*, however, may have missed the mark substantially in reaching this conclusion.

Richardson, which involved a pretext challenge to a traffic stop, preceded *Whren* by two years. The *Richardson* court, perhaps understandably, resisted acknowledging a new constitutional rule by asserting that "a pretextual arrest in which race is a factor may invoke the exclusionary rule by means of the Fourth Amendment." *Whren*, however, makes clear that the 4th Amendement offers no remedy to pretextual police action. The *Richardson* court also emphasized that it had "not found another case comparable to *Jennings* which recognizes that a substantively based Fourteenth Amendment right through the Equal Protection Clause invokes the exclusionary rule."[33] But, *Avery* and *Segars* suggest an opposite judicial trend to what *Richardson* identified in 1994, as reflected in recent lower court decisions.[34] And, the *Richardson* court incorrectly surmised that in 1993 "[t]he Sixth Circuit implicitly rejected *Jennings* in *US v Ferguson*."[35] In *Ferguson*, the 6th Circuit did not address an equal protection claim, but merely adopted an objective standard for 4th Amendment analysis.[36] *Avery* confirms that the 6th Circuit never retreated from *Jennings*' basic premise.

The time thus appears ripe for an equal protection exclusionary rule. This rule would provide relief even when the objective facts defeat a 4th Amendment claim, so long as the police targeted the defendant for that investigation solely due to race.[37] The bigger issue, however, may become demonstrating equal protection violations, even sufficiently to obtain a pretrial hearing.

Pleading an Equal Protection Claim

Criminal practitioners in New York know too well that "[h]earings are not automatically or generally available for the asking by boilerplate allegations."[38] Rather, under Criminal Procedure Law § 710.60(1), "[a] motion to suppress evidence . . . must state the ground or grounds of the motion and must contain sworn allegations of fact . . . supporting such grounds."

Not an easy task with equal protection claims, as they require proof of both discriminatory intent and discriminatory effect.[39] No wonder the prevailing view appears to be that "[a] 'racial profiling claim under the Equal Protection Clause is difficult, if not impossible, to prove,'"[40] since a defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose."[41] Nevertheless, *Segars* illustrates that sufficient equal protection claims can be framed, generally circumstantially.[42]

Segars, an African American, contended that a police officer ran his license plates because of his race, resulting in his arrest for driving with a suspended license.[43] In testing Segars' claim, the New Jersey Supreme Court employed a familiar three-part analysis. A defendant "bears the preliminary obligation of establishing a prima facie

case of discrimination . . . Once a defendant through relevant evidence and inferences establishes a prima facie case of racial targeting, the burden of production shifts to the State to articulate a race-neutral basis for its action."[44] If the prosecution offers a race-neutral basis, the burden returns to the defendant of proving discriminatory enforcement by a preponderance of the evidence.[45]

Segars testified that as he entered a bank to use the ATM, a Caucasian police officer passed him on the way out, and "'was looking with sort of a question mark on his face . . . sort of looking back.'"[46] After using the ATM, Segars drove out of the bank lot, around the officer's vehicle, which now blocked the exit lane, to a Quick Stop next door. The officer approached Segars in the Quick Stop lot and asked for credentials, and Segars admitted his license was suspended. The officer testified "that he never used the [ATM] during the events in question, that he never saw Segars, that he did not know Segars's race before the [license] check, that the [license] check was totally random, and that he checked and ticketed others, including a Caucasion motorist, during the same period."[47] In response, Segars presented the bank's ATM records, which showed that the officer used the ATM one minute prior to Segars.[48] Police records also revealed that the officer ran Segars' license two minutes after Segars used the ATM.[49]

The Court found that Segars' testimony and the bank and police records "met his burden of establishing a prima facie case of selective enforcement,"[50] as the records "bolstered Segars's assertion that he and [the officer] first encountered each other in the bank, and that the officer only then ran the . . . check on Segars's license plate."[51] Thus, "a trier of fact could infer that [the officer] checked Segars's plates because of his race and testified falsely about what he did because he knew that racial targeting was wrong."[52] The Court reached this conclusion even though Segars admitted that the officer did ticket another, Caucasion motorist, remained polite, and never com-

mented on race.[53] The Court noted that the officer ran the Causasion motorist's plates "as a result of observing an expired inspection sticker on the Caucasian motorist's car. By that testimony, [the officer] revealed that that motorist was not checked randomly, but for cause. Such a for cause stop is irrelevant in determining whether the Officer's claimed random stops were racially motivated."[54]

Nevertheless, the officers' testimony that he ran Segars' plates randomly, as part of his usual practice, "met [the State's] burden of production."[55] At this second stage of the analysis, the Court noted, the officer's testimony "was a race-neutral explanation not subject to a credibility assessment."[56] Yet, the Court further concluded that "[b]ecause the evidence that raised the inference of racial targeting also impeached [the officer's] race-neutral rationale, a critical part of the State's rebuttal should have been the production of an explanation for [the officer's] inaccurate testimony."[57] Since "[n]o such explanation was forthcoming,"[58] "it was not appropriate for the [lower] court to proffer an explanation for [the officer's] inaccurate testimony."[59] Accordingly, the Court found "that Segars . . . met his burden of persuasion."[60]

A defendant, of course, could not develop the facts of a pretrial motion to the degree in *Segars*, especially with New York's meager discovery rules.[61] But, a defendant need not win the hearing to obtain one; the defendant need only raise issues of fact. Thus, the facts Segars offered to raise the initial inference, or *prima facie* case, of racial targeting may illustrate the type of allegations sufficient to warrant a pretrial hearing. The *Segars* Court noted, however, "[t]hat this is a very unusual case,"[62] and admonished: "Without [the officer's] repudiated testimony, the evidence produced by Segars that [the officer] saw him prior to the [license] check would have been completely inadequate to support an inference of discriminatory enforcement."[63] Consequently, *Segars* also makes clear that a defendant must add something suggesting discrimination beyond an officer's mere awareness of the defendant's race to raise an inference of racial targeting.

A defendant may start, therefore, by alleging that the police observed the defendant's appearance, and only then altered their previous actions to target the defendant. Indeed, allegations demonstrating that the police targeted a defendant for investigation before the defendant committed any observable offense or caused any suspicion may prove key to raising a red flag of racial targeting. For instance, if a defendant was stopped for traffic infractions, the defendant may aver that the police followed the defendant for an unusual length of time first, suggesting either no real interest in the infraction, or that the police followed waiting for the defendant to commit an infraction after already targeting the defendant on the basis of race.[64] A similar scenario can be alleged regarding street encounters, too, if the police followed or questioned a defendant before they could have developed any reason to suspect wrongdoing.[65]

Consistent with *Segars*, however, some corroborative indication of racial targeting should be offered. So, a defendant should highlight facts that may suggest a discriminatory purpose, like police statements that the defendant was stopped because the defendant "matched a description" that never existed or as part of a "routine check," or police comments like, "You know the drill."[66] Or, a defendant may connect the complained-of stop to "neighborhood profiling," which may underlie racial targeting of the defendant—such as the stop of a Caucasian motorist in Washington Heights, or the police asking, "What are you doing in this neighborhood?" A defendant even may add more traditional pretext allegations to the mix, such as the fact that the police were not working traffic duty, nor issued a traffic summons.

Inexplicable disparate treatment further may reveal a discriminatory purpose,[67] especially when the police can "control the investigated population."[68] For example, a defendant may have observed the police ignore speeding Caucasian motorists but stop the defendant, an African American or Hispanic driver, for the same or an even more minor infraction.[69] Obviously, the police cannot control the population using the roadways. But, this allegation, especially if combined with other indicators of racial targeting, may suggest that the police in fact limited the motorists they investigated to particular races. Thus, "not only would they be able to control the investigated population, they could do it with impermissible criteria."[70]

Ultimately, a sufficient racial targeting claim will require careful investigation and consultation with the defendant, and perhaps some pleading creativity, to demonstrate that the police targeted the defendant solely due to race. At that point, however, a race-neutral response merely will join issue and require a hearing.[71] But, if a defendant's motion establishes only that "an officer . . . generated many reasons for that [investigation]—one being race,"[72] the court quite likely will deny the motion without a hearing.[73]

Conclusion

Surely, no New York jurist wishes for racial targeting to remain a feature of police investigative practices. Yet, without a meaningful suppression remedy, criminal courts can do little to combat racial targeting. Courts, therefore, hopefully will recognize an equal protection exclusionary rule, and give defendants a chance to fashion proper pleadings in factually appropriate cases. ⚖

Endnotes

1. *People v Robinson*, 97 NY2d 341; 767 NE2d 638, 652; 741 NYS2d 147 (NY 2001) (Levine, J, dissenting); *see also* Barry Kamins, NEW YORK SEARCH & SEIZURE, at 390 (Gould 2002).

2. 517 US 806, 813 (1996).

3. 97 NY2d 341; 767 NE2d 638; 741 NYS2d 147 (NY 2001).
4. See NY Const., article I, § 12.
5. 97 NY2d 341; 767 NE2d at 642; 741 NYS2d 147 (NY 2001); *see also People v Wright*, 98 NY2d 657; 773 NE2d 1011; 740 NYS2d 273 (NY 2002).
6. *See e.g.*, *People v Park*, 294 AD2d 887; 741 NYS2d 824, 825 (4th Dept 2002); *People v Webb*, 291 AD2d 319; 737 NYS2d 618, 619 (App. Div. 1st Dept 2002); *People v Hammond*, 291 AD2d 779; 737 NYS2d 733, 734 (App. Div. 4th Dept 2002). One Justice of the Supreme Court has hinted that *Whren* may not "extend to searches based only upon reasonable suspicion." *US v Knights*, 122 S Ct 587, 593 (2001) (Souter, J., concurring). Yet, this reasonable suspicion-probable cause distinction seems unlikely, as the reasonable suspicion standard also involves an objective analysis. *See Terry v Ohio*, 392 US 1, 21 (1968) (noting that "the facts [must] be judged against an objective standard"); *cf. People v Carter*, 743 NYS2d 886 (2nd Dept 2002) (citing to *Robinson* in upholding "the stop and frisk of the defendant"); *cf. also US v Mariscal*, 285 F3d 1127, 1129-31 (9th Cir. 2002); *US v Hunnicutt*, 135 F3d 1345, 1348 (10th Cir. 1998); *People v Valenzuela*, 88 CalRptr2d 707, 712 (Ca. Ct. App. 1999). Even the levels of police intrusion that New York courts recognize below a 4th Amendment seizure—a "request for information" and a "common law inquiry"—appear to turn on a similar objective analysis. *See People v DeBour*, 40 NY2d 210; 352 NE2d 562, 571-72 (1976). Pretext challenges apparently still may be raised to administrative or inventory searches. *See Whren*, 517 US at 811; *Valenzuela*, 88 CalRptr2d at 712-13; *cf. also People v Molnar*, 98 NY2d 328; 774 NE2d 738; 746 NYS2d 673 (NY 2002).
7. *Robinson*, 97 NY2d 341; 767 NE2d at 644; 741 NYS2d 147.
8. *Id.* at 644; *see also Whren*, 517 US at 813.
9. *See US v Armstrong*, 517 US 456, 461 n. 2 (1996); *see also US v Chavez*, 281 F3d 479, 486-87 (5th Cir. 2002) (explaining that "[n]either the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the . . . Equal Protection Clause"); *US v Valenzuela*, 2001 WL 629655, at *6 (D. Colo. 2001).
10. *Robinson*, 97 NY2d 341; 767 NE2d at 644; 741 NYS2d 147.
11. 799 A2d 541 (NJ 2002).
12. *Id.* at 543-44.
13. *Id.* at 544.
14. *Id.* at 543, 546.
15. *Id.* at 546.
16. *Id.* at 549.
17. *Id.*; *see also State v Maryland*, 771 A2d 1220, 1228-29, 1231 (NJ 2001).
18. 137 F3d 343 (6th Cir. 1997).
19. *See id.* at 346-47.
20. *See id.*
21. *See id.* at 347.
22. *See id.* at 352.
23. *See id.* at 353.
24. *See id.* at 355-58.
25. *Id.* at 352.
26. *Id.* at 353, 355.
27. *Id.* at 355.
28. 985 F2d 562, 1993 WL 5927 (6th Cir. 1993).
29. *Id.* at *4.
30. *See Avery*, 137 F3d at 358 (Boggs, J., concurring); but *cf. Valenzuela*, 2001 WL 629655, at *6 (observing that "[a]lthough the *Avery* court never explicitly addressed the issue, it must have implicitly assumed that a violation of the Fourteenth Amendment would be subject to the exclusionary rule . . . the only possible remedy would have been suppression").
31. 94 Ohio App 501; 641 NE2d 216.
32. *Richardson*, 94 Ohio App 501; 641 NE2d at 221.
33. *Id.* (citations omitted).
34. *See US v Pollard*, __ F.Supp. 2d __, 2002 WL 1363433, at *11-12 (D. VI 2002) (citing to *Avery*, holding that "suppression is a viable remedy for an equal protection violation"); *cf. also US v Aliperti*, 2002 WL 1634440, at *3 (D. Kan. 2002); *US v Barker*, 2001 WL 1793731, at *1 (W.D. Ky. 2001).
35. *Richardson*, 94 Ohio App 501; 641 NE2d at 221. *See US v Ferguson*, 8 F3d 385 (6th Cir. 1993) (en banc).
36. *See id.* at 391-92.
37. *Cf. Bradley v US*, __ F3d __, 2002 WL 1723779, at *4 (3rd Cir. 2002) (noting that "[t]he fact that there was no Fourth Amendment violation does not mean that one was not discriminatorily selected for a search").
38. *People v Mendoza*, 82 NY2d 415; 624 NE2d 1017, 1019; 604 NYS2d 922 (NY 1993).
39. *See Armstrong*, 517 US at 463-67.
40. *Robinson*, 97 NY2d 341; 767 NE2d at 655; 741 NYS2d 147. (Levine, J., dissenting).
41. *McCleskey v Kemp*, 481 US 279, 292 (1987) (emphasis in original).
42. *See Davis*, 426 US at 242; *cf. People v Holmes*, 291 AD2d 779; 612 NYS2d 153, 154 (App. Div. 1st Dept 1994) (noting that "intent almost invariably must be inferred from circumstantial evidence").
43. *Segars*, 799 A2d at 543.
44. *Id.* at 549.
45. *See id.* at 549, 550.
46. *Id.* at 544.
47. *Id.* at 551; *see also id.* at 544.
48. *Id.* at 545.
49. *Id.*
50. *Id.* at 551.
51. *Id.* at 545.
52. *Id.* at 551.
53. *See id.* at 544.
54. *Id.* at 552. This fact also likely eliminated the argument that any discriminatory intent did not have a discriminatory effect on *Segars*, *cf. Wayte*, 470 US at 608-09; *cf. also Bradley*, 2002 WL 1723779, at *4-5 and n. 11; *Avery*, 137 F3d at 347, although the Court never addressed this issue explicitly.
55. *Segars*, 799 A2d at 551.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 552.
60. *Id.*
61. *See e.g.*, CPL 240.44(1).
62. *Segars*, 799 A2d at 552.
63. *Id.* (emphasis added).
64. *Cf. e.g.*, *Aliperti*, 2002 WL 16344440, at *1.
65. *Cf. also Holland*, "Safeguarding Equal Protection Rights," 37 AM. CRIM. L. REV. at 1137-39 (discussing hypothetical from Avery).
66. Obviously, a defendant's claim that the police used racial slurs will suggest volumes about their motivations.
67. *See Davis*, 426 US at 242.
68. *Avery*, 137 F3d at 357.
69. *Cf. e.g.*, *Aliperti*, 2002 WL 16344440, at *1.
70. *Avery*, 137 F3d at 357.
71. *See* CPL 710.60(4).
72. *Avery*, 137 F3d at 353; *see also id.* at 354 note 5.
73. *See* CPL 710.60(3)(b).

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

Search and Seizure (Arrest/ Scene of the Crime Searches) (Warrantless) **SEA; 335(10) (80)**

Kirk v Louisiana, 536 US ___, 122 SCt 2458, 153 LEd2d 599 (2002)

Based on an anonymous citizen complaint, police watched the defendant's apartment for signs of drug sales. A buyer was stopped by police outside the defendant's house. The police decided to enter the defendant's apartment out of fear that the evidence might be destroyed. They knocked on the defendant's door, arrested and searched him, and discovered drugs and money on his person while inside the apartment. A search warrant was obtained later. Charged with possession with intent to distribute, the defendant moved to suppress the evidence due to a warrantless entry, arrest, and search without exigent circumstances. The motion was denied after a hearing. On appeal the court affirmed holding that since the drugs and money were found on the defendant, whose arrest was valid, the warrantless search of the apartment was irrelevant.

Holding: Entering an apartment without a warrant or exigent circumstances to arrest someone suspected of selling drugs violated the 4th Amendment. *Payton v New York*, 445 US 573 (1980). "[T]he Fourth Amendment has drawn a firm line at the entrance to the house . . . , [a]bsent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id* at 590. The state court's failure to assess the presence of exigent circumstances violated *Payton*. Judgment reversed and remanded.

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

Hope v Pelzer, 536 US ___, 122 SCt 2508, 153 LEd2d 666 (2002)

The petitioner, an Alabama prisoner, was handcuffed to a hitching post for two hours for a disciplinary violation. After another incident, he was put in leg irons and handcuffed to the post without his shirt for seven hours. Guards gave him water once or twice, but no bathroom breaks. He was forced to remain in a standing position with arms raised for the entire time. The petitioner filed suit under 42 USC 1983 against the prison guards. Without deciding the 8th Amendment issue, the court held that the guards had qualified immunity, which was affirmed on appeal.

Holding: Handcuffing an inmate to a hitching post, restricting movement, denying sufficient water or bathroom breaks, compounded by taunting and humiliation, violated the 8th Amendment. *Whitley v Albers*, 475 US 312, 319 (1986). These actions put the guards on notice that they were violating the constitution. *Saucier v Katz*, 533 US 194, 201 (2001). "The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." Federal case law and a Department of Justice report provided "fair and clear warning" sufficient to preclude summary judgment based on qualified immunity. *See US v Lanier*, 520 US 259 (1997). Judgment reversed.

Dissent: [Thomas, J] The petitioners factual allegations against specific guards were insufficient to over come the qualified immunity standard. Their limited actions did not obviously violate the 8th Amendment, which by itself did not provide adequate notice that their conduct was wrong.

Ethics (Judicial) **ETH; 150(10)**

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

Republican Party of Minn. v White, 536 US ___, 122 SCt 2528; 153 LEd2d 694 (2002)

Minnesota prohibited judicial candidates from announcing their views on disputed legal or political issues. Minn Code of Judicial Conduct, Canon 5(A)(3)(d)(i) (2000). The petitioner ran for a judgeship and distributed campaign literature criticizing the state Supreme Court's decisions on crime, welfare and abortion. He withdrew after a complaint was filed. Two years later, he ran again and sought an advisory opinion from the Lawyers Board about enforcement of the "announce clause." The Board was dubious of its constitutionality but would not comment further. The petitioner filed an action in federal court claiming that the clause violated the 1st Amendment. The court upheld the clause, which was affirmed by the 8th Circuit.

Holding: Overbroad speech restrictions on judicial candidates violated the 1st Amendment. The strict scrutiny test required proof that the "announce clause" was narrowly tailored to serve a compelling state interest, *ie*, impartiality. *Eu v San Francisco County Democratic Central Comm*, 489 US 214, 222 (1989). The clause failed the test since it restricted speech on issues, not bias concerning particular parties. Judgment reversed and remanded.

US Supreme Court *continued*

Concurring: [O'Connor, J] Restricting judicial campaign speech was not the proper method for assuring impartiality.

Concurring: [Kennedy, J] Being a judicial candidate alone did not justify speech restrictions.

Dissent: [Stevens, J] Judicial candidates needed different treatment from other elected officials.

Dissent: [Ginsburg, J] The "announce clause" applied to prospective statements committing candidates to particular positions, while permitting enough speech about judicial qualifications and views to inform the electorate.

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

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

Stewart v Smith, 536 US ___, 122 SCt 2578, 153 LEd2d 762 (2002)

Convicted of murder and other crimes, the defendant was sentenced to death. He filed a postconviction motion under Ariz. Rule Crim. Proc. 32 claiming ineffective assistance of counsel during the sentencing phase. The state court denied the claim because the defendant failed to raise it in two previous Rule 32 petitions. The court rejected the defendant's argument that the procedural default was excused due to a conflict of interest between his motion attorneys and the trial attorney who were from the same public defender office. The ineffectiveness claim was again raised in a federal habeas petition. Relying on the state court ruling, the district court rejected the petition for procedural default. On appeal, the 9th Circuit reversed, finding that the procedural default ruling required evaluation of the merits and that federal review of the merits was appropriate under *Ake v Oklahoma*, 470 US 68 (1985).

Holding: The state supreme court replied to certified questions on the interpretation of Rule 32 indicating that the "constitutional magnitude" of a claim depends on the right asserted, not on the merits. *Stewart v Smith*, 46 P3d 1067, 1068 (2002). Categorizing a claim under Rule 32 did not depend on federal law. *See Delaware v Prouse*, 440 US 648, 652 (1979). The state court reasoned that since "deputies in the Public Defender's office represent their clients and not their office, respondent's appellate lawyers would never have allowed 'a colorable claim for ineffective assistance of counsel' to go unstated." The procedural default was based on state grounds, not on the merits of a federal claim. Judgment reversed, case remanded.

Death Penalty (Racial Discrimination) **DEP; 100(130)**

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

United States v Bass, 536 US ___, 122 SCt 2389, 153 LEd2d 769 (2002)

Federal prosecutors sought the death penalty against the defendant, an African-American, in a double homicide. The defendant rejected a plea bargain and moved for dismissal of the death penalty notice, or, in the alternative, discovery to support a selective prosecution claim. Upon granting of the motion, prosecutors refused to comply. The court dismissed the death penalty notice. The discovery order was affirmed on appeal.

Holding: National statistics showed that federal prosecutors charged African-Americans with death-eligible offenses twice as often as whites, but the statistics were insufficient to justify a discovery order for a claim of selective prosecution. Defendants requesting discovery orders in selective prosecution cases need to show evidence of discriminatory effect and discriminatory intent. *United States v Armstrong*, 517 US 456, 465 (1996). There had to be a "credible showing" that "similarly situated individuals of a different race were not prosecuted." *Id* at 470. The US Dept of Justice study, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* contained raw statistics about overall charges that were silent about the similarly situated defendants required by *Armstrong*. Judgment reversed.

New York State Court of Appeals

Ethics (Judicial) **ETH; 150(10)**

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

Matter of Shanley, No. 83, 7/1/02

Two allegations of misconduct were made against the petitioner justice. One, she circulated campaign literature stating she was a "graduate" of "Judicial Law Courses" from various institutions when the only degree she had was a high school diploma; the courses in question were CLE courses taken in conjunction with her job as a law clerk. Two, her use of campaign literature in which she called herself a "Law and Order Candidate" committed her, or appeared to commit her, to a pro-prosecution bias. This would violate the impartiality requirement of 22 NY CRR 100.5(A)(4)(d)(i) and (ii). A referee's finding that as to the first allegation the petitioner had committed misconduct was not challenged. The referee found that the second allegation could not form the basis for disciplinary action. The Commission on Judicial Conduct affirmed as to the first allegation but found that the "law and order" charge was worthy of discipline. A public admonishment was issued.

Holding: Whether use of the phrase "law and order candidate" was intended to convey an image as a criminal law conservative, or whether a reasonable person viewing the ad would see it that way, need not be determined. The

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Commission "has not shown that the phrase carries a representation that compromises judicial impartiality." The phrase "law and order" is not a commitment, pledge or promise of conduct in office. The admonishment for the misrepresentation of educational qualifications is affirmed. Judgment affirmed as modified.

[Ed. note: For a US Supreme Court decision on judicial campaign promises, see p. 16.]

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

Sentencing (Presentence Investigation and Report) **SEN; 345(65)**

People v Hicks, No. 97, 7/1/02

The defendant pled guilty in satisfaction of all charges and negotiated a proposed sentence of consecutive three-to-six year terms. This promise was conditioned on the defendant truthfully answering all questions asked of him by the court and the probation department. The defendant agreed that if he violated any condition, the court was not bound by its promises and he could not withdraw his plea. During his presentence report interview with the probation department, the defendant denied guilt. Based on this acknowledged lie, the court sentenced the defendant to two consecutive 10-to-20 year terms. The Appellate Division imposed the bargained-for sentence.

Holding: Conditions agreed upon as part of a plea bargain are generally enforceable, unless violative of statute or public policy. *See People v Avery*, 85 NY2d 503, 507. There was nothing "subjective" about the condition in question. It was explicit, objective, accepted by the defendant, and concededly breached. Sentence enhancement based on the breach did not violate any statute or public policy. The presentence report may be the most important document at both sentencing and the correctional level of the criminal process. The defendant's failure to answer truthfully hindered the preparation of an accurate report. Judgment reversed, case remitted.

Speedy Trial (Cause for Delay) (Statutory Limits) **SPX; 355(12) (45)**

People v Smietana, No. 90, 7/2/02

An information charging second-degree criminal contempt and harassment was filed on June 5, 1998. The court issued a summons, which the defendant picked up on July 14. He was arraigned the same day, which was the prosecution's first notification of the charges. At a pretrial conference on Aug. 7, the prosecution announced ready for trial. A trial date was postponed to Dec. 20 because a witness required an interpreter. On that date, the defendant moved to dismiss the information, contending that the 90-day CPL 30.30 speedy-trial time limit had been exceeded where the prosecution was chargeable with the 39 days between filing the information and arraignment and 55 days of post-readiness delay. The court dismissed the criminal contempt charge for insufficiency, then reasoned that under CPL 30.30(1)(d) the prosecution was required to announce readiness within 30 days of filing an accusatory instrument because the charge was now a violation. However, the 39-day pre-arraignment period was found excludable because the prosecution did not know of the charges until arraignment. The defendant's harassment conviction was affirmed by the Appellate Term.

Holding: The court erred in retroactively imposing the shorter CPL 30.30 period, but the error was waived by the prosecution's failure to challenge it. The delay between filing of the information and arraignment is excludable under the CPL 30.30(4)(g) exceptional circumstance provision. The police, court, and prosecutor did what was required of them by law, yet the prosecution was unaware of the charges before arraignment and unable to prepare for trial. There is no indication that such delay frequently occurs. Order affirmed.

Dissent: [Kay, CJ] An exceptional circumstance should not be based on the prosecution's conceded policy of remaining unaware, until arraignment, of accusatory instruments filed by police.

Search And Seizure (Warrantless Searches) **SEA; 335(80)**

People v Molnar, No. 91, 7/2/02

The defendant, charged with murder, moved to suppress the body and all evidence flowing from its discovery through a warrantless search. The court denied the motion. The Appellate Division affirmed.

Holding: Searches otherwise illegal under the 4th Amendment can be justified by the existence of an emergency. *See eg People v Mitchell*, 39 NY2d 173. To invoke this exception, the police must have, first, reasonable grounds to believe that there is an emergency and an immediate need for their assistance to protect life or property. Here, a 911 caller alerted police of a strange odor emanating from the defendant's apartment. There was no response to the officer's knocks. The emergency exception requires second that the search not be primarily motivated by an intent to arrest or seize evidence. The police here were acting as public servants. The third requirement, that there be some reasonable basis, approximating probable cause, to associate the emergency with the area to be searched, was met. Police spoke with the complaining neighbor and confirmed that the smell came from the defendant's apartment. The requirement of immediacy must be considered in context. That the police here spent an hour attempting to find alternatives to force to gain access to

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the apartment before making the entry did not remove the situation from the realm of emergency. Judgment affirmed.

[Ed. note: This case is cited in fn. 6 of the Practice Tip on "pretext" challenges to arrest appearing on pg. 11.]

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

People v Sanchez, No. 70, 7/9/02

The defendant was indicted on one count each of intentional murder and depraved indifference murder. He was found guilty of depraved indifference murder. The Appellate Division affirmed.

Holding: The defendant claimed that the prosecution's proof was consistent only with an intentional killing, that under no reasonable view of the evidence could he have been found not guilty of intentional murder but found to have recklessly caused the decedent's death. By agreeing to the court instructing the jury on second-degree manslaughter as a lesser-included offense, the defendant conceded that the evidence could be reasonably viewed to support a finding of reckless homicide but not intentional murder. Had he been convicted of manslaughter he would have been precluded from making this argument. *See People v Borst*, 232 AD2d 727, 728 *lv den* 89 NY2d 940. The act of shooting at the decedent's torso at point blank range could be viewed as not intentionally meant to kill but as presenting such a transcendent risk of causing death that it met the level of manifested depravity needed to establish depraved indifference murder under Penal Law 125.25(2). To require that a defendant have an "unusually evil mental state" is not consistent with precedents in construing depraved indifference. Requiring circumstances evincing a depraved indifference to human life focuses on "an objective assessment of the degree of risk presented by defendant's reckless conduct," not subjective intent. *See People v Register*, 60 NY2d 270 *cert den* 466 US 953. The difference between manslaughter and depraved indifference murder is a graver risk of death and proof of circumstances manifesting a depraved indifference focusing on "an objective assessment of the degree of risk." The requirements the dissent would add are not required under common law and are obsolete under the current statute. Judgment affirmed.

Dissent: [Smith, J] The evidence is insufficient to establish depraved indifference murder.

Dissent: [Rosenblatt, J] By finding the facts of this case sufficient to establish depraved indifference murder, the court "*leaves no conceivable circumstances under which a charge of intentional murder will not be amenable to a conviction for depraved indifference murder*" (emphasis in original).

Death Penalty (Cruelty) (Defense) (Guilt Phase) (Jury Selection) (Legislation) (Penalty Phase) DEP; 100(40) (45) (85) (95) (105) (120)

Evidence (Prejudicial) (Rebuttal) EVI; 155(106) (123)

Grand Jury (Procedure) GRJ; 180(5)

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

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

People v Harris, No. 80, 7/9/02

The defendant was charged with six counts of first-degree felony murder with robbery as the underlying felony, as well as six counts of first-degree same-transaction murder. The prosecution filed notice of intent to seek the death penalty. The defendant was found guilty and sentenced to death. He raised 28 issues and over 60 sub issues on appeal.

Holding: "'Death is different,'" so a capital case requires meticulous and thoughtful attention.

That the prosecution did not instruct the grand jury that intoxication may negate an element of the charged crimes was not error. A prosecutor is not required to present mitigating defenses to a grand jury. *See People v Valles*, 62 NY2d 36, 38. Intoxication, like a mitigating defense, merely reduces the gravity of an offense by negating an element.

The defendant moved to dismiss the felony-murder counts because that provision of the statute includes some felonies while excluding other, arguably more serious, ones. A capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty by distinguishing on a principled basis. *See Arave v Creech*, 507 US 463, 474 (1993). The legislature determined that the predicate felonies for first-degree felony murder should be those with the most potential for violence. The decision to exclude felonies of similar grade, but lacking the inherent potential for violence, was rational.

The court denied the defendant's motion to postpone the death qualification process in jury selection until after the guilt phase of trial. The defendant argued that death qualification would result in a conviction-prone jury and unlawfully exclude certain cognizable groups from the venire. The supporting social science studies submitted in support provided no solid proof that death qualification leads to a more conviction-prone jury or excludes certain groups. The fair-cross-section requirement is limited in scope, a direct and inevitable consequence of the practical

NY Court of Appeals *continued*

impossibility of providing each defendant with a truly "representative" petit jury. *Lockhart v McCree*, 476 US 162, 173-174 (1986). Taking the fair-cross-section requirement to its logical extreme would inappropriately produce juries that include individuals who have indicated that they cannot and would not follow a judge's instruction, undermining the right to an impartial jury. *See Wainwright v Witt*, 469 US 412 (1985). The state has a valid interest in excluding jurors whose views on the death penalty render them unable to perform their duty to try the case without prejudice.

The court instructed the panels that it was looking for jurors who would be open to both sentencing options, a death sentence and life without parole. Because jurors are presumed to follow their oaths, answer questions put to them truthfully, and abide by the court's instructions (*see People v Acevedo*, 69 NY2d 478, 488) no prejudice is found, though courts should exercise caution. Honesty and frankness should be encouraged without seeming to place value on a "correct" answer.

The defendant's contention that CPL 270.16(1) requires only individual voir dire in capital cases is wrong. That provision did not supersede CPL 270.15(1)(c), which states that the court shall permit both parties to examine the prospective jurors "individually or collectively." *See People v Santiago*, 184 Misc2d 403, 405.

The court did not apply the wrong standard in determining for-cause challenges during CPL 270.20(1)(f) death qualification. The proper standard for determining when prospective jurors may be excluded for cause because of their views on capital punishment is whether their views would "prevent or substantially impair the performance of" their duties as jurors in accordance with their instructions and oaths. *Adams v Texas*, 448 US 38, 45 (1980). Jurors who express conscientious views concerning the death penalty yet still are clear that they are able to follow their oaths and remain impartial cannot be excluded for cause.

At trial, the defendant planned to present a defense of extreme emotional disturbance resulting from post-traumatic stress disorder caused in part by child abuse. The court denied the defendant's for-cause death qualification challenge under CPL 270.20(1)(f) to a prospective juror who indicated that she was skeptical of child abuse and its subsequent effect on an adult's behavior. She was never asked if her skepticism would affect her views on the death penalty in general or its application to this case, so no proper claim of for-cause exclusion under CPL 270.20(1)(f) was made.

The defendant retained the services of two expert witnesses, Clark and Drob. Clark testified on direct concerning his diagnosis of the defendant with post-traumatic stress disorder. Drob did not testify. The prosecution's expert testified that based on his own tests and some of Drob's, he could not make the same diagnosis as Clark. The court properly refused to allow the defendant to call Drob, who listened to the prosecution expert's testimony, as a rebuttal witness. Rebuttal evidence is limited to evidence in denial of an assertion of a new affirmative fact or other new matter that an opponent has sought to prove. *See People v Harris*, 57 NY2d 335, 345. The prosecution's witness did not dispute the validity of the tests that Drob performed and Clark relied on, and disagreed with the prosecution's witness only in finding that the tests relied on by Clark were more significant. This point was already asserted by Clark. Hence, the proposed testimony was both cumulative to and duplicative of Clark's.

Several family members of the decedents testified in the guilt phase about personal details about the decedents and their families. Before the prosecution's case, the defendant had sought to limit their testimony, and the prosecution said it would focus mainly on identifying the decedents. After all family members testified, the defendant unsuccessfully moved to strike that testimony which went beyond identification. While testimony of this type should not be used to convey to the jury the seriousness of the loss of life, the defendant, by not objecting sooner, deprived the court the opportunity to avoid such error. *See People v Luperon*, 85 NY2d 71, 77-78. To the extent that the issue was preserved, the error was harmless in light of the overwhelming evidence of the defendant's guilt.

During summations, the prosecutor twice made references that the defendant smiled during the testimony of two prosecution witnesses. The court overruled the defendant's general, single word objections. Admitting evidence of a smile as circumstantial evidence of consciousness of guilt is error. *See People v Basora*, 75 NY2d 992, 994. The defendant's objections did not apprise the court of the constitutional claims now raised. If the issue were reviewed, the error would be found harmless.

During the jury charge, the court said that "[t]he goal of this process is a unanimous verdict." and "You should, therefore, make every effort to harmonize your various views so that you can come to an unanimous agreement as to the facts . . ." During deliberations, the jury asked whether "'a unanimous vote [is] required on the question A, establishment of the extreme emotional disturbance by the defense.'" The court responded yes. The jury found the defendant guilty of all six felony-murder counts and of robbery and that the defendant had failed to establish extreme emotional disturbance. Every juror was asked whether the verdict announced was theirs and each responded "yes." The court's instructions, supplemental instructions and the polling, taken together, show the jury reasonably understood the unanimity requirements.

It is unconstitutional to impose the death penalty under a statutory framework that penalizes the assertion of a defendant's constitutional right. *US v Jackson*, 390 US

NY Court of Appeals *continued*

570 (1968). Such a framework existed when this case was brought to trial. The defendant's right to a jury trial was penalized in that the death sentence could be imposed "only on those who assert innocence and proceed to trial." *Matter of Hynes v Tomei*, 92 NY2d 613. The appropriate remedy is to vacate the death sentence and to remit the case to the trial court pursuant to CPL 470.30(5)(c) for resentencing. Deciding whether the entire death penalty scheme is unconstitutional under the State Constitution's cruel and unusual punishment clause is not necessary to this appeal. Judgment modified, case remitted for resentencing.

Concurrence in Part, Dissent in Part: [Smith, J] The conviction should be reversed. The defendant's motion for "heightened scrutiny and a heightened standard of due process throughout all of the proceedings in this capital case" should have been granted, at least as to issues affecting the sentence. Rebuttal testimony should have been allowed, where a line of defense questioning on direct examination was stopped until after the prosecution's witness, which the defense then sought to rebut. The prospective juror who stated that she would not consider child abuse in determining what sentence to impose should have been dismissed for cause.

First Department

Juries and Jury Trials (Constitution—Right To) (Qualifications) **JRY; 225(20) (50)**

People v Mercado, 290 AD2d 237, 735 NYS2d 125 (1st Dept 2002)

Holding: The defendant was convicted by a jury of burglary, robbery, assault, and criminal impersonation. Several years later, the prosecutor learned that one of the jurors from the defendant's trial was himself a convicted felon. The prosecutor notified the defendant, who moved to vacate his conviction pursuant to CPL 440.10(1)(h) on the ground that he was denied his right to a fair and impartial jury. In the alternative, he requested a hearing. The prosecution opposed on the ground that the defendant did not allege a constitutional violation and that he failed to demonstrate prejudice. The court found that no 6th Amendment right was implicated and denied the motion without a hearing. The defendant is entitled to an evidentiary hearing where he may attempt to establish that actual bias resulted from the juror's failure to disclose his conviction. *US v Boney*, 68 F3d 497. Order reversed, matter remanded. (Supreme Ct, Bronx Co [Globerman, J])

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

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

People v Salazar, 290 AD2d 256, 736 NYS2d 20 (1st Dept 2002)

Holding: The defendant's motion to suppress was properly denied. The warrantless entry into the defendant's apartment, resulting in the seizure of two knives in plain view, was justified under the emergency doctrine based on the totality of the information concerning the defendant's violent conduct, threats and disturbed mental condition. *See People v Mitchell*, 39 NY2d 173, 177-178. The danger did not abate while the officers waited to enter the apartment. *See People v Glia*, 226 AD2d 66, 71-72 *app dsmd* 91 NY2d 846. The evidence was sufficient to convict the defendant of contempt, as his appearance outside the complainant's apartment violated a prohibition of the order of protection. The defendant's simultaneous possession of two knives, with the same intent, constituted a single act requiring concurrent sentences. *See People v Rogers*, 111 AD2d 665 *lv den* 66 NY2d 617. Judgment modified, consecutive sentences on the weapons convictions to run concurrently. (Supreme Ct, New York Co [Bradley, J])

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

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

Morris v Port Authority of NY and NJ, 290 AD2d 22, 736 NYS2d 324 (1st Dept 2002)

Port Authority police officers stationed at Kennedy Airport are required to turn in their radios when off duty. Upon discovering radios missing, the Port Authority Police Department opened and searched approximately 50 lockers, finding two radios. The Port Authority Benevolent Association sought to enjoin the police department from conducting additional random searches of officers' lockers.

Holding: Because the plaintiffs failed to demonstrate the likelihood of success on the merits, their motion for preliminary injunctive relief was properly denied. A search is justified when it is reasonably necessary for work-related purposes. *O'Connor v Ortega*, 480 US 709, 726 (1987). A public employer's intrusions on constitutionally protected privacy interests of public employees is permissible when there are reasonable grounds to believe a search will reveal evidence or is necessary for work-related purposes, and the means are reasonably related to the objective of the search and are not excessively intrusive in relation to the misconduct. *Leventhal v Knapek*, 266 F3d 64, 73. Where the employees are police officers, the reasonableness analysis must take into account their special status; the State can regulate the conduct of its police, even

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when the conduct involves a constitutionally protected right. *Matter of Caruso v Ward*, 72 NY2d 432, 439. The court properly found that whether or not locker searches are a condition of employment is an issue for the trier of fact. Order affirmed. (Supreme Ct, New York Co [Tolub, J])

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

Application of Otero v NYC Department of Corrections, 290 AD2d 272, 735 NYS2d 768 (1st Dept 2002)

Holding: There is substantial evidence (the drug test NIK report and the apprehending officers' written report) to support finding the petitioner guilty of narcotics possession. *See Matter of Archie v Great Meadow Correctional Facility*, 243 AD2d 808. The hearing officer's determination at the inmate disciplinary hearing not to permit the petitioner to call or confront witnesses did not constitute a denial of due process. "An 'inmate's right to present witnesses is necessarily circumscribed by the penological need to provide swift discipline in individual cases *** [and] the very real dangers in prison life which may result from violence or intimidation directed at either other inmates or staff' (*Ponte v Real*, 471 US 491, 495. . .)." An inmate has no unqualified right to present witnesses at a disciplinary hearing and may not confront or cross-examine adverse witnesses. 39 RCNY 1-03[a][10][iii] and [v]. The 3600 days of punitive segregation imposed is reduced to 90 days. Determination modified and otherwise confirmed.

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

Application of Buric v Safir, 285 AD2d 255, 736 NYS2d 342 (1st Dept 2002)

Holding: A Special Referee concluded that the police department intentionally failed to comply with a prior court order directing them to reinstate the petitioner, a police officer. Nearly five years after he was finally reinstated, the petitioner was terminated for using excessive force against a prisoner and lying about doing so. The prisoner had been in a holding cell when a confrontation ensued. The petitioner allegedly slammed the prisoner's head against the cell bars and beat him for 20 minutes. A hearing examiner, basing his decision on the testimony of the prisoner and three witnesses, found the petitioner's version of events implausible. While the determination of an administrative agency will generally be upheld if there is a rational basis for the finding (*Pell v Board of Education*, 34 NY2d 222, 230-231), the findings in this case lack any rational basis. The record contains evidence of bias and retaliation. The three purported witnesses were not even present when the alleged incident took place. The hearing officer ignored evidence of a detective coaching the prisoner and producing witnesses whom he knew did not witness the incident. Because the record does not support the determination (*Mobley v Tax Appeals Tribunal of the State of New York*, 177 AD2d 797 *app dsmd* 79 NY2d 978), the determination which found the petitioner guilty of assault and lying is annulled. The petitioner is entitled to a judicial hearing on the issue of retaliation. Determination modified, matter remanded.

Accomplices (Corroboration) **ACC; 10(20)**

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

People v Cruz, 291 AD2d 1, 737 NYS2d 16 (1st Dept 2002)

Holding: The court dismissed the indictment because the only grand jury testimony linking the defendant to the charged crimes was uncorroborated accomplice testimony. One of the witnesses had participated with the defendant and others in a separate, unsuccessful robbery and had conspired with them to commit other such crimes. However, "there was no evidence that this grand jury witness participated in any offense based on the facts or conduct underlying the charged crimes . . ." Therefore, even accepting that the witness was a member of a larger conspiracy, he was not subject to prosecution for the crimes charged here because he did not personally participate. *People v McGee*, 49 NY2d 48, 57-58, *cert den sub nom Waters v New York*, 446 US 942. He was not an accomplice under Criminal Procedure Law 60.22 and his testimony was not subject to the corroboration requirement. *People v Cona*, 49 NY2d 26, does not compel a different result, because there a charge of conspiracy was included in the indictment. Here, the witness's membership in the conspiracy could be viewed as satisfying the literal language of CPL 60.22, but such a view would be inconsistent with cases requiring participation in at least some of the facts or conduct with which the defendant is charged. *See People v Cobos*, 57 NY2d 798. Order reversed, indictment reinstated. (Supreme Ct, New York Co [Corriero, J])

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

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

People v Woods, 290 AD2d 346, 737 NYS2d 29 (1st Dept 2002)

Holding: Through cross-examination and on summation, defense counsel raised the question of how the detective who questioned the defendant could have given *Miranda* warnings at 10:35, taken an oral statement, then taken a written statement beginning at 10:36 as was noted on that statement. The jury asked the court by note

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whether prior to arrest a person could be asked to answer any questions before being given *Miranda* warnings. The court responded to this inquiry and a later one about whether the defendant was supposed to be Mirandized by saying the court could not answer. This was not the meaningful response required. *See People v Lourido*, 70 NY2d 428, 435. Portions of the applicable standard jury instructions pertain directly to the need to give *Miranda* warnings only if a defendant is in custody. *See* 1 CJI 11.02 at 663-664. Serious prejudice from the failure to respond is established; if the jury had determined that the defendant's statements were involuntary, the remaining evidence would have been insufficient to prove guilt. Whether a defendant's statement is voluntary may require jury determination of whether the defendant's *Miranda* rights were violated. This is distinguishable from *People v Medina* (146 AD2d 344 *affd other gnds* 76 NY2d 331), where the issue—whether the defendant's right to counsel had attached under the *Rogers-Bartolomeo* rule—was a legal, not factual, one. Judgment reversed, matter remanded for new trial. (Supreme Ct, Bronx Co [Hunter, J])

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

People v Greene, 290 AD2 349, 737 NYS2d 32 (1st Dept 2002)

Holding: During *voir dire* in this domestic violence case, a juror told the court that she and her sister had been domestic violence victims years before and she was not sure that she could be impartial. She added "I can try" and similar phrases when responding affirmatively to questions about whether she could listen with an open mind, assess witnesses' credibility, and determine analytically if they were telling the truth. She said she could imagine herself saying that she had been through the same situation, and that there would be some confusion, when asked if she could keep her feelings out of jury deliberations. When the court insisted she answer yes or no whether she could give the defendant a fair trial, she said, "I think I can." "[T]here is no talismanic expurgatory oath to prove that a prospective juror will render an impartial verdict (*People v Johnson*, 94 NY2d 600, 611), and the 'occasional use of allegedly equivocal words such as "try" does not automatically'" disqualify the juror. *People v Semper*, 276 AD2d 263 *lv den* 96 NY2d 738. Where the juror herself called into question her ability to be impartial, and consistently tempered her assurances with equivocation even when a yes or no answer was demanded by the court, the challenge for cause should have been granted. Judgment reversed. (Supreme Ct, Bronx Co [Stadtmauer, J])

Equal Protection (General) **EQP; 140(7)**

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

Gomez v Evangelista, 290 AD2d 351, 736 NYS2d 365 (1st Dept 2002)

Holding: In 1999, as part of the Prisoner Litigation Reform Act, a provision was passed providing that an inmate may pay a reduced fee of between $15 and $50 to commence a state action or proceeding. The reduced fee cannot be waived. Filing without payment may be allowed when exceptional circumstances render the inmate unable to pay any fee, but the State acquires a lien against the inmate's account in that instance. CPLR 1101(f)(2). The requirement that inmates pay at least a $15 fee is rationally related to the legitimate government interest of curbing excessive inmate litigation. The defense of prisoner lawsuits entails the expenditures of valuable staff time. The legislative history of the provision indicates that in 1996 fewer than 1% of the Article 78 proceedings filed by inmates in Albany County resulted in any relief being granted. Governor's Program Bill Memorandum, 1999, New York State Annual 233. This provision is modeled on a federal act which has been effective in decreasing frivolous federal suits and has been found to be rationally related to a legitimate government interest. *See Nicholas v Tucker*, 114 F3d 17 (2nd Cir) *cert den* 523 US 1126. The court below erred in declaring the provision unconstitutional as a denial of equal protection. Order reversed, matter remanded. (Supreme Ct, New York Co [Goodman, J])

Juveniles (Delinquency—Procedural Law) **JUV; 230(20)**

Speedy Trial (General) (Statutory Limits) **SPX; 355(30) (45)**

Re George T., 290 AD2d 396, 736 NYS2d 673 (1st Dept 2001)

Holding: The appellant, adjudicated a juvenile delinquent, claimed that he was denied a speedy fact-finding hearing. The claim that commencement of the hearing was unlawfully delayed was rejected in a prior appeal. *People ex rel. Solomon v Fitzpatrick*, 288 AD2d 106 (106). Any adjournment granted after the hearing commenced did not implicate the right to a speedy hearing. *Matter of Ango H.*, 286 AD2d 500. Family Court Act 340.1 addresses the commencement, not completion, of fact-finding hearings. "However, we take a dim view of the court's taking of evidence for only a short period of time, especially when dealing with a juvenile who is incarcerated. We are aware of the huge number of cases in Family Court and appreciate the difficulties attendant thereto but find there is no excuse for the taking of testimony for five minutes or half

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an hour at a time and then continuously adjourning the case." Order affirmed. (Family Ct, Bronx Co [Lynch, J])

Ethics (General) ETH; 150(7)

Misconduct (General) MIS; 250(7)

Matter of George Edelstein, 290 AD2d 189, 737 NYS2d 592 (1st Dept 2002)

In 1999, a federal district court struck the respondent's name from the roll of attorneys for violating DR 5-103(B), DR 5-101(A), and DR 1-102(A)(5). The 2nd Circuit then disbarred him. He had been admitted to practice in New York by the 1st Department. The Disciplinary Committee sought reciprocal discipline. The 1st Department remanded to the Committee to designate a Hearing Panel to conduct a hearing and recommend an appropriate sanction.

Holding: The acts that warrented disbarment in federal court are acts of misconduct in this jurisdiction. That the Committee misunderstood the remand order to limit the potential sanction to something less is the only way to explain why suspension instead of disbarment, the only appropriate sanction (*see Matter of Robb*, 287 AD2d 1), was proposed. The respondent, representing as appointed counsel a defendant who became a confidential informant, loaned the client money. Upon nonpayment, the respondent withdrew from, then resumed, representation, asked the government to pay the client for cooperating so the client could pay the respondent, and eventually withdrew again and sued the client. When a second client became a fugitive, the respondent denied knowledge of his location. The respondent then met the former client/informant and said he would reveal the fugitive's location if the informant arranged to be paid for the information and split it with the respondent. Upon disclosure of these facts, the respondent claimed the government had sent the informant to set him up. The respondent is disbarred under 22 NYCRR 603.4(g).

Defenses (Justification) DEF; 105(37)

Impeachment (General) IMP; 192(15)

People v Munoz, 291 AD2d 287, 737 NYS2d 604 (1st Dept 2002)

At trial, the defendant admitted to stabbing the complainant, but raised the defense of justification. Meanwhile, the complainant had allegedly shot the defendant's brother and was under indictment for the crime when he testified at the defendant's trial. The court allowed the complainant to be cross-examined about whether he had shot the defendant's brother, but would not allow testimony about the indictment, nor that of a witness claiming that he had seen the complainant at the shooting.

Holding: The rulings did not violate the defendant's right to cross-examine witnesses and present a defense. *See Delaware v Van Arsdall*, 475 US 673, 678-679. The complainant's indictment was not a permissible area for impeachment. *See People v Miller*, 91 NY2d 372, 380. The defendant did not argue until appeal that the complainant's indictment was relevant because the complainant could have been attempting to curry favor with the prosecutors. The argument is unpreserved. *See People v Inniss*, 83 NY2d 653, 658. To the extent that the extrinsic evidence of the shooting was offered to contradict the complainant's denial, it was barred by the collateral evidence rule. *See People v Schwartzman*, 24 NY2d 241, 245 *cert den* 396 US 846. The alleged shooting was extremely remote to any possible motive of the complainant to testify falsely against the defendant. See *People v Thomas*, 46 NY2d 100, 105-106. Judgment affirmed. (Supreme Ct, New York Co [Torres, J])

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

Sentencing (Credit for Time Served) SEN; 345(15)

Re Dwayne R., 291 AD2d 325, 737 NYS2d 851 (1st Dept 2002)

Holding: The appellant was adjudicated a juvenile delinquent. The presentment agency conceded that there was no finding by the court that crediting him for 123 days served in pre-disposition detention would not serve the needs and best interest of the appellant or the need for protection of the community. He is entitled to credit for that time. Family Court Act 353.3(5); *Matter of Wayne S.*, 193 AD2d 371, 372. As also conceded, attempted third-degree assault is a lesser included offense of attempted second-degree assault, and that count of the petition is dismissed. Order of disposition modified, as modified affirmed. (Family Ct, Bronx Co [Martinez-Perez, J])

Evidence (Burden of Proof) (Circumstantial Evidence) EVI; 155(10)(25)

People v Moore, 291 AD2d 336, 738 NYS2d 332 (1st Dept 2002)

Holding: The defendant was convicted of multiple counts of fourth-degree grand larceny, fourth-degree possession of stolen property, and a count of seventh-degree possession of drugs. There was no valid line of reasoning and permissible inferences from which a reasonable person could conclude that every element of the felonies was proven beyond a reasonable doubt. *See People v Bleakley*, 69 NY2d 490, 495. The only circumstantial evidence of the

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defendant's guilt was his possession of the wallet at the time of his arrest. The prosecution introduced no direct evidence to establish when or how the defendant came into possession of the wallet, that he took it or knew that it had been taken, or that the wallet indeed was stolen rather than lost. The jury may have inferred that because the defendant was holding the wallet that he had taken it. However, it is equally reasonable to infer that the defendant found the wallet, as he testified. Given that the evidence provides a reasonable innocent explanation for the defendant's possession of the wallet, the competing inference that he took the wallet from the complaining witness cannot be found beyond a reasonable doubt and is therefore impermissible. *See People v Castillo*, 47 NY2d 270, 277. Whether or not the defendant's testimony was believed, the gaps in the prosecution's case could only be filled by improper conjecture. Judgment modified and as modified affirmed. (Supreme Ct, New York Co [Allen, J])

Juries and Jury Trials (Discharge) (Selection) — **JRY; 225(30) (55)**

People v Davis, 292 AD2d 168, 738 NYS2d 208 (1st Dept 2002)

Holding: The defendant was convicted by a jury of selling drugs. "The court properly exercised its discretion in discharging selected but unsworn juror whose late arrival would have unduly prolonged the trial." Although delay caused by the juror's tardiness would only have been one hour, the court found that this would have interrupted the trial schedule and extended the trial into the next week. The defendant had consented to a delay in swearing selected jurors, agreeing to a creation of a category of jurors "about which the Criminal Procedure Law is silent as to criteria for discharge." *See People v Velez*, 255 AD2d 146 *lv den* 93 NY2d 858. Judgment affirmed (Supreme Ct, New York Co [Atlas, J])

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

Motor Vehicles (Unauthorized Use) — **MVH; 260(35)**

Re Raquel M., 291 AD2d 155, 740 NYS2d 2 (1st Dept 2002)

Holding: Police found the 14-year-old appellant in the passenger seat of a van with no visible damage that would lead an occupant to suspect it had been stolen as it had been three days earlier. She was found to have committed an act that, if committed by an adult, would constitute third-degree unauthorized use of a motor vehicle. Under Penal Law 165.05(1) persons are guilty of unauthorized use of a vehicle when, knowing that they do not have the consent of the owner, they ride in or utilize the vehicle. Persons who engage in such an activity are presumed to know that they do not have the owner's consent. Since the appellant did not offer any evidence to explain her presence in the van, invocation of the presumption was authorized. *People v McCaleb*, 25 NY2d 394, 400-401. Observable indicia of theft are not required to invoke the presumption. Only if the defendant had come forward with credible proof of lack of knowledge would the presentment agency have had a "heavy burden" to sustain its case. Judgment affirmed. (Family Ct, New York Co [Rand, J])

Dissent: [Andrias, JP] Requiring defendants to testify to prove their innocence goes against the constitutional right to remain silent. *Matter of Stephen R.*, 182 AD2d 92, 96. Under the majority's reasoning, everyone would risk conviction by accepting a ride in an unfamiliar vehicle without proof that the driver had permission to use it.

Arrest (General) (Identification) (Police Officers) (Probable Cause) — **ARR; 35(12) (15) (30) (35)**

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

People v Clarkson, 292 AD2d 207, 738 NYS2d 570 (1st Dept 2002)

Holding: The defendant was convicted by a jury of attempted third-degree robbery. The court properly denied the defendant's suppression motion. The court found that the prosecution had shown probable cause when the arresting officer, who had watched a videotape of a robbery several times, subsequently encountered the defendant and identified him as the robber. The prosecution was not required to show the videotape at the suppression hearing in order to meet their burden of coming forward to show the police conduct was lawful. *See People v Berrios*, 28 NY2d 361, 367-368. The officer's testimony that he recognized the defendant was enough, since it was a statement of fact and not a mere legal conclusion. Judgment affirmed. (Supreme Ct, New York Co [Allen, J])

Identification (General) (*Wade* Hearing) — **IDE; 190(17) (57)**

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

People v White, 292 AD2d 239, 739 NYS2d 63 (1st Dept 2002)

Holding: The defendant was seen by a police officer selling narcotics. The prosecution "provided the defendant with CPL 710.30(1) (b) notice that they intended to offer testimony concerning a confirmatory identification by the observing officer at the police precinct." There were actually two confirmatory identifications. The first was

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made when the arresting officer radioed the observing officer while approaching the defendant to confirm that the defendant was the individual observed selling narcotics. A second identification was made at the precinct. The defendant moved to suppress these two identifications. The court denied the motion following a *Wade* hearing. By proceeding at the hearing, the defendant waived the preclusion issue as to the first identification, which was also "clearly exempt from the notice and hearing requirements of CPL article 710." *See People v Newball*, 76 NY2d 587, 592. The second identification was confirmatory even though it was made three hours after the alleged sale was observed. *See People v Morales*, 37 NY2d 262, 271-272.

The defendant's sentence for fifth-degree drug possession is reduced from an illegal six to 12 years to a legal sentence for this class D felony of two to four years. *See* Penal Law 70.06(3)(d), 220.06. There is no reason for resentencing in view of the valid concurrent terms for the other two convictions. *See People v Coleman*, 267 AD2d 110 *lv den* 95 NY2d 794. Judgment modified, and as modified, affirmed. (Supreme Ct, New York Co [Leo, J at suppression hearing and jury trial; Mills, J at sentence])

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

People v Reyes, 292 AD2d 271, 738 NYS2d 850 (1st Dept 2002)

Holding: Because the defendant was deported, his three-month visa having expired, the appeal is dismissed. As a consequence of his own voluntary misconduct, he is unavailable to obey the mandate of the court in the event of an affirmance. *See People v Bacon*, 46 NY2d 1073. If the appeal was considered, the verdict convicting the defendant of robbery and assault would be found to have been based on legally sufficient evidence and the prosecutor's summation not to have deprived the defendant of a fair trial. Appeal dismissed. (Supreme Ct, Bronx Co [Cohen, J])

Grand Jury (General) **GRJ; 180(3)**

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

Search and Seizure (Motions to Suppress [CPL Article 710]) (Search Warrants [Affidavits, Sufficiency of]) **SEA; 335(45) (65[a])**

People v Morales, 292 AD2d 253, 739 NYS2d 149 (1st Dept 2002)

Holding: The prosecution conceded that the defendant was deprived of a fair trial when he was convicted of drug possession at a trial where a redacted version of his grand jury testimony was introduced. His admission that the drugs were found on his dresser was introduced, but not his explanation that they were not his but, perhaps, his son's.

The defendant also argued that his suppression motion should have been granted and his indictment dismissed because there was no probable cause to support the search warrant. The warrant was based upon information given by an informant, whose reliability was not established by the police officer's affidavit. *See People v Darden*, 34 NY2d 177. The prosecution failed to alert the suppression court that the issuing court had examined the informant under oath; such argument is therefore not preserved on appeal. However, a *Darden* hearing was conducted at the defendant's request to demonstrate the informant's existence and credibility. *Cf People v Serrano*, 93 NY2d 73. The suppression court found, after examination using questions submitted by the defense, that the informant was a credible witness and that there had been probable cause. The procedures undertaken to protect the informant, *ie* excluding defense counsel from the hearing, did not violate due process. *People v Castillo*, 80 NY2d 578, 584. Judgment reversed, matter remanded. (Supreme Ct, New York Co [Zweibel, J]

Appeals and Writs (Scope and Extent of Review) **APP; 25(90)**

Arrest (Probable Cause) (Warrants) **ARR; 35(35) (55)**

Search and Seizure (Motions to Suppress [CPL Article 710]) (Plain View Doctrine) **SEA; 335(45) (53)**

People v Polanco, 292 AD2d 29, 740 NYS2d 35 (1st Dept 2002)

The prosecution appealed the court's suppression of evidence following a hearing at which a detective gave testimony characterized by the court as "'tailored to nullify constitutional objections.'"

Holding: The motion court erred by crediting the defendant's testimony over the arresting detective's testimony regarding whether an envelope containing racing slips was sealed, or open with its contents visible, providing probable cause to arrest. The envelope showed no physical proof of ever being sealed. Even though appellate courts give great deference to a trier of fact's credibility assessments, they can be overturned when the weight of the evidence is so great that to not overturn the motion court would be unjust. *See People v Tempton*, 192 AD2d 369, 370 *lv den* 82 NY2d 760. *De novo* factual review power is exercised to hold that the evidence obtained by the arresting detective should not be suppressed because the envelope was in the "plain view" of the detective. Police have probable cause to make a warrantless arrest if they are lawfully in a position to view the object, have lawful

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access to the object, and the object's incriminating nature is immediately apparent. *People v Diaz*, 81 NY2d 106, 110. Here, all three of these criteria were met. Order reversed. (Supreme Ct, Bronx Co [Mogulescu, J])

[Ed. note: See Defense Practice Tips, p. 7 for more on appellate review of police testimony.

Accusatory Instruments (Sufficiency) ACI; 11(15)

Impeachment (General) IMP; 192(15)

People v Real, 293 AD2d 251, 739 NYS2d 267 (1st Dept 2002)

Holding: The defendant received fair notice of the charges against him. The indictment adopted the title of the contempt statute, thereby incorporating the offense the defendant was charged with and the elements of the crime charged. *See People v Ray*, 71 NY2d 849, 850. The court's preclusion of certain testimony which allegedly showed bias on the part of the complainant did not deprive the defendant of a fair trial; "this evidence was exceedingly remote and lacked probative value." *See People v Thomas*, 46 NY2d 100, 105-106 *app dsmd* 444 US 891. Judgment affirmed. (Supreme Ct, Bronx Co [Torres, J])

Assault (Evidence) ASS; 45(25)

Evidence (Sufficiency) EVI; 155(130)

Weapons (Evidence) (Possession) WEA; 385(20) (30)

People v Parker, 293 AD2d 278, 740 NYS2d 49 (1st Dept 2002)

Holding: The defendant's conviction of second-degree assault was based upon legally sufficient evidence and was not against the weight of the evidence. The defendant had sneaked up behind the complainant and stabbed him in the back after the two had an altercation. This evidence clearly established the required element of intent to cause physical injury. *See People v Bracey*, 41 NY2d 296, 301. The defendant's conviction of third-degree possession of a weapon must be reduced to fourth-degree possession because the prosecution failed to establish that defendant had previously been convicted of a crime, a necessary element. *See* Penal Law 265.02(1). The prosecution had solely relied on a certification of conviction identifying the defendant by name. Evidence proving the defendant was the perpetrator of the previous crime was needed. *See People v Van Buren*, 82 NY2d 878. Judgment modified and otherwise affirmed. (Supreme Ct, New York Co [Yates, J])

Contempt (Counsel) CNT; 85(5)

Juveniles (Delinquency-Procedural Law) JUV; 230(20)

Re Jamie D., 293 AD2d 278, 739 NYS2d 816 (1st Dept 2002)

Holding: The presentment agency's claim that the court should not have dismissed the juvenile delinquency petition was not preserved for appeal. *See People v Luperon*, 85 NY2d 71, 78. The petition was properly dismissed for unconstitutional delay prior to the filing of the petition, given the short time frames associated with juvenile delinquency proceedings and their underlying policy considerations. *See Matter of Benjamin L.*, 92 NY2d 660, 667-670. The finding of contempt and the fine imposed against the presentment agency's counsel is vacated because the court failed to follow Judiciary Law 755 and this Court's Rules 604.2(a)(1) and 604.2(a)(3). *See Matter of Morris Cramer Bowling, Ltd., v Cramer*, 38 AD2d 774. Judgment modified and otherwise affirmed. (Family Ct, Bronx Co [Shelton, J])

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

Larceny (Evidence) (Fraud) (Grand Larceny) LAR; 236(25)(35)(40)

People v DiCarlo, 293 AD2d 279, 741 NYS2d 508 (1st Dept 2002)

Holding: The verdict was based on legally sufficient evidence, which established that the defendants intended to deprive the School Construction Authority (SCA) of property. The defendants wrongfully obtained this property in an amount exceeding the statutory threshold of $50,000. *See People v Robinson*, 60 NY2d 982. They did so by obtaining reimbursement in excess of their contractual entitlement through fraudulent misrepresentations upon which SCA relied. The court's restitution determination was not inconsistent with the verdict; the restitution hearing was not part of the trial, but had a different fact-finder addressing different issues. *See* Penal Law 60.27(2); CPL 400.30 (4). Just because the defendants are ordered to pay restitution to SCA in an amount currently owed does not negate the sufficiency of the trial evidence that the defendants had stolen over the statutory amount from SCA. Even if they pay outstanding liens, they are still guilty of second-degree grand larceny—but for the instant criminal prosecution the defendants had no intention of paying the money back. The claim of ineffective assistance of counsel lacks merit. Using one defendant and a "professional quantity surveyor" to present the "lump-sum-contract" defense, foregoing cross-examination of a witness who might have denied even more forcefully that the contract was a "lump-sum" one, and other decisions were reasonable but

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unsuccessful strategies. *See People v Henry*, 95 NY2d 563, 565. Judgment affirmed. (Supreme Ct, New York Co [Sudolnik, J])

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

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

People v Gardine, 293 AD2d 287, 740 NYS2d 52 (1st Dept 2002)

The defendant was convicted, after a jury trial, of second-degree murder.

Holding: The defendant failed to make a prima facie showing that a child who may have witnessed the murder was in the "'control'" of the prosecutor. *See People v Gonzalez*, 68 NY2d 424, 427-28. The prosecutor sought to subpoena the child, but the mother refused to let him testify. The child should be deemed "unavailable." *See People v Rivera*, 249 AD2d 141 *lv den* 92 NY2d 904. The prosecution's ability to force a minor to testify over parental objection may be more theoretical than practical. *See* Family Ct Act 158; *Matter of People v Louise D*, 82 Misc2d 68. Therefore, the court properly refused to give a missing witness charge to the jury. The court properly exercised its discretion when it refused to allow a totally useless demonstration, using the courthouse hallway to show distance measurements, requested by the defendant. Judgment affirmed. (Supreme Ct, New York Co [Figueroa, J]

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

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

Matter of Balcacer, 293 AD2d 107, 740 NYS2d 192 (1st Dept 2002)

Holding: The respondent was suspended from practicing law for three months for violating DR 1-102(A)(4), DR 2-101(A) and DR 2-105(B) of the Lawyer's Code of Professional Responsibility, after he had placed two deliberately false and misleading advertisements, aimed at the Dominican community, in the yellow pages. The respondent misled the Dominican community by holding himself out as more experienced and qualified then he was. He lied about having professional associates ("experienced, Jewish, 'criminal defense specialists,' former prosecutors . . .") just to increase his business. The respondent admitted that the advertisements were intended to deceive potential clients and that this was wrong, but believed his sanction should be limited to public censure. The term of suspension recommended by the Departmental Hearing Committee should be increased. The deceptive advertising was extremely serious because "it was directed at a particularly vulnerable segment of society for his [respondent's] own financial gain." Determination confirming findings of fact and conclusions of law confirmed, respondent suspended for six months. (Departmental Disciplinary Committee for the 1st Judicial Department)

Instructions to Jury (Preliminary Instructions) (Witnesses) **ISJ; 205(48)(55)**

Witnesses (Cross Examination) (Direct Examination) (General) **WIT; 390(11) (15) (22)**

People v Delpilar, 293 AD2d 365, 742 NYS2d 200 (1st Dept 2002)

Holding: The court properly allowed the prosecutor to reopen direct examination of a witness after cross-examination had begun. During a recess, the witness, who originally was too frightened to make an in-court identification, approached the prosecutor about her willingness at that point to do so. Although mid-testimony conferences with witnesses are frowned upon, the truth-seeking function of this trial was promoted by permitting the witness to make an in-court identification of a defendant. *See People v Branch*, 83 NY2d 663. The court adequately safeguarded the defendant's fair trial rights by restricting the prosecutor's examination of the witness and by permitting the defendant to also cross-examine the witness about her conversation with the prosecutor and change in testimony, and by allowing in summation comment that improper coaching may have caused the change. The defendant complained that he was not allowed to show that the codefendant had a homicidal motive the defendant did not share. Even if the court erred in not allowing this evidence, it was not prejudicial because there was overwhelming evidence of the defendant's guilt.

The court properly denied the defendant's mistrial motion based upon the introduction of hearsay testimony. Before deliberation the judge sufficiently instructed the jury to disregard the stricken hearsay testimony. It is presumed that the jury followed these instructions. *See People v Davis*, 58 NY2d 1102, 1104. Judgment affirmed. (Supreme Ct, Bronx Co [Barrett, J])

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

Re Application of Stone, 740 NYS2d 335 (1st Dept 2002)

These cases concern two men that were deemed not responsible for their crimes by reason of mental disease.

Holding: The Insanity Defense Reform Act (CPL 330.20) protects society from persons found to be not guilty of a crime due to mental disease, while providing

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treatment for such individuals. *See Matter of Oswald N.*, 87 NY2d 98, 104. The Act requires acquittees to be committed to the State Office of Mental Health (OMH) to determine if they have a dangerous mental disorder or illness (CPL 330.20[2]). An acquittee found to be dangerous is admitted into a secure psychiatric hospital. If found not to be dangerous the acquittee is transferred to a non-secure hospital, and once found not to be mentally ill is released into the community. A judicial determination is required prior to this transfer and release. All transfers and releases require the issuance of Orders of Conditions. CPL 330.20 [11], [12]. An Order of Conditions, which directs the acquittee to comply with the treatment plan that the court deems appropriate, is valid for five years from issue. If the court shows good cause this may be extended for an additional five years. The court may also discharge the acquittee, terminating the Order of Conditions, when the judge finds the acquittee no longer suffers from a dangerous mental condition and therefore is not a threat to public safety. The Order of Conditions is the means by which the convicting court maintains control over the acquittee. *See Matter of Jill ZZ*, 83 NY2d 133, 138. A hearing is required even after the expiration date of an Order of Conditions to determine if there was "good cause" to extend the Order of Conditions under CPL 330.20 (1)(o), or if the acquittee met the criteria for discharge set forth in CPL 330.20(13). To simply dismiss an untimely case on jurisdictional grounds would punish the public for the State's mistake. *See People ex rel Logatto v Hanes*, 93 AD2d 676, 678. Orders reversed, hearings ordered. (Supreme Ct, Bronx Co [Katz, J] [Saks, J and Katz, J])

Forgery (Possession of a Forged Instrument) **FOR; 175(30)**

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

People v Hall, 294 AD2d 112, 743 NYS2d 69 (1st Dept 2002)

Holding: The appellant was deemed a persistent felony offender after he was convicted of second-degree forgery, second-degree possession of a forged instrument, and criminal possession of stolen property; in 1982 the appellant was convicted of a felony. However, as the prosecution conceded, the conviction for possession of a forged instrument should be dismissed because the appellant was already convicted of forgery based upon the same instrument. Penal Law 170.35. The appellant's other arguments were unpreserved and without merit. Judgment modified and as modified, affirmed. (Supreme Ct, New York Co [Rettinger, J])

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

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

Matter of Meltzer, 293 AD2d 202, 741 NYS2d 240 (1st Dept 2002)

Holding: The respondent attorney admitted to all charges except one as to which he contested that the stipulated facts constituted a violation of the Disciplinary Rules. He and his paralegal / office manager formed a corporation, Golden Mountain International, that, through the paralegal, provided legal services in immigration matters. Three matters were neglected: *eg* papers were not timely or properly filed with the Immigration and Naturalization Service and in one instance the paralegal dishonestly concealed the neglect. When two clients sought refund of their fees, the respondent baselessly and angrily claimed the work had been done and, in one case, threatened to call the police. In contesting the one charge, the respondent argued that because the corporation never made a profit, he had not shared in legal fees generated by a non-lawyer. A lawyer violates DR 3-102, prohibiting fee-sharing with a non-lawyer, by agreeing to do so through distribution of corporate profits regardless of whether any profit is actually realized. The Hearing Panel and referee recommended public censure, finding substantial mitigating factors including a recent divorce, financial difficulties, a diagnosis of major depression, and expression of remorse. Petition granted, the respondent publicly censured.

Defense Systems (Assigned Counsel Systems) (Compensation Systems [Attorney Fees]) **DFS; 104(5) (25[b])**

NY County Lawyers' Association v State of NY, __ AD2d __, 742 NYS2d 16 (1st Dept 2002)

The New York County Lawyers' Association (NYCLA) sought declaratory and injunctive relief from the State of New York, challenging the statutory level of and limits on compensation for assigned counsel and the distinction between in-court and out-of-court attorney compensation fees established by County Law 722-b, Family Court Act 245 and Judiciary Law 35. NYCLA argued that due to this compensation level, fewer attorneys are available to act as publicly-paid counsel for eligible children and adults. NYCLA asserted that the recognized crisis created a systemic, "severe and unacceptably high risk" that individuals will be denied their constitutional right to meaningful and effective assistance of counsel. NYCLA brought action on the sole behalf of the above individuals. The defendant moved to dismiss the complaint, saying NYCLA lacked standing and that the complaint asserted non-justiciable claims.

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Holding: The matter in this case is justiciable. It is within courts' competence to ascertain whether the State has satisfied a duty of compensation created by the Legislature. *Kolostermann v Cuomo*, 61 NY2d 525, 531. The subject "'is the *operation and administration of the courts by the courts'*" [emphasis in original], making court resolution of the issue suitable. The claim that the issues raised are "not ripe for litigation due to the absence of specific alleged instances" of a violation of the right to effective counsel is rejected. This State has recognized the validity of a claim of prospective injury. *See Swinton v Safir*, 93 NY2d 758. Standing exists based on the following. The plaintiff presented sufficient evidence to show that a third party suffered an "injury in fact." A substantial relationship exists between the plaintiff and the holder of the right in question. The impossibility of the holder of the right being able to protect it is sufficiently established. The motion court properly found a sufficient basis to conclude that clients' rights are likely to be adversely affected absent litigation. Order affirmed. (Supreme Ct, New York Co [Suarez, J])

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

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

Trial (Presence of Defendant [Trial in Absentia]) — **TRI; 375(45)**

People v Williams, 294 AD2d 174, 741 NYS2d 680 (1st Dept 2002)

The defendant was convicted of multiple offenses and sentenced as a persistent violent felony offender to an aggregate prison term of 25 years to life.

Holding: After nine jurors had been selected, the defendant waived his right to appear at trial. The court correctly denied his application to discharge the selected jurors and recommenced jury selection with a new panel. The defendant created the situation for which he sought a remedy. The court took steps to lesson the prejudice by repeatedly instructing the jury not to draw negative inferences from the defendant's absence. *See People v Brisbane*, 205 AD2d 358 *lv den* 84 NY2d 933.

The court wrongly adjudicated the defendant a persistent violent felony offender. The prosecution failed to establish some of the periods of incarceration on which they relied to toll the ten-year limit on prior convictions. The prosecution relied solely on the defendant's NYSID sheet which failed to show two periods of incarceration (*see* CPL 400.15[2]; 400.16[2]), and failed to bring forth the defendant's Department of Correctional Services record. At resentencing, the prosecution may seek to cure the defect in their proof of the defendant's status. Case remanded for resentencing. Judgment modified, matter remanded. (Supreme Ct, New York Co [Tejada, J])

Second Department

Possession (General) — **POS; 288.3(10)**

Narcotics (Possession) — **NAR; 265(57)**

People v Hamilton, 291 AD2d 411, 736 NYS2d 901 (2nd Dept 2002)

Holding: The evidence was legally sufficient to establish the defendant's guilt of second-degree murder beyond a reasonable doubt, and the verdict on that count was not against the weight of the evidence. *See* CPL 470.15[5]. The prosecution failed to present legally sufficient evidence of fourth-degree criminal possession of a controlled substance. The prosecution's theory was that the defendant was in constructive possession of drugs recovered from his codefendant's jacket pocket in the back seat of a car. In New York, to support a charge of constructive possession of tangible property, the prosecution must show that the defendant had sufficient control of the area where the contraband was found to exercise "'dominion or control'" over it. *People v Manini*, 79 NY2d 561, 573. Judgment modified, conviction and sentence as to criminal possession vacated and that count of the indictment dismissed, and as modified, affirmed. (Supreme Ct, Kings Co [Tomei, J])

Evidence (Sufficiency) (Weight) — **EVI; 155(130)(135)**

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

People v Greene, 291 AD2d 410, 736 NYS2d 900 (2nd Dept 2002)

Holding: The defendant's contention that the evidence of his guilt was insufficient is unpreserved for review. *See* CPL 470.05[2]; *People v Gray*, 86 NY2d 10. Viewed in a light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), the evidence was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Resolution of issues of credibility, and the weight to be accorded to the evidence presented, are primarily questions for the trier of fact, which saw and heard the witnesses. *See People v Gaimari*, 176 NY2d 84, 94. Its determination is to be awarded great weight on appeal and should not be disturbed unless clearly unsupported by the record. *See People v Garafolo*, 44 AD2d 86, 88. The verdict of the guilty was not against the weight of the evidence. *See* CPL 470.15[5]. The count charging the defendant with second-degree criminal trespass must be dismissed as a lesser-included offense of first-degree bur-

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glary. *See People v Kolempear*, 267 AD2d 327. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Douglass, J])

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

Domestic Violence (General) **DVL; 123(10)**

Matter of Xavier C., 291 AD2d 466, 737 NYS2d 541 (2nd Dept 2002)

Holding: The assigned counsel for the appellant submitted a brief in accordance with *Anders v California* (386 US 738 [1967]), moving to be relieved of the assignment. Based on an independent review of the record, there are nonfrivolous issues with respect to, *inter alia*, the Family Court's summary finding that the appellant's four children were neglected because of the appellant's domestic violence, notwithstanding that there was no evidence that any of the children witnessed the domestic violence. Counsel is relieved and directed to turn over all papers in her possession to new counsel assigned herein to perfect the appeal. *See Matter of Kotzker v Bonafilia*, 284 AD2d 535. Current counsel is ordered to turn over a copy of the transcript of the proceedings to new counsel, who shall serve and file a brief on behalf of the appellant within 90 days of this decision and order. The respondent may serve and file a brief within 120 days of this decision and order. By prior decision and order, the appeal will be prosecuted on the original papers and on the typewritten briefs of the parties. Motion granted, new counsel assigned. (Family Ct, Suffolk Co [Lehman, J])

Juries and Jury Trials (Alternate Jurors) (Discharge) **JRY; 225(5) (30)**

People v Williams, 291 AD2d 466, 737 NYS2d 635 (2nd Dept 2002)

Holding: "As police officers were about to execute a defective warrant at an apartment where the defendant was a guest, he dropped bags of cocaine out of the apartment window. The branch of the defendant's omnibus motion which was to suppress the seized cocaine was properly denied, since he did not have a reasonable expectation of privacy in the apartment (*see*, *People v Wesley*, 73 NY2d 351)." However, because the court did not obtain the defendant's written and signed consent to replace a regular juror with an alternate juror after jury deliberations began, a new trial is required. See CPL 270.35(1), *People v Page*, 88 NY2d 1, 3. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Pincus, J at trial and sentence, Fisher, J at hearing])

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

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

People v Logan, 291 AD2d 459, 737 NYS2d 549 (2nd Dept 2002)

The court denied the defendant's motion to vacate a judgment of conviction dating from Nov. 20, 1978.

Holding: "The Supreme Court properly denied the defendant's motion pursuant to CPL 440.30(1-a) and 440.10(1)(g) to vacate his judgment of conviction since the defendant failed to demonstrate that the items he seeks to have tested for DNA are still in existence (see, CPL 440.30[1-a]; *People v Ahlers*, 285 AD2d 664; *Matter of Washpon v New York State Dist. Attorney*, 164 Misc2d 991)." Order affirmed. (Supreme Ct, Kings Co [Juviler, J])

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

Prisoners (Disciplinary Infractions) **PRS I; 300(13)**

Matter of Whitfield v Fischer, 291 AD2d 504, 739 NYS2d 720 (2nd Dept 2002)

The petitioner borrowed three library books from the prison library. When he was notified that they had become overdue, he returned them. The prison's hearing officer presumed that the petitioner knew the rules of the library since he had borrowed books before, and found him guilty of possession of stolen property. The hearing officer determined that guilt could be "assumed" from the failure to return the books, even without any proof of larcenous intent. The superintendent upheld the determination.

Holding: The charge was not supported by substantial evidence. *See Matter of Agosto v Goord*, 264 AD2d 840. The petitioner's behavior "does not give rise to an inference of any intentional wrongdoing with regard to the books and can be distinguished from cases in which inmates intentionally damage library books or otherwise evidence an intent to prevent their recovery (*see, Matter of Benton v Couture*, 269 AD2d 642; *Matter of Webb v Goord*, 254 AD2d 551; *Matter of Daniel v Coughlin*, 147 AD2d 896)." Petition granted, determination annulled, references to the charges to be expunged from the petitioner's institutional record.

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

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

People v Smith, 291 AD2d 575, 737 NYS2d 880 (2nd Dept 2002)

Holding: The defendant correctly argued that the court improperly admitted testimony of a detective regarding the characteristics of pedophiles after the court

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refused to qualify the detective as an expert in the field of pedophilia. Due to the abundance of evidence that established the defendant's guilt, the error was harmless. The exclusion of the detective's testimony would not have changed the outcome. Judgment affirmed. (Supreme Ct, Kings Co [Gerges, J])

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

Robbery (Degrees and Lesser Offenses) (Elements) (Evidence) **ROB; 330(10) (15) (20)**

People v Nelson, 292 AD2d 397, 738 NYS2d 603 (2nd Dept 2002)

Holding: The defendant unsuccessfully sought to suppress identification testimony, arguing that the identification resulted from a warrantless search of his mother's house in violation of *Payton v New York* (445 US 573 [1980]). The court properly found that the prosecution sustained its burden of proving that entry into the home was valid based upon the mother's consent. The conviction of first-degree robbery must be reversed for lack of legally sufficient evidence that the stun gun allegedly displayed was a "dangerous instrument." The prosecution offered no evidence which conveyed that the gun "'under the circumstances in which it [was] used, attempted to be used or threatened to be used, [was] readily capable of causing death or other serious physical injury' (Penal Law 10.00[13])." Reliance by the prosecution on *People v MacCary* (173 AD2d 646) is misplaced. There, evidence was entered to show that the stun gun when applied to certain parts of the body long enough would cause disfigurement and other harm. The jury found the defendant guilty of only first-degree robbery. That count must be dismissed. Judgment reversed, new trial ordered on lesser robbery counts. (Supreme Ct, Kings Co [Gerges, J])

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

People v Breland, 292 AD2d 460, 740 NYS2d 345 (2nd Dept 2002)

The defendant was court convicted of first-degree robbery for allegedly hitting the complainant in the head with a gun and then removing fifty dollars from his pocket.

Holding: The tape recording of the complainant calling the police was wrongly admitted into evidence. The complainant ran from the crime scene to look for his uncle, rested on a park bench, and then ran away when he saw his attacker coming toward him with other men. Only then did he call the police. This does not establish that the complainant's statement to the operator fell within the excited utterance exception to the hearsay rule, which requires that statements be made "'under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection' (*People v Brown*, 70 NY2d 513, 518; *see*, *People v Nieves*, 67 NY2d 125, 131)." The lapse of time between the incident and the call, the lack of serious injury, and the actions taken during the time lapse support a conclusion that the complainant had the capacity to reflect, even if he sounded upset on the tape. *See People v Dalton*, 88 NY2d 561, 579-580. The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co (Marrus, J)

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

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Ocean, 292 AD2d 545, 739 NYS2d 735 (2nd Dept 2002)

The defendant was convicted of two counts of first-degree sexual abuse and endangering the welfare of a child. He was sentenced to indeterminate terms of two to six years. He appealed, and on Nov. 13, 2001, the matter was remitted for the court "to hear and report on the issue of whether the hospital records of the minor complainant and her brother were exhibited to the Grand Jury . . ." No other issues were decided. *See*, *People v Ocean*, 288 AD2d 330.

Holding: The court properly found that no evidence of the medical records of the minor complainant and her brother was presented to the grand jury. The prosecution conceded that the defendant's sentence should be reduced. The incident that led to the defendant's conviction occurred during Dec. 1995. "Since the crime was committed after October 1, 1995, the maximum sentence imposed on this conviction may only be double the minimum sentence, not triple (*see*, Penal Law 70.02[4], as amended by L 1995, ch 3, § 4)." It is clear that the court wanted to impose a sentence with a two-year minimum. The sentence is reduced to a term of two to four years' imprisonment. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Starkey, J])

Juries and Jury Trials (Alternate Jurors) (Discharge) **JRY; 225(5) (30)**

People v Kilmer, 292 AD2d 544, 739 NYS2d 588 (2nd Dept 2002)

Holding: The court properly exercised its discretion in replacing a sworn juror, having made adequate inquiry into the juror's unavailiblity for continued service due to the grave illness of her grandmother. *See* CPL 270.35;

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People v McDonald, 143 AD2d 1050. The substitution occurred at a relatively early stage in this criminally negligent homicide trial, only two of several prosecution witnesses having testified. Judgment affirmed. (Supreme Ct, Dutchess Co [Dolan, J])

Family Court (General) FAM; 164(20)

Juveniles (Custody) (Jurisdiction) JUV; 230(10) (70)

Matter of Jude F., 291 AD2d 165, 740 NYS2d 80 (2nd Dept 2002)

Holding: The Family Court properly placed a juvenile delinquent probation violator in the custody of the State of New York Office of Children and Family Services (OCFS) without his consent where he had turned 18 after the violation but before placement. The historic function of the juvenile justice system, to help rehabilitate children, is reflected in Family Court Act 301.1. It declares that in any delinquency proceeding, the court shall consider the needs and best interest of the child along with the community's need for protection. OCFS has a vital role in carrying out this statutory scheme. As to the age limitation for the placement of juveniles in the agency's custody, Executive Law 507-a(2)(a) permits youth to be placed in OCFS custody until the age of 21. Family Court Act 355.3(6) regarding successive extensions of placement states that placement cannot be "'made or continued'" beyond the juvenile's 18th birthday without the child's consent. Applying this passage to initial placements for probation violations is inappropriate. The only alternative the Family Court could seek would be conditional discharge, which would undermine the legislative intent of "providing appropriate rehabilitation services…to older youths who have never previously been placed in the custody of OCFS, but may benefit from a period of placement." Therefore, Family Court Act 355.3(6) does not prohibit the Family Court from involuntarily placing an 18 year old in the custody of OCFS. Judgment affirmed. (Family Ct, Kings Co [Hepner, J])

Guilty Pleas (General) (Withdrawal) GYP; 181(25) (65)

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

People v Kostka, 292 AD2d 634, 741 NYS2d 53 (2nd Dept 2002)

Holding: The defendant was apprehended in 1998 after he had failed to appear for a 1977 sentencing hearing following his guilty plea to second-degree burglary. The court expressed its intention to impose an increased sentence because by fleeing he violated a condition of the plea agreement. However, the defense objected. The minutes of the plea hearing could not be found to determine if the defendant had in fact been told about the consequences of failure to appear for sentencing. The defendant contended that he should still receive the original penalty promised in 1977. Generally, if a court is unwilling or unable to sentence a defendant in accordance with a plea bargain, the court must afford the defendant the opportunity to withdraw the plea, or impose the promised sentence. *See People v Selikoff*, 35 NY2d 227 *cert den* 419 US 1122. Here, the defendant should not be allowed to withdraw his plea because the prosecutor would be prejudiced due to the inordinate passage of time. *See* CPL 220.60(3); *People v Frederick*, 45 NY2d 520. Therefore, the defendant should be afforded the promised sentence. Judgment modified, sentence vacated, remanded for resentencing. (Supreme Ct, Westchester Co [Dachenhausen, J, at plea; Perone, J, at sentencing])

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

People v Dini, 292 AD2d 631, 741 NYS2d 59 (2nd Dept 2002)

Holding: A defendant has the absolute right to be present at all material stages of the trial. *See* CPL 260.20; *People v Roman*, 88 NY2d 18. According to CPL 310.30, when a deliberating jury requests information, the court must direct the jury back into the courtroom and provide the requested information in the defendant's presence. On the first day of deliberations, the defendant waived this right and allowed the court to give additional information to the jury in her absence, in the presence of counsel and the prosecutor. However, on the second day of deliberations, the court responded to another note, giving additional instructions regarding constructive possession, without consulting the defendant, again in the presence of counsel. The defendant was not asked about absences on the second day, and asserts that her waiver of the right to be present did not apply to the discussion, albeit brief, that occurred on the second day in the jury room. "We are constrained to agree." *See People v Ginyard*, 282 AD2d 256. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Lewis, J])

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

People v Simms, 292 AD2d 637, 739 NYS2d 604 (2nd Dept 2002)

Holding: The court record did not show if the proper procedures under CPL 400.21 for determining the defendant's status as a second felony offender were followed. *See People v Bressingham*, 148 AD2d 463. The case should be remitted for resentencing in accordance with CPL

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400.21. Judgment modified, affirmed as modified, and remanded. (Supreme Ct, Queens Co [Spires, J])

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

People v Cortez, 745 NYS2d 467 (2nd Dept 2002)

Holding: "The defendant correctly contends that the defense counsel's deficient representation deprived him of a fair trial. A portion of the defendant's claim is based on matter dehors the record. As to that part of his claim that is reviewable, the record demonstrates that counsel did not provide meaningful representation. Among the deficiencies in counsel's performance were her lack of familiarity with the rules of evidence, her failure to review *Rosario* material (*see People v Rosario*, 9 NY2d 286, *cert. denied* 368 US 866), her inability to effectively cross-examine the People's witnesses, her solicitation of inadmissible identification testimony during cross-examination of a detective and her failure to object when further testimony was elicited from the detective on redirect, and her misstatement in summation that a witness had made an in-court identification of the defendant when he had not, in fact, done so. While no single error on counsel's part would constitute ineffective assistance of counsel, the cumulative effect of these errors deprived the defendant of meaningful representation (*see People v Zaborski*, 59 NY2d 863, 865; *People v Lindo*, 167 AD2d 558, 559." It is unnecessary to address the defendant's remaining contention. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Hall, J])

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

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

People v McCarthy, 293 AD2d 490, 740 NYS2d 381 (2nd Dept 2002)

The decedent confronted someone who was trying to steal his car radio. The defendant, who accompanied that person, engaged in a gun battle with the decedent while running down the street. This exposed bystanders to the risk of harm. After shooting the decedent in the face, killing him, the defendant fled. These facts support a finding that the defendant acted with depraved indifference to human life. *See People v Ficaro*, 233 AD2d 460. The facts also support the conviction of felony murder based on the attempted theft of the radio. One witness provided evidence that the defendant took part in the attempted robbery; his credibility was primarily a question for the jury, whose determination is entitled to great weight on appeal. *See People v Garafolo*, 44 AD2d 86, 88. The court should have held a hearing and issued a limiting instruction as to evidence of uncharged crimes. *See People v Ventimiglia*, 52 NY2d 350, 361-362. Any error was harmless. Judgment affirmed. (Supreme Ct, Queens Co [Demakos, J])

Dissent: [Goldstein, J] The person who tried to steal the radio said the defendant was not a participant, and had approached, pulling a gun, after the decedent reached for a gun in an ankle holster. The decedent shot the defendant, who then killed him. Five years later the defendant talked about the incident to an informant who then testified that the defendant said he participated in the robbery attempt. Extensive evidence of uncharged crimes admitted in this sharply contested trial was not harmless.

Evidence (Photographs and Photography) (Relevancy) **EVI; 155(100) (125)**

People v Sanchez, 293 AD2d 499, 742 NYS2d 58 (2nd Dept 2002)

Holding: At trial, the defendant sought to introduce a photograph of an individual who was arrested with him, contending that the complainant's description of the perpetrator more closely matched that individual. The court should have allowed counsel to question the witnesses in an attempt to establish when the photograph was taken, rather than preclude its admission because the date was not established. The photograph was clearly relevant, as it tended to prove that the complainant had misidentified the defendant, a material issue in the case. *See People v Primo*, 96 NY2d 351, 355. The court also should have allowed the defense to lay a foundation for the introduction of a second photograph, which allegedly depicted a bruise on the back of the defendant's head. It was relevant, as it supported the defendant's allegations that his confession was the product of coercion in the form of police brutality. Counsel should have been permitted to lay a foundation for its admission. *See People v Schwartzman*, 24 NY2d 241, 245.

The defendant presented sufficient evidence to raise an issue as to whether he voluntarily made a statement to a police officer. He was entitled to a jury charge concerning voluntariness. *See People v Cefaro*, 23 NY2d 283. Once the court denied this request, it should have granted the defendant's alternate request to charge the jury with respect to his contention that he never made the statement. *See* CPL 710.70(3). The cumulative effect of these errors denied the defendant his right to a fair trial. *See People v Vasquez*, 120 AD2d 757. Order reversed, new trial ordered. (Supreme Ct, Queens Co [Dunlop, J])

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

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

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Matter of Birkett, 292 AD2d 57, 740 NYS2d 120 (2nd Dept 2002)

Holding: The respondent attorney was charged with neglecting a legal matter entrusted to him in violation of DR 6-101(a)(3) of the Code of Professional Responsibility. He was retained by a client in January 1997 for a criminal appeal. The respondent failed to move for poor person relief until a complaint was filed with the Grievance Committee, and failed to file an acceptable brief until July 13, 2000. His first brief was rejected by the court for not containing a table of contents, certification, or pagination. The respondent admitted all allegations. He attempted to mitigate them by claiming the checks used to retain him were post-dated and bounced. He also alleged he was suffering from depression, had moved to Florida, was not currently practicing law, and was not sure if he would seek admission to the Florida bar. He did not appear at the disciplinary hearing. The special referee properly sustained the charge. Notwithstanding the proffered mitigation, this is the third instance of neglect that has warranted the petitioner's attention. Motion to confirm report granted, the respondent is suspended from the practice of law for one year. ([Monteleone, Special Referee])

Juries and Jury Trials (General) JRY; 225(37)

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

People v Clark, 293 AD2d 624, 742 NYS2d 70 (2nd Dept 2002)

Holding: The defendant was charged with intentional murder and depraved indifference murder as well as first- and second-degree manslaughter. The jury was instructed not to consider first-degree manslaughter unless it found the defendant not guilty of the murder charges, and not to consider second-degree manslaughter unless they found him not guilty of first-degree. After the defendant was convicted of first-degree manslaughter and was sentenced, appellate counsel obtained a verdict sheet revealing the jury had checked "guilty" next to first-degree manslaughter, and "not guilty" next to second-degree, seemingly in violation of the court's instructions. The defendant's argument that he was deprived of his right to effective assistance of counsel and due process of law is not preserved for review. The verdict sheet was not requested by counsel, and counsel failed to raise any objections to its handling. *See* CPL 470.05(2); *People v McBride*, 203 AD2d 86, 87. A repugnancy claim must be made before the jury is discharged so the matter can be resubmitted to them. *See People v James*, 267 AD2d 327. The claim is in any event without merit; the check mark on the verdict sheet did not constitute the verdict. *See Matter of Oliver v Justices of N.Y. Supreme Ct. of N.Y. County*, 36 NY2d 53. The court was not required to *sua sponte* notify the defendant of the verdict sheets, which did not constitute a "substantive juror inquiry" or communication. *See People v Brown*, 217 AD2d 703. Order affirmed. (Supreme Ct, Kings Co [Kreindler, J])

Counsel (Choice of Counsel) (Right to Counsel) COU; 95(9.5) (30)

Grand Jury (Procedure) (Witnesses) GRJ; 180(5) (15)

People v Estrada, 293 AD2d 626, 740 NYS2d 241 (2nd Dept 2002)

Holding: The defendant made a second request to postpone presentment of his case to the grand jury in order to assure the presence of his counsel, who was actively engaged in a federal criminal trial. The prosecution denied the request and presented without the defendant's counsel. The court properly dismissed the indictment for the prosecution's denial of the defendant's right to counsel.

The defendant's postponement request was made in good faith and was not a dilatory tactic. *See People v Diaz*, 137 Misc2d 181. The importance of the defendant being represented by counsel of his choice required the prosecution to make reasonable accommodation. *See People v Winslow*, 140 Misc2d 210, 214. Since the prosecution refused the postponement to allow the defendant to appear with counsel, the defendant was not afforded a reasonable time to exercise his right to appear as a witness before the grand jury. *See* CPL 190.50(5)(a). Order affirmed. (County Ct, Nassau Co [Boklan, J])

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

Matter of Mandel, 293 AD2d 750, 742 NYS2d 321 (2nd Dept 2002)

Holding: The defendant was notified that his case had been referred to the Board of Examiners of Sex Offenders (Board) for review and determination of whether the appellant was required to register as a convicted sex offender. Counsel sent a letter detailing why registration was unwarranted. The Board determined that the appellant was required to register based on a federal conviction of possessing computer child pornography. After a hearing, where the appellant maintained that the Board incorrectly determined that he must register, County Court correctly determined that it was without authority to review the Board's determination. The language of the Sex Offender Registration Act (Correction Law article 6-C) directs the Board to determine whether a person must register, and limits the court's function to determining the duration of registration and the level of notification. Since the court's function in a proceeding

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under SORA is limited, in the absence of a proceeding pursuant to CPLR article 78, the court may not review the Board's registration determination. Order affirmed. (County Ct, Nassau Co [Palmieri, J])

Assault (Evidence) (Lesser Included Offenses) (Serious Physical Injury) **ASS; 45(25) (50) (60)**

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

People v Snyder, 294 AD2d 381, 741 NYS2d 892 (2nd Dept 2002)

Holding: Even viewed in the light most favorable to the prosecution, the evidence is insufficient for a conviction of first-degree assault. *See* Penal Law 120.10. That the surviving complainant, who did not testify, was shot in the leg did not establish the element of "serious physical injury" as defined in Penal Law 10.00(10). It was legally sufficient to prove that the surviving complainant suffered "physical injury" as defined in Penal Law 10.00(9) and thus supports a conviction of the lesser-included offense of second-degree assault. *See* Penal Law 120.05(2). The conviction is reduced accordingly. *See People v Mack,* 268 AD2d 599, 600. Other challenges raised by the defendant were not preserved for appellate review, and other arguments were without merit. Judgment modified, as modified affirmed, matter remitted. (Supreme Ct, Kings Co [Reichbach, J])

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

Menacing (Elements) (Evidence) **MEN; 247(10) (15)**

Matter of Michael H., 294 AD2d 364, 742 NYS2d 103 (2nd Dept 2002)

A juvenile was found to have committed acts which, if committed by an adult, would have constituted fourth-degree grand larceny and third-degree menacing.

Holding: "[W]e find that the evidence was legally insufficient to establish the crime of menacing in the third degree beyond a reasonable doubt because it did not establish that the complainant had a well-founded fear of serious physical injury (*see Matter of Akida L.,* 170 AD2d 680; *see also Matter of Steven W.,* __ AD2d __ [Appellate Division Docket No. 2001-04041, decided herewith])." Disposition modified, provision adjudicating the appellant a juvenile delinquent based upon third-degree menacing vacated and that count dismissed, and as modified, affirmed. (Family Ct, Richmond Co [Porzio, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Observations and State of Mind)]) (Motions to Suppress [CPL Art. 710]) **SEA; 335(10[g(iv)]) (45)**

People v Hartman, 294 AD2d 446, 744 NYS2d 38 (2nd Dept 2002)

Holding: The suppression court erroneously found that the prosecution failed to establish probable cause for the defendant's arrest and granted the defendant's motion to suppress physical evidence and identification testimony. Probable cause was established by the testimony of the arresting officer about information transmitted by the undercover, who claimed to have seen the defendant give pills to someone on the street in exchange for $10. *See People v Ketcham,* 93 NY2d 416, 419-420. The arresting officer was told by the undercover officer of the transaction. Acting upon that information, the arresting officer detained the defendant and arrested him after confirming his identification with the undercover officer. Probable cause requires not proof beyond a reasonable doubt, but only that a reasonable person with the officer's knowledge would conclude that the defendant was engaged in or was about to be engaged in a crime. *See People v McRay*, 51 NY2d 594, 602. This activity was consistent with illegal narcotics sales rather than exchange of a legal medicinal remedy. Order reversed, suppression denied, and matter remanded. (Supreme Ct, Queens Co [Grosso, J])

Dissent: [Friedmann, J] Lacking evidence of the distance from the undercover to the defendant, the undercover's training, the character of the neighborhood as being drug-prone (it was described as a busy commercial and residential area, with church services just ending), or that the exchange involved "'the hallmark of an illicit drug exchange,'" there was insufficient proof of probable cause.

Sentencing (General) (Hearing) (Pronouncement) **SEN; 345(37) (42) (70)**

People v Sacco, 294 AD2d 452, 741 NYS2d 742 (2nd Dept 2002)

Holding: The court failed to pronounce a clear sentence on each of the counts on which the defendant was convicted. The case must be remitted to the court for resentencing in accordance with Criminal Procedure Law 380.20 (*see People v Sturgis,* 60 NY2d 816) and for further proceedings pursuant to CPL 460.50 (5). Judgment modified, as modified, affirmed and matter remitted (Supreme Ct, Kings Co [Reichbach, J])

Second Department *continued*

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

People v Alvarez, 294 AD2d 442, 741 NYS2d 900 (2nd Dept 2002)

Holding: The court correctly granted the defendant's motion to suppress narcotics found on the defendant's person. The officer was patrolling in a van when he saw the defendant walking down the street with his arm around the woman with him. The officer noticed the defendant held a small bundle of folded white pieces of paper that the officer believed, based on his own training and experience, to be cocaine. This observation provided reasonable suspicion, justifying a stop. It did not rise to the level of probable cause justifying the immediate arrest of the defendant without further inquiry. *See People v Martinez*, 80 NY2d 444, 447. Order affirmed. (Supreme Ct, Queens Co, [Dunlop, J])

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

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

Matter of Ciccone, 293 AD2d 151, 742 NYS2d 338 (2nd Dept 2002)

Holding: The respondent, an attorney, was served with three charges of professional misconduct, which he admitted in part and denied in part. The matter was sent to a Special Referee, who upheld all three charges. Those included failure to satisfy a judgment against him, neglect of a criminal matter, and neglect of a child support matter. As to the criminal case, after being retained he failed to appear on two scheduled arraignment dates or to explain his absence, and failed to appear again after being advised by a letter from the court to do so. After being served with the petitioner's motion to confirm the report of the Special Referee, the respondent made no attempt to oppose or answer the motion. Motion granted, the respondent suspended for five years.

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

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

People v Butti, 294 AD2d 591, 742 NYS2d 570 (2nd Dept 2002)

Holding: The court erred when it failed to hold a hearing on the issue of restitution despite the defendant's specific request for one. *See* Penal Law 60.27(2). The defendant's right to a speedy trial was not violated. He pled guilty with the understanding that he would receive the sentence actually imposed, and may not now complain that it was excessive. *See People v Brown*, 287 AD2d 464 *lv den* 97 NY2d 679. Judgment affirmed, order reversed, matter remitted for a hearing on restitution. (County Ct, Westchester Co [Perone, J])

Dismissal (In the Interest of Justice) **DSM; 113(20)**

People v Algarin, 294 AD2d 589, 742 NYS2d 899 (2nd Dept 2002)

Holding: The defendant and a codefendant stole a bicycle at gunpoint. The defendant suggested to the complainant that he had a gun in his bag while the codefendant pointed a gun at the complainant. Both defendants were picked up a short time after and a gun was recovered from the defendant's bag. Both defendants pled guilty. The defendant did not show up for sentencing and a bench warrant was issued. The codefendant appeared, and has served his sentence. In May 2000, the defendant was returned to court on a bench warrant, 17 years after he absconded. He moved withdraw his guilty plea so that he could plead guilty to a lower charge allowing a sentence of probation, having received drug treatment and become a model citizen supporting himself and his elderly mother. The prosecution first opposed the motion, but later concurred. The court, instead, dismissed the charges in the interest of justice under Criminal Procedure Law 210.40. The power to dismiss in the furtherance of justice should be exercised sparingly. There is no "compelling factor" here making prosecution of the indictment an injustice. *See* CPL 210.40[1]; *People v Crespo*, 244 AD2d 563). This defendant admitted to active participation in a serious robbery, and did not seek the relief granted. Order reversed, matter remitted to the court for further proceedings. (Supreme Ct, Kings Co [Lewis, J])

Fourth Department

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

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

People v Davis, 291 AD2d 937, 738 NYS2d 149 (4th Dept 2002)

Holding: Following his conviction, the defendant was sentenced to a concurrent, indeterminate term of three and one-quarter to six and one-half years. His assigned counsel moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38) and submitted a brief stating there are no nonfrivolous issues meriting consideration. However, the record shows that the minimum term of the sentence may be illegal. The minimum period of an indeterminate sentence "'shall be not less than one year nor more than one-third of the maximum term imposed.'" *See* Penal Law 70.02[3][b]). The court imposed

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a minimum period that was one-half of the maximum term. Reviewing the sentencing minutes makes clear that the defendant was not adjudicated a second felony offender. The record on appeal contains no reference to the prosecution filing a statement pursuant to Criminal Procedure Law 400.21(2). New counsel is to brief that issue as well as any other issues that counsel's review of the record may disclose. Case held, decision reserved, motion granted, new counsel assigned. [County Ct, Chautauqua Co (Ward, J)]

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

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

People v White, 291 AD2d 842, 737 NYS2d 181 (4th Dept 2002)

Holding: The defendant's contention that her conviction is not supported by legally sufficient evidence because the evidence at trial did not exclude to a moral certainty every hypothesis of innocence is not preserved for review (*see People v Gray*, 86 NY2d 10, 19) and in any event is without merit. The defendant further argues for reversal due to prosecutorial misconduct during summation. The defendant did not request further curative instructions or move for a mistrial with respect to objections that were sustained, and thus the court is deemed to have corrected the errors. *People v Williams*, 46 NY2d 1070, 1071. The prosecutor did improperly vouch for the credibility of one of the witnesses and denigrate the defense. *See People v Chase*, 265 AD2d 844, 845-846 *lv den* 94 NY2d 902. This conduct is not to be condoned, but was not so egregious as to deny the defendant a fair trial. *See People v Burroughs*, 280 AD2d 965 *lv den* 96 NY2d 798. The sentence of 12 ½ to 25 years is illegal (*see* Penal Law 70.02 [former (3)(a); (4)]) and is reduced to a term of eight to 25 years. Judgment modified, and as modified, affirmed. (County Ct, Niagara Co [Hannigan, J])

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

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

People v Stephens, 291 AD2d 841, 737 NYS2d 889 (4th Dept 2002)

Holding: The defendant entered a guilty plea, but before sentencing wrote to the court requesting that he be permitted to withdraw his plea based on a conflict with his attorney. The defendant claimed the lawyer had misrepresented the maximum sentence the defendant could receive if he were convicted after trial of first-degree robbery. Defense counsel denied making a misrepresentation to the defendant. The court told the defendant that it chose to believe "'your attorney over you in this case'" and denied the defendant's request. The court erred by failing to assign a different attorney to represent the defendant before deciding this issue. *People v Chrysler*, 233 AD2d 928. A defendant is denied effective assistance of counsel when the defendant's attorney, either voluntarily or at the urging of the court, became a witness against the defendant. *People v Santana*, 156 AD2d 736, 737. Case held, decision reserved, and matter remitted for the assignment of new counsel and a *de novo* determination of the motion to withdraw the guilty plea. (Supreme Ct, Erie Co [Tills, J])

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

Assault (Instructions) **ASS; 45(45)**

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

People v McDonald, 291 AD2d 832, 737 NYS2d 446 (4th Dept 2002)

Holding: The court erred by denying the defendant's challenge for cause of a prospective juror who said that he attended high school with a prosecution witness, and admitted that he would tend to believe that witness over someone he did not know. The juror did not provide an unequivocal assurance that he could put his bias aside and render a fair and impartial verdict. If there is any doubt about potential jurors' impartiality, courts should err on the side of excusing them. *See People v Arnold*, 96 NY2d 358, 362). The court's ruling constitutes reversible error; the defendant had exhausted all his peremptory challenges before the end of jury selection. *See People v Guzman*, 76 NY2d 1, 4.

The court's instruction on the lawful duty element of second-degree assault (Penal Law 120.05[3]) was improper. The court told the jury that "lawful duty" was "performing an official function of any kind" instead of instructing on the duties of a peace officer under Criminal Procedure Law 140.25. *See gen People v Greene*, 221 AD2d 559, 559-560. Count three of the indictment charging second-degree harassment is defective, as it fails to allege that the defendant "acted 'with intent to harass, annoy or alarm another person' Penal Law § 240.26(1)." Judgment reversed, count three dismissed, new trial granted on counts one and two. (County Ct, Ontario Co [Doran, J])

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

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

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People v Khan, 291 AD2d 898, 737 NYS2d 738 (4th Dept 2002)

Holding: The defendant's purported waiver of his right to appeal was ineffective. While he signed a waiver of the right to appeal, the plea colloquy does not contain any reference to his waiving that right; the waiver cannot be deemed knowing and voluntary. *See People v McGee*, 241 AD2d 972 *lv den* 90 NY2d 941. The contention that the defendant's conviction of "both DWAI and AUO in the first degree" violate the constitutional prohibition against double jeopardy is rejected. Both charges were contained in a single indictment and were disposed of by a single plea; Penal Law 70.25(2) requires that the sentences upon conviction of both counts be concurrent. There is no double jeopardy implication. *See People v Mabry*, 151 AD2d 507, 508 *lv den* 74 NY2d 813. The claim that Vehicle and Traffic Law 1192(1) is unconstitutional is also without merit. *See People v Cruz*, 48 NY2d 419, 423-427, *app dsmd* 446 US 901. The defendant forfeited, by his guilty plea, his other contentions. *See People v Cox*, 275 AD2d 924, 925 *lv den* 95 NY2d 962. Judgment affirmed. (County Ct, Seneca Co [Bender, J])

Juveniles (Visitation) **JUV; 230(145)**

Prisoners (Family Relationships) (Visitation) **PRS I; 300(16) (45)**

Matter of Rodenbaugh v Gillen, 291 AD2d 882, 738 NYS2d 621 (4th Dept 2002)

Holding: The petitioner was awarded visitation with his daughter at the correctional facility where he is incarcerated, but the visitation was limited to only four days per year during specified months. The order is affirmed for reason stated in the decision at Family Court. Additionally, the court did not abuse its discretion in failing to specify the duration of the permitted visitation at the correctional facility. In view of the evidence that the child is uncomfortable in the petitioner's presence, it may be appropriate to limit the duration of the visitation. The petitioner may seek modification of the order if the respondent acts unreasonable in limiting the duration of the visitation. Order affirmed. (Family Ct, Seneca Co [Bender, J])

Fraud (General) **FRD; 176(10)**

Guilty Pleas (Vacatur) **GYP; 181(55)**

People v Bruce, 291 AD2d 879, 737 NYS2d 729 (4th Dept 2002)

Holding: The court erred in accepting the defendant's plea of guilty to first-degree offering a false instrument for filing. The plea colloquy was factually insufficient. Although the defendant failed to preserve his contention for review, preservation is not required where, as here, the "'defendant's recitation of the underlying facts negated an essential element of the crime and the court failed to make further inquiry to ensure that the plea was knowing and voluntary' (*People v Pergolizzi*, 281 AD2d 958, 959 . . .)." After the defendant said he did not really feel he was guilty, had made a mistake, and that "'[i]t wasn't meant to be a fraud'" the court advised him that he had to specify that he was either guilty or not guilty. The defendant stated he was guilty. However, immediately after entry of the guilty plea, the court gave the defendant an opportunity to speak before sentence was pronounced, and the defendant again stated it was a big mistake and misunderstanding. His statements constituted repeated denials of an essential element of the crime, *ie* an "'intent to defraud the state.'" Penal Law former 175.35. The court erred in failing to conduct further inquiry before accepting the plea. *See People v Lopez*, 71 NY2d 662, 666. Judgment reversed, plea vacated, and matter remitted for further proceedings. (County Ct, Livingston Co [Cicoria, J])

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

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

Juveniles (Representation) **JUV; 230(125)**

Bluntt v O'Connor, 291 AD2d 106, 737 NYS2d 471 (4th Dept 2002)

The defendant was appointed law guardian for the plaintiff's child. The plaintiff brought suit alleging, *inter alia*, a breach by the defendant of her duty to the child. The court granted summary judgment and dismissed the complaint. Costs were not granted, as the appellate courts had not previously addressed the issues.

Holding: The plaintiff asserted standing to bring a claim on behalf of the child under CPLR 1201. The court's dismissal of the complaint should have been based on the plaintiff's lack of standing, because she and the law guardian are adverse parties. While the legislature has demonstrated a preference for natural guardians (*see Stahl v Rhee*, 220 AD2d 39, 44), a parent may be removed as natural guardian for having an interest adverse to the infant, or if the infant's natural guardians have irreconcilable differences with each other. When this complaint was filed, the plaintiff was in litigation with the father. As a child's best interests are ordinarily to have a relationship with the noncustodial parent, the defendant's duties

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include fostering that relationship. The plaintiff was not in privity with the law guardian and lacked standing to sue individually.

As to the merits, the legal standard for evaluating a law guardian's representation was set out once in New York, in *Marquez v Presbyterian Hosp. in City of N.Y.* (159 Misc2d 617). If the merits here were reached, other states' decisions suggesting that law guardians on these facts have absolute quasi-judicial immunity for acts within the scope of their appointment would be persuasive. Further, exposure of law guardians to tort liability would exacerbate the problem of low fees for such representation. Order affirmed. (Supreme Ct, Erie Co [Joslin, J])

Gambling (General) **GAM; 178(17)**

Trial (Verdicts [Motions to Set Aside (CPL §330 Motions)]) **TRI; 375(70(a))**

People v Davidson, 291 AD2d 810, 737 NYS2d 467 (4th Dept 2002)

Holding: The defendant was convicted of loitering in a public place for the purpose of gambling with gambling paraphernalia. The court granted a motion to set aside the verdict by determining that Penal Law 240.35(2) is unconstitutional because it is indistinguishable from Penal Law 240.35(3), which was invalidated by *People v Uplinger* (58 NY2d 936 *cert dsmd* 467 US 246). However, 240.35(3) is a companion statute to the consensual sodomy statute invalidated by *People v Onofre* (51 NY2d 476 *rearg den* 52 NY2d 1072 *cert den* 451 US 987). Thus, 240.35(3) was struck as not severable from that sodomy statute. *New York v Uplinger*, 467 US 246, 248, n 2 [1984]). In contrast, Penal Law 240.35(2) does not punish conduct anticipatory to constitutionally protected activity. It was enacted, under the State's broad and comprehensive police power, to prohibit loitering in a public place, not for the purpose of all gambling, but only "'for the purpose of gambling with cards, dice or other gambling paraphernalia.'" Only the issue of whether 240.35(2) is indistinguishable from 240.35(3) is considered on this appeal by the prosecution. Whether the gambling statute is a valid exercise of the police power because it is reasonably related to the public good must be raised in a possible future appeal by the defendant. *People v Goodfriend*, 64 NY2d 695, 698. Order reversed, motion denied, verdict reinstated, and matter remitted for sentencing. (Supreme Ct, Monroe Co [Mark, J])

Dissent: [Pine, J, and Gorski, J] The *Uplinger* analysis applies equally to a conviction under Penal Law 240.35(2). It has been consistently held that casual gambling is not a crime and that casual gamblers are not criminals.

Appeals and Writs (Mandamus) (Prohibition) **APP; 25(55)(65)**

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

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

Matter of Hinman v Mark, 291 AD2d 870, 737 NYS2d 323 (4th Dept 2002)

Holding: The petitioners commenced this Article 78 proceeding seeking writs of mandamus and writs of prohibition concerning review of fees for assigned counsel by administrative judges, now authorized by 22 NYCRR 127.2(b). The respondents are a trial judge and the Administrative Judge of the Seventh Judicial District. The request to order the Monroe County Assigned Counsel Program to remit enhanced compensation to petitioner Hinman, and the request to prohibit trial courts from relying on any determination of an Administrative Judge pursuant to section 127.2(b), must be dismissed. Both writs were sought against entities who are not parties to the proceeding, so there is no jurisdiction. The request to order Justice Mark to exercise his discretion pursuant to County Law 722-b and the request for prohibit Justice Van-Strydonck from prospective review of trial court orders pursuant to 22 NYCRR 127.2(b) raised issues that should be raised in a declaratory judgment action. *See Matter of Levenson v Lippman*, 290 AD2d 211. Petition dismissed.

Death Penalty (Guilt Phase) (States [New York]) **DEP; 100(85) (155[gg])**

Double Jeopardy (Lesser Included and Related Offenses) (Pleadings and Pleas) **DBJ; 125(15) (25)**

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

People v Hall, 291 AD2d 143, 738 NYS2d 782 (4th Dept 2002)

Holding: The defendant pled guilty to first- and second-degree murder, with a sentence of life imprisonment, in exchange for the prosecution not seeking the death penalty. He contends the plea was invalid under *Matter of Hynes v Tomei* (92 NY2d 613 *cert den* 527 US 1015). That case found pleas of guilty to first-degree murder under CPL 220.10(5)(e) and 220.30(3)(b)(vii) to be unconstitutionally coerced because only those who maintained their innocence and demanded a jury trial were subject to capital punishment. While a defendant may not plead guilty to first-degree murder when there is a notice of intent to seek the death penalty, plea-bargaining to lesser offenses even when a notice of intent is pending remains unaffected. The defendant argued that his plea was

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invalid because the 120-day period for the prosecutor to elect to seek the death penalty (CPL 250.40[2]) had not expired, so that his plea to first-degree murder was taken while a notice of intent to seek death was "pending" within the meaning of *Hynes*. This was incorrect; the plea agreement offered by the prosecution for life imprisonment without parole *is* the prosecution's announcement of intent not to seek death. *See Matter of Francois v Dolan*, 95 NY2d 33, 37. The defendant claimed his conviction of first- and second-degree murder for the same offense violated his constitutional right against double jeopardy. His waiver of the right to appeal the conviction on all grounds encompassed this contention. *See People v Almonte*, 288 AD2d 632. Furthermore, double jeopardy bars successive prosecutions, not simultaneous prosecution of a crime and its lesser-included offenses. *See gen US v Dixon*, 509 US 688, 695-696. Judgment affirmed. (Supreme Ct, Monroe Co [Mark, J])

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

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

People v Simpson, 292 AD2d 852, 738 NYS2d 801 (4th Dept 2002)

Holding: The defendant's motion to have the indictment dismissed because he was denied his right to testify before the grand jury was without merit because it was made several months after he was arraigned. *See* CPL 190.50(5)(c); *see also People v Halm*, 180 AD2d 841, 842 *affd* 81 NY2d 819. The court's denial of the defendant's challenge for cause to a prospective juror is claimed as error. Erroneous denial of a challenge for cause does not require reversal unless the defendant has used all preemptory challenges at that time or by the end of jury selection. *People v Lynch*, 95 NY2d 243, 248; CPL 270.20(2). Here, after the court denied the defendant's challenge for cause, the prosecutor used a preemptory challenge to strike the juror. *See People v Stone*, 239 AD2d 872 *lv den* 90 NY2d 943.

Neither subdivision of the first-degree robbery statute charged here (Penal Law 160.15[2], [4]) can serve as the predicate crime for the noninclusory concurrent count of first-degree criminal use of a firearm. *See People v Brown*, 67 NY2d 555, 560-561 *cert den* 479 US 1093. This unpreserved error is reviewed in the interest of justice, and the criminal use of a firearm conviction is reversed and dismissed. Judgment modified, and as modified, affirmed. (Supreme Ct, Erie Co [Tills, J])

Assault (Lesser Included Offenses) **ASS; 45(50)**

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

People v Fort, 292 AD2d 821, 739 NYS2d 319 (4th Dept 2002)

Holding: The defendant was convicted of first-degree attempted murder and first- and second-degree assault. Although the conviction of attempted murder was based on legally sufficient evidence, the conviction for second-degree assault should be dismissed. As a lesser-included offense of first-degree assault, second-degree assault "should have been presented only in the alternative as an inclusory concurrent count of assault in the first degree." *See* CPL 300.40(3)(b); *People v Rivera*, 268 AD2d 538, 539-540 *lv den* 95 NY2d 802. The concurrent sentences imposed on the remaining counts, the longest of which are 25 years, are unduly harsh and severe. The sentences on counts one and two are reduced to 20 years. Judgment reversed in part, modified in part, and affirmed in part. (County Ct, Oneida Co [Donalty, J])

Probation and Conditional Discharge (Conditions and Terms) (Revocation) **PRO; 305(5) (30)**

People v Brogan, 292 AD2d 781, 738 NYS2d 784 (4th Dept 2002)

Holding: The defendant was convicted of first-degree sexual assault. He was put on probation and required to complete a mental health evaluation and abide by treatment recommendations. He missed his first mental health evaluation. During the second scheduled examination, he exhibited psychotic symptoms but said he had no desire to see a psychiatrist or take medication. The psychiatrist testified that without medication, the defendant would not profit from treatment or successfully complete the sex offender treatment program. The defendant was found to have violated probation, and was sentenced to prison. The conditions of probation did not violate the defendant's constitutional right to direct his own medical treatment. *See Rivers v Katz*, 67 NY2d 485, 492-493 *rearg den* 68 NY2d 808. He voluntarily agreed to comply with all treatment recommendations as a contingency of remaining at liberty. *See People v Hale*, 93 NY2d 454, 463-464. The conditions were not punitive and were reasonably related to the defendant's rehabilitation. The sentence was neither harsh nor severe. Judgment affirmed. (County Ct, Monroe Co [Bristol, J])

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

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

People v Moyer, 292 AD2d 793, 738 NYS2d 810 (4th Dept 2002)

Holding: The defendant was convicted of driving while intoxicated. He was not denied his statutory right to a speedy trial. The effectiveness of an order reducing one count of the indictment was stayed (*see* CPL 210.20[6]), and the duration of that stay was not chargeable to the prosecutor. *Cf People v Holmes*, 206 AD2d 542, 543. The court failed to get a waiver of the defendant's right to be present at sidebar conferences concerning prospective jurors' ability to serve objectively and impartially. However, the court obtained a *nunc pro tunc* waiver the next day, making declaration of a mistrial before the first jury was sworn unnecessary. The mistrial did not prejudice the defendant. *See gen People v Arnold*, 96 NY2d 358, 362.

As the defendant was being taken to a police car, he was questioned without *Miranda* warnings and made inculpatory responses. Those statements were suppressed. He was given *Miranda* warnings in the patrol car, where he slept for an hour until a police van arrived. Further warnings were given and interrogation continued. This questioning was part of a continuous chain of events, and the statements made after the warnings were administered must also be suppressed. *See People v Nova*, 198 AD2d 193, 195 *lv den* 83 NY2d 808. An officer who was present during the pre-*Miranda* questioning interrogated the defendant, post-*Miranda*, one hour later in the same location. *See People v Jordan*, 190 AD2d 990, 991 *affd* 83 NY2d 785. There was not such a break in the questioning that the defendant was no longer under the influence of the improper questioning. *See People v Chapple*, 38 NY2d 112, 115. Judgment reversed, motion granted, new trial granted. (County Ct, Monroe Co [Geraci, Jr., J.; pretrial motions and first trial, Dattilo, Jr., J])

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

People v Ehrhardt, 292 AD2d 790, 738 NYS2d 922 (4th Dept 2002)

Holding: The defendant violated his probation for third-degree weapon possession. *See* Penal Law 265.02(4). He was sentenced to a three-year determinate prison term and a five-year period of post-release supervision. The five-year period was illegal under Penal Law 70.45(2). It is reduced to a three-year period. *See eg People v Rawlinson*, 280 AD2d 943 *lv den* 96 NY2d 833. Judgment modified, and as modified, affirmed. (County Ct, Monroe Co [Connell, J])

Sentencing (Concurrent/Consecutive) **SEN; 345(10) (15)**
(Credit for Time Served)

People v Johnson, 292 AD2d 803; 738 N.YS2d 632 (4th Dept 2002)

Holding: The defendant had been sentenced for robbery before the arson in this case was committed; the arson sentence was required to be consecutive to that for the robbery. In an effort to provide jail credit to the defendant for time in custody after arraignment on the arson, the court directed the arson sentence to run *nunc pro tunc* from the date of his arraignment. Penal Law 70.30 governs the calculation of the defendant's sentence, including its starting date and the amount of jail credit, and the court cannot bypass the statute. *See People v Linares*, 174 AD2d 847, 848 *lv den* 78 NY2d 969. The *nunc pro tunc* directive is vacated. Judgment modified and, as modified, affirmed. (County Ct, Chautauqua Co [Ward, J])

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

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

People v Williams, 292 AD2d 843, 738 NYS2d 809 (4th Dept 2002)

Holding: The evidence was legally sufficient to support the conviction of second-degree attempted murder. *See People v Welcome*, 181 AD2d 628 *lv den* 79 NY2d 1055. The verdict was not against the weight of the evidence despite minor variations in the descriptions of the shooter provided by eyewitnesses. The evidence supports the conclusion that the jury did not fail to give the evidence the proper weight. *See People v Bleakley*, 69 NY2d 490, 495. It showed that the defendant left home with a gun and made a comment indicating he intended to shoot rival gang members, fit eyewitnesses' description of the shooter, was named by the decedent, and had the gun and clothing matching witness descriptions in his home afterward.

However, where the defendant was sentenced to determinate terms for attempted murder and assault, the court erred in sentencing him to a consecutive term of incarceration for first-degree use of a firearm. *See* Penal Law 265.09(2). All sentences shall run concurrently. *See People v LaSalle*, 95 NY2d 827, 829. Judgment modified, and as modified, affirmed. (County Ct, Onondaga Co [Fahey, J])

Parole (Board/Division of Parole) **PRL; 276(3)(40)**
(Revocation)

Fourth Department *continued*

People ex rel. Fryer v Beaver, 292 AD2d 876, 740 NYS2d 174 (4th Dept 2002)

Holding: The Division of Parole determined that the defendant violated the conditions of his parole by striking his pregnant girlfriend. The determination of the Board was supported by substantial evidence and the lower court erred by granting the petition seeking a writ of *habeas corpus*. *See Matter of Westcott v New York State Bd. of Parole*, 256 AD2d 1179. Although the girlfriend later denied that the defendant had hit her, the Administrative Law Judge properly admitted into evidence hearsay testimony by both a police officer and a parole officer that the girlfriend initially said the defendant hit her. *See Matter of Courtney v New York State Div of Parole*, 283 AD2d 707. The determination was supported by substantial evidence. Judgment reversed, petition dismissed. (Supreme Ct, Orleans Co [Punch, J])

Concurrence: [Scudder, J] The majority's conclusion is correct, but the analysis is not, for it failed to address the proper test, whether the determination was supported by a "'residuum of legal evidence.'" *Matter of Hilbourne v Rodriguez*, 155 AD2d 917. Unlike administrative proceedings in which a determination must be supported by substantial evidence, parole violations must be established by a preponderance of the evidence.

Witnesses (Child) (Cross Examination) WIT; 390(3) (11)

People v Ortega, 292 AD2d 792, 740 NYS2d 539 (4th Dept 2002)

Holding: The lower court erred in setting aside the verdict pursuant to CPL 330.30(1). The defendant had sought to cross-examine the complainant concerning a fight the defendant and the complainant's father had after the young girl revealed that the defendant had sexually abused her. The defendant contended that the complainant had been induced by the altercation to stick to her story. The cross examination of the young witness was properly limited. Normally, evidence that might ascertain the bias or hostility of a witness is "'generally admissible as relevant to the jury's consideration of that witness's credibility.'" *People v Shairzai*, 215 AD2d 259, 263 *lv den* 86 NY2d 802. While extrinsic proof tending to show a reason to fabricate is never collateral (*People v Hudy*, 73 NY2d 40, 56) a court can use its discretion to exclude such proof when it is too remote or speculative. *People v Retzer*, 245 AD2d 1132 *lv den* 91 NY2d 976. The defendant's theory about the complainant's testimony is purely speculative and lacks any factual basis. Order reversed, motion denied, verdict reinstated, matter remitted for sentencing. (Supreme Ct, Monroe Co [Fisher, J]) ⚖

Defender News *(continued from page 4)*

Newspaper Photographer Excluded From Murder Trial

For more than a year, the media followed the case of Susan Mooney, accused of killing her infant son. Before trial started, the *Daily News* made an oral application, and later filed a written request, asking permission for one still photographer to be in the courtroom. The defense objected asserting that the media coverage to date had "been so intrusive—and so grossly inaccurate—as to inhibit her from being tried fairly by a jury of her peers, for fear that the pool of citizens has been irreparably tainted." (Consequently, the defendant waived her right to a jury trial.) The defense raised concerns that defendant's 11-year old son might become the focus of media attention; and trial witnesses might object to being photographed on the stand. "[I]n general, the integrity of the trial may be compromised by the intrusive behavior of a photographer taking multiple shots throughout the trial." Civil Rights Law § 52. They pointed out that photographers could take pictures of the parties outside the courtroom. The *Daily News* did not provide any information to justify their request. Failing to meet their burden of proof, the court denied the newspaper's application for still photography in the courtroom. *People v. Mooney, NYLJ*, 10/11/02 (Sup Ct Bronx County).

Intent Cannot Be Inferred From Actions in First Degree Assault

The defendant attended a holiday party where a fight had broken out. He, among others, left the melee and headed outside. A witness saw him running towards the victim with a baseball bat. The defendant struck the victim in the head, dropped the bat and ran away. The prosecution charged him with First Degree Assault: "The defendant on or about December 25, 2000 in Suffolk County, with intent to cause serious physical injury to [the victim], caused such injury by means of a dangerous instrument." Evidence at trial showed that the victim had been treated for sever brain injuries, establishing "serious physical injury." The baseball bat qualified as a "dangerous instrument." The remaining element for First Degree Assault was intent. The prosecution relied upon the physical attack and injuries alone. After a bench trial, the court found that the defendant's intent could not be inferred solely from the result of his actions. *See People v. Claudio*, 135 AD2d 358 (1st Dept 1987). Since intent to cause serious physical injury was not proven beyond a reasonable doubt, the evidence only supported a conviction for Assault in the Second Degree. *People v. Kathiravelu, NYLJ*, October 11, 2002 (Suffolk County Ct). ⚖

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