



Public Defense Backup Center
REPORT

Volume XVIII Number 1

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Defender News

Race Issues Continue to Matter

Criminal defense lawyers frequently deal with issues of race. They strive to meet the increasingly difficult requirements for preventing a prosecutor's peremptory challenge of potential jurors of a particular race (see the Court of Appeals opinions in *People v James*, digest p. 22 and *People v Smocum*, No. 22, 2/25/03, digest to appear in a future issue). Conversely, defense lawyers have to fend off prosecution claims that they are improperly dismissing potential jurors on the basis of race or ethnicity. Defense lawyers may try to introduce expert testimony in appropriate cases about provable psychological barriers to accurate cross-race identification. (See eg, "Admissibility of Expert Identification Testimony in New York After *People v Anthony Lee*," by David Crow, *Backup Center REPORT* June, 2001.) In dozens of ways, defense attorneys must deal with racial issues. The "Race and Law" page in the "Hot Topics" section at www.nysda.org is a source of information on current developments regarding race issues, including the one that follows.

Equal Protection Expanded Under NY Constitution

In 1992, an elderly Oneonta woman reported to police that she had been attacked by a man believed to be African-American. The police questioned 300 nonwhite

Defender Institute Basic Trial Skills Program Application Inside

males in the vicinity, including a large number of SUNY students. Race alone was the criteria for interviewing suspects. No arrests were made. Equal protection claims were filed in federal and state courts—the federal claims were rejected by the 2nd Circuit. *Brown v City of Oneonta*, 235 F3d 769 (2nd Cir 2000). However, a turnabout occurred in the state courts. First, the NY Court of Appeals recognized a "constitutional tort" based on the state constitution in a class action suit brought by attorney Scott N. Fein of Whiteman Osterman & Hanna. *Brown v State*, 89 NY2d 172, 652 NYS2d 223 (1996). Most recently, the Court of Claims held New York's equal protection provision to be more expansive than its federal counterpart. The plaintiffs in *Brown* were not collaterally estopped by the 2nd Circuit decision, and their cause of action survives. (NYLJ, 1/30/03.)

Affirmative Action Amici Support in Supremes

The most significant challenge to affirmative action since *Regents of the University of California v Bakke*, 438 US 265 (1978), is being made to the University of Michigan's policy of applying race and ethnicity factors in both undergraduate and law school admissions. Many institutions have filed *amicus* briefs in the two cases pending before the Supreme Court, *Grutter v Bollinger*, No. 02-241 and *Gratz v Bollinger*, No. 02-516. Stanford University was the latest to join more than 60 *amicus curiae* (including hundreds of organizations and colleges) supporting the

Celebrating the 40th Anniversary of *Gideon v Wainwright* March 18, 2003, in Albany

The Gideon Coalition and others are joining to celebrate *Gideon*. We will examine and illustrate the present state of New York's Public Defense System and make recommendations for reform.

Let's not let New York lag behind, but make it a leader in defense systems once again.

Join Us!

**For more information, contact
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University's policy. (*Stanford Daily*, 2/24/03.) The briefs filed by the Department of Justice claimed that the University of Michigan ignored race-neutral alternatives in its admissions policies and equated their policies with quotas. (*American Lawyer Media*, 1/21/03.)

Legislature and Courts Act on DWI

Threshold Dropped to .08%

Legislation reducing the Driving While Intoxicated (DWI) limit in New York State from 1.0% to .08% has been enacted. For more information about this change, read Al O'Connor's *Legislative Update* (p. 11).

IAC Addressed in DWI Case

While DWI practitioners begin to consider the implications of the new statutory standard, a New York federal court has addressed an issue regarding effective representation in a DWI case. A repeat drunk driver appeared before Onondaga County Judge Mulroy on a new felony DWI charge and a probation violation. He was represented by a Syracuse attorney, who had testified previously against Judge Mulroy in a disciplinary proceeding. (Mulroy was later removed from the bench.) Counsel never revealed to his client the role he played in the disciplinary action against the judge. After being sentenced to two consecutive state prison terms, the defendant filed a *habeas* petition claiming ineffectiveness of counsel for the lawyer's failure to disclose. Finding that the sentence would not have been different before another judge, the federal magistrate concluded that the defendant's attorney was not ineffective, as no prejudice was shown. The magistrate did state that "a reasonable attorney would have disclosed to his client the fact that he had testified against the judicial officer before whom his client was to appear." *Frase v McCray*, No. 01-CV-1704 (NDNY 1/8/03). (NYLJ, 1/13/03.)

2003 Brings a Blizzard of Public Defense Developments

In the early weeks of 2003, members of every branch of government have turned attention to the crisis in New York State's public defense system. Low assigned counsel rates remain the most visible aspect of the crisis. A lack of lawyers able to afford doing cases at 1986 rates continues to deprive eligible clients of timely, adequate representation.

Governor's Budget Not Just a Repeat of History Executive Includes Partial State Funding for Increased Fees

The Governor submitted with his FY 2003 Proposed Executive Budget a bill that includes an increase in the rates paid to assigned lawyers under County Law 722-b.

If passed, the bill would raise assigned counsel fees to \$60 for misdemeanors and \$75 for all other cases including felonies, appeals, and family court representation. Total compensation for misdemeanor representation is capped at \$1600 per case, while all other representation is capped at \$4000 per case. "Compensation in excess of the foregoing limits" would be permitted in "extraordinary circumstances." The bill would also amend Judiciary Law 35(3) to raise law guardian fees to \$75 per hour.

Statutory limits on auxiliary services would be increased. The proposal would amend County Law 722-c, increasing the cap to \$1000, and making clear that this amount is available "per investigative, expert or other service provider." A court could still provide for compensation in excess of the amount in extraordinary circumstances.

All increases would be effective for representation provided on or after Jan. 1, 2004.

The Governor's bill would create an Indigent Legal Services Fund under a new statutory section, State Finance Law 98-b. This Fund would be under the joint custody of the Comptroller and the Commissioner of Taxation and Finance, and would "consist of all moneys appropriated for the purpose of such fund, all other moneys required to be paid into or credited to such fund, and all moneys received by the fund or donated to it." No exact mechanism or formula for distribution is included, and the bill does not speak to funding any particular public defense service, stating only that, "Moneys of the indigent legal services fund shall be available, subject to appropriations and in accordance with law." Revenue streams for the fund would include new Vehicle and Traffic fees and increased mandatory surcharges, an increase in the charge for electronic searches of the OCA

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criminal history database and other searches, and an increase of the biennial lawyer registration fee to \$350.

NYSDA has analyzed the bill (and bill memo) and concluded that the proposal appears designed to pay the total costs of the state-funded law guardian fee increase while imposing a partial unfunded mandate on counties and the city of New York with regard to other assigned counsel costs. For a copy of the analysis, contact the Backup Center. The Governor's Bill Memo (for the whole bill, covering much more than public defense issues) can be found at http://www.budget.state.ny.us/pubs/executive/fy0304articleVIIbills/ppgg_memo.html.

Traditional State Funding for Public Defense Programs Eliminated

Since 1996, the Governor has annually eliminated funding for certain defense programs, relying on the Legislature to restore them. The following programs were again eliminated in the Governor's proposed budget:

- NYSDA—In FY02, NYSDA received \$1,222,528;
- Indigent Parolee Representation Program (IPP)—In FY02, IPP received \$1,378,722;
- Prisoners' Legal Services (PLS)—In FY02, PLS received \$2,285,000;
- Neighborhood Defender Service of Harlem (NDS)—In FY02, NDS received \$294,000.

Other Defense Programs Cut

While the Governor has not eliminated Aid to Defense in recent years, the amount has, until this year, remained stable. This year he has proposed a 15% cut, from \$13,837,300 to \$11,762,000. Allocations for this program may also be subject to change. The bill calls for a distribution plan developed at the discretion of the commissioner of the division of criminal justice services and approved by the director of the budget, with funds appropriated for this program to "be distributed utilizing a formula based on the most current full annual criminal justice indicators available at the time awards are made. . . ."

The total proposed appropriation for the Capital Defender Office (CDO) represents a decrease from FY2002 of about 6 percent. Of the total, \$7,576,000 is for services and expenses of the CDO and \$5,519,000 for the payment of private attorney compensation and fees and expenses for auxiliary services.

Prosecution-Related Items

Many prosecution budget items are imbedded within proposed appropriations that bear ambiguous names, making a straight comparison between prosecution and defense impossible. However, as a sampling, the Governor has included funding for Aid to Prosecution of \$17,989,000; he provides \$1,360,000 for the 32 counties not

part of the original Aid To Prosecution program. State funding of \$2,975,000 is provided for capital assistance to prosecutors. State assistance of \$3,081,000 is provided to localities to subsidize district attorney salaries. Also, \$1,211,000 is made available to the Special Narcotics Prosecutor, and \$510,000 is proposed for four district attorney DTAP programs in New York City. Funds within the \$1,215,000 Road To Recovery Program are also earmarked for district attorneys. All these funding levels represent 15 percent cuts from last year.

Presumably, a portion of the \$42,000,000 proposed "for services and expenses related to the domestic incident preparedness program to combat weapons of mass destruction" can and will be diverted to prosecutors.

Court Increases NYC Hourly Assigned Counsel Rate to \$90

In a long-awaited decision, New York Supreme Court Justice Suarez granted the New York County Lawyers' Association's motion for declaratory relief and permanent injunction raising assigned counsel rates in New York City to \$90 per hour. In *New York County Lawyers' Association v New York State*, No. 102987-2000 (Sup Ct NY County 2/5/03; revised 2/13/03). Justice Suarez declared the State's "failure to increase the rates paid to assigned private counsel, to abolish the arbitrary distinction between the rates paid for in-court and out-of-court work, and to remove the caps on total per case compensation has created a severe and unacceptably high risk that children and indigent adults are receiving inadequate legal representation. . . ." The interim rate of \$90.00 an hour in criminal and family court cases remains in effect until modification of County Law 722-b and Judiciary Law 35 by the Legislature or further order of the court. (NYLJ, 2/5/03.)

After the New York County Lawyers' Association (NYCLA) filed a judgment implementing the decision, both the city and state served notices of appeal. In a seven-page position paper, NYCLA urged court-assigned attorneys to begin requesting reimbursement at \$90 an hour despite the appeal, arguing that the statutory stay triggered by the appeals did not operate on the declaratory judgment portions of the ruling. That declaration that current statutory fees are unconstitutional leaves lower courts free to approve vouchers at levels they view appropriate. The head of appeals for the city Corporation Counsel's office disagreed with the NYCLA analysis. (NYLJ, 2/26/03.) The position paper and other materials are posted on the NYCLA web site: www.nycla.org.

The \$90 per hour rate set by Justice Suarez reflects other fee developments. For example, this rate became the new standard for federal Criminal Justice Act attorneys in 2002, Pub. L. No. 107-77 (2001). It was the rate set last year by a federal judge for New York City family court attorneys representing indigent mothers in removal proceedings. In re Nicholson, 203 FSupp2d 153 (EDNY 2002). It is

also the rate sought in a pending lawsuit by the Wayne County Criminal Defense Bar Association in Michigan. (*Detroit News*, 11/12/02.)

Chief Judge Continues to Talk about AC Rates

As she has for several years, Chief Judge Kaye commented in her "State of the Judiciary" message about the deplorable state of assigned counsel compensation. In the past 17 years, while the cost of living has gone up 70%, the assigned counsel rates have not budged. Judge Kaye observed the decline in assigned counsel panels and the effect of resulting delays on expanding criminal and family court dockets. She bemoaned the resort to judicial remedies to solve a legislative issue. "Crafting appropriate across-the-board rate increases, together with the procedures to implement them and sources to pay for them, are tasks far better accomplished by the policymaking branches of government. Even in today's fiscal straits, this must remain a priority for legislative action." (*State of the Judiciary 2003*.)

As the keynote speaker at the Access to Justice Forum during the New York State Bar Association's Annual Meeting, Judge Kaye again talked about the legal needs of the poor. She acknowledged that "access to justice simply is not at the top of anybody's list of government concerns. It's not even on the list of government concerns." She is considering an independent commission to raise funds, free of "the partisan politics that shifts the focus away from the goal of making access to justice a reality for all." Judge Kaye said she encouraged creative approaches to providing legal services through the court system by combining existing practices with *pro bono* initiatives, and increasing collaboration among providers. (*NYLJ*, 1/23/03.)

Independent Public Defense Commission Bill Re-Introduced

State Senators Dale Volker, John DeFrancisco, Patricia McGee, Olga Mendez, and Guy Vellella introduced a bill on Feb. 13, 2003 to establish a state public defense commission and provide fiscal relief to localities. The bill, S1894, would raise assigned counsel fees to \$75 per hour and create an independent commission to distribute state funds to localities for public defense, reimbursing up to 40% of such costs for localities meeting standards to be established by the commission. It tracks bills introduced in the last session by Sen. Volker and others. An identical bill, A5394, has been introduced by Member of the Assembly Joseph Lentol with 56 other sponsors. The full text of the bills can be found on the web at <http://www.senate.state.ny.us/>, or contact the Backup Center.

Defender Not Covering Family Court

While getting settled into his new position, Essex County Public Defender Mark Montanye has begun re-

viewing cases and setting up shop. He will represent all indigent defendants in felony cases countywide and misdemeanor defendants in the southern half of the county. Part-Time Public Defender Claudia Russell will handle misdemeanor cases in the northern area. A second part-time public defender, for family court, has been eliminated. "They apparently didn't get an applicant for the Family Court office," Montanye said. The county's assigned counsel system, slated for extinction, will continue to handle family court cases for now. County officials will reevaluate the situation next year. (*Press Republican*, 1/14/03.)

Gideon 40 Years Later, Still Unfinished Business

"I am entitled to be represented by Counsel" Clarence Earl Gideon stated at the start of his burglary trial. A Florida judge's denial of Gideon's right to counsel was echoed across America until March 18, 1963, when the US Supreme Court granted Gideon's request. *Gideon v Wainwright*, 372 US 335 (1963).

Celebrate Gideon in Albany

In recognition of *Gideon's* 40th anniversary, the well-established and growing Gideon Coalition, which advocates for important reforms in public defense services and annually marks the date *Gideon* was decided, will be celebrating the right to counsel. The Coalition will join with NYSDA, the League of Women Voters of New York State, the Committee for an Independent Public Defense Commission, and others during an array of events in Albany. Highlights will include a Client-Defender Speak Out, and the debut of the Gideon Players, a Capital District improv troupe. The New York State Bar Association is also commemorating the day.

National Gideon Symposium to be Held in DC

Also on March 18, in Washington DC, the National Criminal Defense Lawyers Association (NACDL), the National Legal Aid and Defender Association (NLADA), and Arnold & Porter will present a national symposium, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, at the Georgetown University Law Center. In conjunction with this event, NACDL has created a web site of resources about *Gideon* and the issues still unresolved in its wake. The site, <http://www.nacdl.org/gideon>, contains links to the decision, oral arguments, pleadings, and other historical documents. There are also links to national reports and articles about the continuing problems of indigent defense, such as excessive caseloads and lack of funding. At the same time, NLADA has been working to increase awareness about *Gideon* and the crisis in indigent defense on their web site: <http://www.nlada.org>.

Better to Get it Right the First Time

Historically and currently, obtaining sufficient resources for public defense has been hard. Public defense advocates know that there are economic, systemic, and human costs to short-changing the system for representing eligible clients. Whether as the result of inadequate counsel or other errors in the system, men and women wrongfully sent to prison pay the highest price for a justice system slow to recognize its faults. When that recognition comes, it can be expensive—which may account for the system's reluctance to acknowledge error—but the unjustly convicted and their advocates assert that economic damages are frequently too little, too late.

Victims of Unjust Convictions Seek Compensation

Anthony Faison and Charles Shepherd of Brooklyn were convicted of murder based mostly on single eyewitness testimony and served 14 years in prison before exoneration. New York State settled their claim under the Unjust Conviction and Imprisonment Act for \$3.3 million (they originally sought \$60 million). It is the largest award since enactment of the law in 1984, but their attorneys criticized the compensation process. "The state treats these cases like lawyers for the sleaziest insurance companies treat their cases," said Ronald L. Kuby. "They felt this was as cheap as it was going to get for them." Attorneys' fees are not included under the statute. Kuby suggested that "the state—and wrongfully convicted defendants—might be better served if the statute were administered like the federal Sept. 11 Victim Compensation Fund. The fund has established an administrative process for determining awards that precludes participants from filing lawsuits."

Since 1984, 163 of 175 cases before the Court of Claims have been dismissed. The total award in the remaining twelve cases was \$5.5 million. (NYLJ, 1/15/03.) These statistics might prove daunting to Lazaro Burt, who spent 10 years in prison after being wrongly convicted of a Queens murder. His lawsuit against the State for \$30 million is pending. According to Daniel M. Perez, one of Burt's attorneys, "The average payout is between \$50,000 and \$150,000 for every year of prison." (NY Daily News, 2/6/03.)

Misconduct By Corrections Officers and Police Officers

Victims of mistreatment in another part of the system—by prison guards and police officers—have fared better than the wrongfully convicted in New York's federal courts. A federal judge in the Eastern District found Nassau County and five corrections officers could be held civilly liable for their involvement in the beating death of an inmate in 1999. The victim, Thomas Pizzuto, had been serving a 90-day sentence for driving under the influence of drugs. His wife filed a wrongful death suit against the

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County. According to the court: "Their [officers'] convictions . . . [prevent] them from disputing their acts . . . and their own sworn testimony in the criminal proceeding and this civil action eliminates any material question of fact regarding civil liability." (Newsday, 1/17/03.)

Westchester County reached a settlement with a Brooklyn woman, Nicole Sarnicola, for \$75,000 as a result of her being strip-searched in the course of a drug arrest by local police. A few months before, a federal judge determined that there was no reasonable suspicion to justify a strip-search. He also raised concerns about routine strip-searching of all suspects arrested on felony narcotics charges without reasonable suspicion. *Sarnicola v County of Westchester*, NYLJ, 11/7/02 (SDNY). James Meyerson, Sarnicola's lawyer added: "[W]e believe that this decision should have broader implications beyond Miss Sarnicola, even with the settlement. If nothing else, (we hope) that the county would instruct their officers to follow policy as written." (Journal News, 1/2/03.)

Finally, the Northern District has upheld the right of an Ulster County man to speak with the press about the settlement in his police brutality case. Arthur LaGrange received a \$40,000 settlement because of police misconduct during his 1999 arrest. Originally, the judge reduced the settlement due to LaGrange's public statements, but reversed himself finding that no pre-trial gag order existed. In a footnote, the court observed: "It must be noted that the condition (of not speaking to the press about the settlement) may violate or restrict the public's right to important information." According to LaGrange's attorney, Alan Sussman: "I think the hero of this long story is Arthur. He wanted the public to know." (Daily Freeman, 1/29/03.)

No Reward for Doing the Right Thing

At the other end of the spectrum, a New York City Police Officer was suspended for not arresting a homeless man. There has been much criticism surrounding the City's treatment of the homeless, but one officer followed his conscience. Officer Eduardo Delacruz, a member of the NYPD's Homeless Outreach Unit, told fellow officers during the arrest of a homeless man: "I told you before, I'm not going to do it. I won't arrest an undomiciled person." For refusing to join in any more arrests of the

homeless, NYPD officials suspended Delacruz for 30 days. Patrick Markee, Spokesman for the Coalition for the Homeless, said: "Delacruz should be applauded for his sensitivity." Lawsuits have been filed over the City's aggressive sweeps of the homeless for minor offenses, and what the Patrolmen's Benevolent Association has characterized as "organized harassment." (*LA Times*, 11/30/02.)

Ignoring Alibi Evidence Is Ineffective Representation

After more than five years in prison and 1300 hours of investigation and legal maneuvering by two dedicated *pro bono* attorneys from Davis, Polk & Wardell (supervised by The Legal Aid Society of New York City), Diomedes Polonia, once convicted of attempted murder, is free. (*NYLJ*, 2/6/03.) Thomas Hosford, a Bronx resident, was shot during an attempted robbery in his apartment. While in the hospital, under medication, from a photospread, he identified Polonia as the attacker. From the beginning, Polonia asserted his innocence, and provided the name of an alibi witness—first to the Legal Aid attorney representing him at arraignment. His trial attorney did not investigate the alibi, file a notice, or interview the witness. At trial, the defendant testified about his alibi. His friend and witness was in court, but not called to testify. "[C]ounsel made absolutely no effort to talk to her [alibi witness], prepare her as a witness or file notice of alibi. Leaving the production of witnesses, in particular, an alibi witness, to a friend of defendant was not professional. It was counsel's obligation to seek out and interview Ms. Uriarte once he was advised that she would support defendant's alibi."

Despite the witness's appearance in court, no adjournment was sought to interview her or make an effort to file a late alibi notice. Evidence at a post-conviction hearing showed that counsel was aware of this witness before trial. Although defense counsel "actively litigated" the case, filed suppression motions and effectively cross-examined the eyewitness, his mishandling of the alibi defense was critical—it "struck at the core of the defense." The court found his conduct to be ineffective and ordered a new trial. *People v Polonia*, *NYLJ*, 2/19/03 (NYC). The Bronx District Attorney has chosen not to retry the case. (*NYLJ*, 1/31/03.)

State Takes Aim at Sex Offenders, Shoots Itself in the Foot

Imprisonment Beyond Maximum Expiration Date Ruled Unlawful

Parole and prison officials who have made high sport of the mistreatment of sex offenders finally had their comeuppance in a Buffalo courtroom in December. Justice

Vincent E. Doyle ruled that a scheme hatched by the Division of Parole and the Department of Correctional Services to imprison sex offenders beyond their maximum expiration dates is illegal. In *People ex rel. O'Connor o.b.o. Kevin L. v Barbary & Travis*, the state refused to release the 19 year-old petitioner even after his determinate 2-year prison sentence expired on Dec. 22, 2001. Parole and prison officials refused to discharge Kevin L. to begin serving his 3-year period of post-release supervision, ostensibly because he lacked a residence that had been approved by the Division of Parole. The state argued it had discretion under Jenna's Law to incarcerate Kevin L. for the full 3-year period of "post-release" supervision without ever releasing him. On Dec. 19, 2002, Justice Doyle rejected this outrageous claim of authority: "This Court finds nothing in either the language of the statute itself or in its legislative history to justify respondents' reliance on P.L. § 70.45 as authority to hold petitioner in custody beyond the maximum expiration date of his prison sentence."

Justice Doyle also excoriated the Division of Parole for failing to assist Kevin L. He found the Division "appears to have done virtually nothing to assist Petitioner with obtaining acceptable housing or living arrangements Lest there be any doubt about the Division of Parole's responsibilities, this Court holds that it has an affirmative duty to provide meaningful, pro-active assistance to Petitioner in his effort to obtain housing and/or employment which comports with the terms and conditions of his post-release supervision." Justice Doyle sustained a writ of habeas corpus and ordered Kevin L.'s immediate release.

Kevin L. was released on Dec. 20, 2002, almost one year to the day after his sentence expired. He was represented by Backup Center staff attorney, Al O'Connor. A copy of Justice Doyle's decision is available from the Backup Center.

Albany Court Dismisses Felony Charge for Failure to Verify Address under SORA

Mayor Michael Bloomberg recently announced a plan to more closely monitor released sex offenders in New York City, the Specially Targeted Offenders Project (STOP). Under the plan, law enforcement officials vow to subject "high risk" sex offenders to even tighter parole and probation supervision, and to aggressively prosecute offenders who violate Megan's Law reporting requirements. See "A Closer Eye on the Worst Offenders," *NY Times*, 1/28/03, p. B-4. However, because many of these specially targeted offenders were administratively classified as Level 3 sex offenders by parole and probation officials under a scheme held unconstitutional in *People v David W.*, 95 NY2d 130 (1999), successful prosecutions may prove to be elusive. As pointed out in a recent decision by Albany County Court Judge Thomas Breslin, the constitutional infirmity identified in *David W.* offers a

complete defense to a criminal charge for failure to *verify* an address under Megan's Law.

In *People v. Jesse D.*, the defendant was administratively classified a Level 3 sex offender by parole officials in 1996. The defendant signed a form acknowledging his Level 3 designation and his understanding of his duty to personally verify his address every 90 days with local police. Jesse D. was subsequently charged with violating the statute and he pleaded guilty to the Class A misdemeanor offense. When he allegedly failed to verify his address again, Jesse D. was indicted as a repeat offender for a Class D felony. Judge Breslin dismissed the indictment, holding that Jesse D.'s Level 3 designation was invalid because he had not been given notice of the risk level determination and an opportunity to be heard in 1996. Importantly, Judge Breslin rejected the prosecution's argument that Jesse D. should be estopped from raising the constitutional claim because he had not previously challenged his designated risk level, either in an Article 78 proceeding, or in his prior prosecution for failing to verify.

Albany attorney Lee Greenstein represented Jesse D., with assistance from the Backup Center. A copy of Judge Breslin's decision is available from the Backup Center.

Law Enforcement Initiatives, Prosecution Policies, and Specialty Courts Bear Watching

It can be hard to keep track of new programs that may affect clients and defense representation. Following are some developments at several levels of government of which defense lawyers should be aware; if they are not yet trends in your jurisdiction, they may be soon.

Rochester Targets the Usual Suspects

As part of a US Department of Justice funded program, a community prosecutor in Rochester will soon begin keeping tabs on local "troublemakers." The position was created to provide local prosecutors with information not appearing on criminal histories. The community prosecutor is supposed to work with police and community organizations to spot people "who most erode the quality of life in the Rochester Police Department's Clinton Section patrol district." His observations will be used in the local prosecutor's case evaluation. Press reports indicate that "[f]or these defendants, plea bargains may be harder to negotiate and mercy from judges more difficult to obtain." Local defense lawyer Mark Funk has said that "he's troubled by the concept of a 'secret list' of defendants who are treated differently." (*Rochester Democrat and Chronicle*, 12/10/02.) The samizdat rap sheet threatens to be a source of endless mischief, hidden from defense counsel and beyond the pale of the Criminal Procedure

Law. It can be expected to infect everything from bail applications to plea bargains to sentencing.

Feds Seek More Death Penalty Cases in New York

Attorney General Ashcroft has rejected local recommendations against the death penalty in ten New York cases. The avowed purpose of overriding the advice of local US attorneys was to create consistency in the application of the federal death penalty. According to Kevin McNally of the Federal Death Penalty Resource Counsel Project in Kentucky, "They are attempting to bring the federal death penalty to areas of the country like the Northeast that are less hospitable to the death penalty than the traditional death penalty states. This is not an accident or a statistical fluke. This is a deliberate decision to require not a few but many death penalty trials in the Northeast and in New York in particular." (*NY Times*, 2/6/03.) The Attorney General's actions are being challenged in at least one of the cases, that of Jairo Zapata in the Eastern District of New York. (*NYLJ*, 2/24/03.)

Ashcroft's actions may bring to mind the 1996 New York incident in which the Governor replaced Bronx District Attorney Robert Johnson with the State Attorney General after Johnson refused to prosecute a case capitalily (see *Backup Center REPORT* Jan. 1998, p. 8). However, that action was mooted by the suicide of the defendant, and no other such replacements have occurred.

Among the concerns expressed about Ashcroft's decisions is the appearance of racial bias. According to one press report, "In the 28 cases he is known to have ordered prosecutors to try as capital crimes, just two of the defendants were white, according to the Federal Death Penalty Resource Counsel Project. Nineteen were black, five were Hispanic, one was Native American and one was Asian." (This same account noted that the Albany Common Council has joined other municipalities in calling for a moratorium on executions while issues of fairness are examined.) (*Times Union*, 2/24/03.)

The race factor in federal death penalty prosecution decisions was explored recently by the Vera Institute of Justice, which convened a roundtable of former U.S. Attorneys who had served during the late 1990s to discuss what role, if any, their decision-making process played in the imbalance of death cases against minority defendants. The resulting report, *Issues of Consistency in the Federal Death Penalty* (2002), is available at http://www.vera.org/publication_pdf/161_248.pdf. It drew on a survey released by the Justice Department in 2000 that found a disproportionate number of defendants were minorities. *The Federal Death Penalty System* (DOJ 2001), <http://www.usdoj.gov/dag/pubdoc/deathpenaltystudy.htm>.

Special NYC Court to Handle Felony Probation Violations

One judge in each borough of New York City will be designated to handle violations of felony probations under a fast track plan announced by Mayor Bloomberg and Chief Judge Kaye. The desired results are closer monitoring of cases, faster dispositions, and harsher sentences for violators. The probation court proposal is an extension of Operation Spotlight, a program to step-up enforcement of repeat misdemeanor offenders. "Our [NYC's] administration's approach to fighting crime puts emphasis on problem people and problem places," according to Mayor Bloomberg. "Probation violators are problem people." There are 80,000 probationers in NYC, and an average of 7,000 violations filed annually. (*NYT*, 2/5/03.)

NIC Manual on Violations Available Online

Just as New York City is clamping down on probation violators, the National Institute of Corrections (NIC) made available online its manual, *Responding to Parole and Probation Violations* (NIC 2001), <http://www.nicic.org/pubs/2001/016858.pdf>. The handbook is intended to help localities develop innovative and effective approaches for handling violators. NIC examined the practices of 29 jurisdictions, including New York City. At the outset it notes: "Policymakers need to know whether revocation of probation will make it less likely that offenders will reoffend in the future or whether another intervention will be more effective. Indeed, many probation and parole agencies are beginning to question the assumption that revocation will 'get the offender's attention' and result in better performance." (NIC at 8.) The book provides a framework for

improving the administration of the violation process through strategic planning, alternatives to revoke and remand, and collaboration. It includes a resource list, diagrams, exercises, and exhibits with sample policies and worksheets.

Domestic Violence Courts Go Statewide

Problem solving courts were among other issues underscored in Judge Kaye's "State of the Judiciary" message mentioned earlier. Expanding the up-to-now experimental Integrated Domestic Violence (IDV) Court is, Kaye said, a priority. The IDV combines under one judge related Criminal Court, Family Court, and Supreme Court proceedings for families allegedly suffering from domestic violence. Judge Kluger of NYC has been appointed Statewide Deputy Chief Administrative Judge for Court Operations and Planning. She will be responsible for overseeing the implementation of IDV Courts in every county, with a goal of making IDV statewide by 2006. IDV courts are operating in the Bronx, Westchester, Suffolk, and Rensselaer Counties, and two more are being readied in Monroe and Onondaga Counties. Judge Kluger had a key role in the development of the Bronx IDV. (*NYLJ*, 1/14/03; *State of the Judiciary* 2003.)

Hofstra Clinic Honors Gradess

NYSDA's Executive Director, Jonathan E. Gradess, was honored by Hofstra University School of Law's Law Clinic at the Clinic's 30th Anniversary Dinner on Feb. 27, 2003. Gradess was one of three recipients of Distinguished Clinic Alumni Awards. ♪

Book Review

Corpse: Nature, Forensics, and the Struggle to Pinpoint Time of Death

By Jessica Snyder Sachs
Perseus Publishing (2001)
270 pages; ISBN: 073820336X

By Martin W. Hatcher*

I see dead people. They are in varying degrees of decomposition. They are infested with maggots. You will see them too if you read this book. The thing is, I don't see them in a horror kind of way—more of a "this is fascinating" kind of way.

The author covers a lot of ground—and a lot of bodies both below and above it—in her inquiry into the art of fixing the time of death. She starts in earnest with the 19th century, but reaches as far back as ancient China in her single-minded pursuit, and ends in the present.

She delves into the science, but she also deals with the scientists—anthropologists, forensic pathologists, botanists, zoologists, entomologists, and more. There are courtroom battles (both famous and obscure) over the evidence, all searching for the answer to "When did he/she die?"

Not an easy problem, as it turns out. In fact, it seems an almost impossible one. How hot or cold was it out the night he died? That one you hear every day in every TV murder mystery. But it is not that simple. In some cases, body temperature will rise after death—that can screw up a good estimate.

* *Martin Hatcher* is an Albany artist who also writes science fiction.

(continued on page 16)

CONFERENCES & SEMINARS

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Federal Practice for the State Practitioner
Date: March 28, 2003
Place: Brooklyn, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; website www.nysacdl.org

Sponsor: Wayne State University School of Medicine, Michigan State Police, and Fraternal Order of Police, State Lodge of Michigan
Theme: Medicolegal Investigation of Death
Dates: April 2-4, 2003
Place: Dearborn, MI
Contact: For general course information, contact Andrea Lubienski: (313)610-1277 or e-mail alubien@med.wayne.edu; for registration information contact: Wayne State University School of Medicine: tel (313)577-1180; fax (313)577-7554; e-mail dcme@med.wayne.edu

MISSED IT?

**If you couldn't be at
NYSDA's 17th Annual Metropolitan Trainer on
Mar. 8, 2003, you can still get the materials.**

**Call Shahrul Ladue at the Backup Center:
518-465-3524**

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Rules of the Road
Date: April 4, 2003
Place: Nyack, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Mineola Trainer
Date: April 11, 2003
Place: Mineola, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; website www.nysacdl.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer
Date: April 26, 2003
Place: Syracuse, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Association of Sentencing Advocates
Theme: Were They Born This Way? Understanding the Mind, the Behaviors, and the Cultural Differences of Clients: Tools for Effective Advocacy
Dates: April 30-May 2, 2003
Place: Albuquerque, NM
Contact: tel (202)628-0871; fax (202)628-1091; e-mail nasa@sentencingproject.org; website www.sentencingproject.org/nasa

Sponsor: National Association of Criminal Defense Lawyers
Theme: Trial Techniques & Strategies from the Masters
Dates: April 30-May 3, 2003
Place: New York City
Contact: NACDL: tel (202)872-8600 ; fax (202)872-8690; e-mail assist@nacdl.org

Sponsor: New York State Defenders Association
Theme: 36th Annual Meeting and Conference
Date: July 20-July 23, 2003
Place: Saratoga Springs, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; website www.nysda.org

Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: August 8-15, 2003 [Note Date Change]
Place: Dubois, WY
Contact: tel (760)322-3783; fax (760)322-3714; website www.triallawyerscollege.com ☪

Don't Miss the Training You Need!

Check our website for the latest Seminar Information
The *REPORT* is posted there long before the printed issue is mailed!

Also see the "Training Calendar" for new developments.

Job Opportunities

The Public Defenders Office of Cattaraugus County is accepting applications for **Assistant Public Defender**. Candidates must be law school graduates and members in good standing of the NY State bar, with sufficient experience to undertake cases before Cattaraugus County Court and/or Cattaraugus County Family Court. Excellent research and writing skills and a strong commitment to the representation of individuals who are unable to retain counsel required. Ability to work collaboratively with other lawyers, social workers and investigators necessary. Salary is negotiable. EOE. Send cover letter, expressing interest and salary requirements, with application and/or résumé to: Mark S. Williams, Public Defender, c/o Cattaraugus County Human Resources Department, 303 Court Street, Little Valley, NY 14755. All applications must be received before 5:00 pm, Mar. 14, 2003. Applications may be obtained at the above address or by accessing the county website at www.co.cattaraugus.ny.us/civil/exam.

The Office of the Appellate Defender (OAD) seeks **Staff Attorneys**. The not-for-profit OAD—part law firm, part training program—is devoted to providing high-quality representation to indigent defendants primarily in state criminal appeals and in collateral proceedings in state and federal court. It offers 2-year positions to lawyers with top-level skills in legal research and writing and a commitment to representing the indigent. Attorneys are intensively trained and supervised, and depart as first-class advocates committed to high-quality public defense. The office is devoted to maintaining a staff of lawyers with diverse backgrounds and experiences. Salary based on years of experience, starting at \$41,000 + benefits. Submit cover letter, résumé, and writing sample to: Tuli Taylor, Administrative Attorney, Office of the Appellate Defender, 45 West 45th Street, 7th Floor, New York NY 10036

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 résumés to: Joseph H. Oswald, Esq., Oswald & McMorris, PO Box 328, Fort Edward NY 12828; fax (518)747-5664; website: www.oswaldmcmorris.net

Don't Miss an Application deadline!

Check the *REPORT* as soon as it hits the web at www.nysda.org, and look at Job Opportunities (under NYSDA Resources) for notices received after the *REPORT* deadline.

The Bronx Defenders, an innovative community based public defender office in the South Bronx, accepts applications year-round from **experienced criminal defense lawyers** interested in joining their office. Contact Robin G. Steinberg, Executive Director, The Bronx Defenders, 860 Courtlandt Avenue, Bronx NY 10451. website www.bronxdefenders.org

Students interested in **summer law internships** and **law internships** should send a résumé, cover letter and writing sample to: Florian Miedel, Legal Director, at the above address. The Bronx Defenders also accepts application from college interns for summer placement and investigative interns for both summer and semester placement. Applications should be sent to Nicole Mull, Attorney, at the above address.

The Louisiana Crisis Assistance Center, a leading trial office based in New Orleans, LA, specializing in the defense of indigent people charged with capital crimes, seeks an **experi-**

enced Trial Attorney. Significant felony trial experience critical; capital defense experience important. Must be willing to sit the next Louisiana bar. Salary negotiable, but you won't ever get rich doing capital trial work in the Deep South. Benefits. EOE; LCAC recognizes the desperate need to attract more minorities and women to capital defense work in the South. Contact Clive Stafford Smith or Kim Watts at (504)558 9867; e-mail lcac@thejustice-center.org

The Brennan Center for Justice at NYU School of Law seeks an **Associate Counsel** for its Criminal Justice Program, which tackles the harsh impact of criminal justice policies, enforcement practices, and sanctions on communities of color and low-income communities. Associate Counsel, working with other organizations, will implement the Program's current advocacy agenda while exploring and developing new substantive areas. Responsibilities will include preparing policy analyses, writing reports and other public education materials, participating in legislative and agency advocacy, advising officials and activists, organizing convenings, developing scholarship, and conducting litigation. Required: excellent writing, research, analytic, and oral skills; initiative and creativity to move ideas from concept to implementation; ability to collaborate with an array of partners; and 6 to 10 years' experience, preferably in the criminal justice arena. Sensitivity to the broad implications of criminal justice policy, passion for system reform, and humor desirable. Salary and benefits comparable to other leading NYC non-profit legal employers. Direct questions to Chelsea Slosky, Program Associate, Criminal Justice Program, (212)998-6282, chelsea.slosky@nyu.edu. Send cover letter, resume, two writing samples, and names of three references to: Associate Counsel Position-Criminal Justice Program, Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 12th Floor, New York NY 10013. ☺

By Al O'Connor*

Introduction

The 2002 session began with high expectations of Rockefeller Drug Law reform, and ended in December with our hopes dashed once again by the enormous political influence of prosecutors. Although Rockefeller reform was a front-burner issue throughout the session, prosecutors ultimately refused to give up their control over the diversion of low-level drug-addicted offenders from prison to treatment programs. Discussions eventually broke down over this issue. Under the Governor's proposal, prosecutors, not judges, would have been the real arbiters of which drug-addicted defendants would receive treatment, and which would be condemned to long prison sentences. The Governor's plan gave prosecutors license to devise their own standard-less diversion plans, and it stripped judges of authority to offer drug treatment to any defendant who declined to participate in even the most Draconian prosecution-sponsored program. The Assembly held firm to its position that judges must control the diversion process. Stay tuned in the 2003 session.

Although 2002 was an election-year session (which normally crackle with hair-raising schemes to increase our clients' suffering) the Legislature was relatively quiet on criminal justice matters this year. In March, it passed significant amendments to the Sex Offender Registration Act, but these changes were largely compelled by federal requirements for Byrne Formula grant funding. In a one-day post-election session in December, the Legislature amended the Vehicle and Traffic Law (VTL) to reduce the blood-alcohol level required for driving while intoxicated from .10% to .08%. This change was similarly dictated by Congressional grant funding requirements. At the same special session, the Legislature passed the Sexual Orientation Non-Discrimination Act (SONDA), a civil rights bill the Republican majority had long kept off the Senate floor.

In 2002, the Legislature also enacted new crimes relating to identity theft, and passed a small number of minor bills of possible interest to public defense lawyers. The complete text of these laws is available in McKinney's Session Law News and from the Backup Center.

Penal Law

Chap. 619 (A.4939) (Identity Theft).

Effective: November 1, 2002

Enacts comprehensive new provisions relating to identity theft and related offenses under Article 190 of the Penal Law:

*Al O'Connor is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.

➤ Identity theft:

A person is guilty of identity theft in the third degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby:

In the third degree (Penal Law § 190.78)

1. Obtains goods, money, property or services or uses credit in the name of such other person or causes financial loss to such person or another person; or
2. Commits a Class A misdemeanor or higher level crime.

(Class A misdemeanor)

In the second degree (Penal Law § 190.79)

1. Obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds five hundred dollars; or
2. Causes financial loss to such person or to another person or persons in an aggregate amount that exceeds five hundred dollars; or
3. Commits or attempts to commit a felony or acts as an accessory to the commission of a felony; or
4. Commits the crime of identity theft in the third degree as defined in section 190.78 of this article and has been previously convicted within the last five years of identity theft in the first, second or third degrees, unlawful possession of personal identification information in the first, second or third degrees, or grand larceny in the first, second, third or fourth degrees.

(Class E felony)

In the first degree (Penal Law § 190.80)

1. Obtains goods, money, property or services or uses credit in the name of such other person in an aggregate amount that exceeds two thousand dollars; or
2. Causes financial loss to such person or to another person or persons in an aggregate amount that exceeds two thousand dollars; or
3. Commits or attempts to commit a Class D felony or higher level crime or acts as an accessory in the commission of a class D or higher level felony; or
4. Commits the crime of identity theft in the second degree as defined in section 190.79 of this article and has been previously convicted within the last five years of identity theft in the first, second or third degrees or unlawful possession of personal identification information in the first, second or

third degrees, or grand larceny in the first, second or third degrees.

(Class D felony)

➤ **Unlawful possession of personal identification information**

In the third degree (Penal Law § 190.81)

A person is guilty of unlawful possession of personal identification information in the third degree when he or she knowingly possesses a person's financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, personal identification number, mother's maiden name, computer system password, electronic signature or unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

(Class A misdemeanor)

In the second degree (Penal Law § 190.82)

A person is guilty of unlawful possession of personal identification information in the second degree when he or she knowingly possesses two hundred fifty or more items of personal identification information of the following nature (see list above) knowing such information is intended to be used in furtherance of the commission of a crime defined in this chapter.

(Class E felony)

In the first degree (Penal Law §190.83)

A person is guilty of unlawful possession of personal identification information in the first degree when he or she commits the crime of unlawful possession of personal identification information in the second degree and:

1. With intent to further the commission of identity theft in the second degree, he or she supervises more than three accomplices; or
2. He or she has been previously convicted within the last five years of identity theft in the first, second or third degrees, or unlawful possession of personal identification information in the first, second or third degrees or grand larceny in the first, second, third or fourth degrees.

(Class D felony)

Affirmative Defenses (Penal Law § 190.84)

In any prosecution for identity theft or unlawful possession of personal identification information pur-

suant to this article, it shall be an affirmative defense that the person charged with the offense:

1. Was less than twenty-one years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another solely for the purpose of purchasing alcohol;
2. Was under eighteen years of age at the time of committing the offense and the person used or possessed the personal identifying or identification information of another solely for the purpose of purchasing tobacco products; or
3. Used or possessed the personal identifying or identification information of another person solely for the purpose of misrepresenting the person's age to gain access to a place the access to which is restricted based on age.

Definitions:

"Personal identifying information" means a person's name, address, telephone number, date of birth, drivers license number, social security number, place of employment, mother's maiden name, financial services account number or code, savings account number or code, checking account number or code, brokerage account number or code, credit card account number or code, debit card number or code, automated teller machine number or code, taxpayer identification number, computer system password, signature or copy of a signature, electronic signature, unique biometric data that is a fingerprint, voice print, retinal image or iris image of another person, telephone calling card number, mobile identification number or code, electronic serial number or personal identification number, or any other name, number, code or information that may be used alone or in conjunction with other such information to assume the identity of another person.

"Electronic signature" shall have the same meaning as defined in subdivision three of section one hundred two of the state technology law.

"Personal identification number" means any number or code, which may be used alone or in conjunction with any other information to assume the identity of another person or access financial resources or credit of another person.

Miscellaneous Provisions

The bill also adds these newly added identity theft felonies to the list of "specified offenses" that can support a terrorism prosecution under Penal Law Article 490. It also includes amendments to CPL § 20.40 to support broad geographic jurisdiction over identify theft prosecutions, which may be prosecuted i) in any

county in which the person who suffers financial loss resided at the time of the commission of the offense, or ii) in the county in which the person who suffers financial loss resided at the time of the commission of the offense, or iii) in the county where the person whose personal identification information resided at the time of the commission of the offense. Finally, the bill amends Penal Law § 60.27 to make clear that victims of identity theft offenses may be entitled to restitution and that compensation may be ordered for any “adverse action taken against them” as a result of an identity theft offense.

Chap. 598 (Assault on bus and train employees).

Effective: November 1, 2002

Elevates simple assaults on train and bus operators, ticket inspectors, and conductors to assault in the second degree, a Class D violent felony (new subdivision 11 to Penal Law § 120.05.)

Criminal Procedure Law

Chap. 498 (S.2835) (Writ of Error Coram Nobis—Applications for leave to appeal to Court of Appeals authorized).

Effective: November 1, 2002.

In *People v. Bachert*, 69 N.Y.2d 593 (1987), the Court of Appeals noted that Appellate Division orders entered in connection with writs of error coram nobis alleging ineffective assistance of appellate counsel are not appealable. The Court invited the Legislature to authorize such review. Fifteen years later, the Legislature has finally done so. This legislation amends CPL § 450.90 to authorize a permissive appeal to the Court of Appeals from an order either “granting or denying a motion to set aside an order of an intermediate appellate court on the ground of ineffective assistance or wrongful deprivation of appellate counsel.”

Chap. 588 (A.11194) (Verdict Sheets—Brief explanatory notations).

Effective: September 24, 2002.

Amends CPL § 310.20 to allow brief explanatory notations on verdict sheets concerning dates, names of complainants or specific statutory language when a court submits two or more counts set forth in the same article of law. A 1996 amendment to CPL § 310.20 was limited to two or more counts defined in the same section of law.

Chap. 462 (S.7479) (Domestic Violence—Orders of Protection).

Effective: November 18, 2002.

Amends CPL § 530.13 (5) to require a court to “inquire as to the existence of any other orders of protection

between the defendant and the person or persons for whom the order of protection is sought;” requires that orders of protection plainly state an expiration date and specifies that orders of protection in domestic violence cases be printed on uniform statewide forms.

Chap. 62 (A.9404) (Audio-Visual court appearances).

Effective: May 7, 2002.

Amends CPL § 182.20 to add Erie County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

Chap. 57 (S.6465) (Audio-Visual court appearances).

Effective: May 7, 2002.

Amends CPL § 182.20 to add Niagara County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

Chaps. (various) (Peace Officer status).

Effective: Upon Governor’s signature.

Confers peace officer status on:

Chap. 260 uniformed court officers of the Village Court of Quogue (A.6502) (July 30, 2002);

Chap. 261 uniformed court officers of the Town of East Hampton (A.6504) (July 30, 2002);

Chap. 623 officers and members of the fire investigation unit of the fire department of the city of Buffalo (October 2, 2002);

VETOED persons appointed as public safety officers by the commissioner of the Department of Public Safety of the Town of Hempstead (S.7400-a);

Chap. 320 dog control officers of the Town of Clarence (August 6, 2002);

Chap. 321 airport security guards, senior airport security guards, airport security supervisors, retired police officers, and supervisors of same, who are designated to provide security at Long Island MacArthur Airport (August 6, 2002).

Chap. 92 (A.11419) (Federal law enforcement officers).

Effective: June 4, 2002.

Amends CPL § 2.15 to add Federal Reserve Law Enforcement Officers to the list of federal officers who possesses limited authority to act as peace officers under New York law.

Vehicle and Traffic Law

Chap. 3 (A.8429) (DWI – BAC reduced from .10% to .08%).

Effective: November 1, 2003.

Amends VTL § 1192 (2) to provide that “no person shall operate a motor vehicle while such person has .08 of

one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine, or saliva" [reduced from .10%]. To accommodate the lower *per se* intoxication threshold, the *per se*—level II standard for drivers of commercial motor vehicles, which previously ranged from .07% to .09%, has been changed to .07% only [VTL § 1192 (6)], as has the *prima facie* evidence standard for driving while ability impaired [VTL § 1195 (2)(c)]. The suspension pending prosecution provisions of VTL § 1193 (2) have also been amended to reflect the lower .08% threshold.

Chap. 691 (A.8775) (DWI prior offenses – mandatory jail or community service).

Effective: September 30, 2003.

Enacts a mandatory jail sentence of 5 days or, as an alternative, 30 days of community service for defendants who commit the crime of DWI [VTL § 1192 (2) or (3)] and have a prior DWI conviction within the preceding 5 years; and a mandatory jail sentence of 10 days or 60 days of community service for defendants who have been convicted on "two or more occasions" of DWI within the preceding 5 years.

Chap. 546 (A.8853) (Vehicle and Traffic Law – Use of both lap belts and shoulder harnesses required).

Effective: 60 days after Governor's signature.

Amends VTL § 1229-c to provide that "except as otherwise provided for passengers under the age of four, it shall be a violation of this section if a person is seated in a seating position equipped with both a lap safety belt and a shoulder harness belt and such person is not restrained by both such lap safety and shoulder harness belt."

VETOED (S.5333) (Vehicle and Traffic Law—Parking violations—Time limit on application to dismiss notice of violation).

Effective: Upon Governor's signature.

Amends VTL §238 (2-a)(b) to provide that an application to dismiss a parking ticket on the ground that it fails to contain required identifying information may be made "up to one year after a default judgment has been rendered on the violation."

Corrections and Parole

Chap. 11 (S.6263-a) (Sex Offender Registration Act – New crimes and diminished rights).

Effective: March 11, 2002

[*Ed. note:* Much of the following information appeared in the May/June 2002 issue of the *REPORT* and is repeated here for completeness of the Legislative Review. The earlier issue included a "Quick Reference

Chart" not included here. That chart is available in the PDF version of the *REPORT* on our web site, or from the Backup Center.]

Several new offenses have been added to the list of crimes covered by the Sex Offender Registration Act (SORA, also known as Megan's Law), including the following:

- **Felonies** (including attempts): *Persistent sexual abuse* (Penal Law § 130.53); *Aggravated sexual abuse in the fourth degree* (Penal Law § 130.65-a); *Facilitating a sex offense with a controlled substance* (Penal Law § 30.90); and *Disseminating indecent material to minors in the first degree* (Penal Law § 235.22); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).
- **Misdemeanors** (including attempts): *Sexual Misconduct* (Penal Law § 30.20); *Sexual abuse in the third degree* (Penal Law § 130.55); and where the victim is under age 18, or the defendant has a prior sex offense conviction: *Forcible touching* (Penal Law § 130.52); or any SORA offense committed as a *hate crime* (Penal Law § 485.05) or as a *crime of terrorism* (Penal Law § 490.25).

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

- **Effective date:** Registration requirements will apply prospectively to offenses committed on or after Mar. 11, 2002. However, in some limited circumstances the amendments will apply retroactively if the defendant was convicted of a newly added felony offense (including designated federal offenses) and was still serving the sentence on Mar. 11, 2002.
- **New Reporting Requirements:** The SORA now requires lifetime registration for three new categories of offenders (in addition to Risk Level 3). Regardless of a defendant's risk level assessment,

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

lifetime registration will be required for **sexual predators, sexually violent offenders, and predicate sex offenders**. Sexual predators will also be required to personally verify their addresses every 90 days for life. A “sexual predator” is a person who stands convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes him or her likely to engage in predatory sexually violent acts. A “sexually violent offender” is a sex offender who stands convicted of a sexually violent offense [Correction Law § 168-a (3)]. A “predicate sex offender” is a person convicted of a sex offense or a sexually violent offense who has a previous conviction for one or more of such crimes.

- **Effective date for new categories:** These three new categories will apply at risk level assessment hearings conducted on or after Mar. 11, 2002. However, the new categories will not apply to hearings conducted after Mar. 11, 2002 if the defendant was previously classified in an administrative or judicial risk level assessment proceeding conducted prior to Jan. 1, 2000, or was included in the plaintiff class in *Doe v Pataki*, 3 FSupp 2d 456 (SDNY 1998). Offenders classified after Mar. 11, 2002 as a sexual predator, sexually violent offender, predicate sex offender or Level 3 sex offender will be permanently ineligible to petition the court for relief from the duty to register pursuant to Correction Law § 168-0. Level 3 sex offenders who were classified prior to Mar. 11, 2002 may petition for such relief after 13 years.

Chap. 251 (S.7581) (Work Release eligibility—Victims of Domestic Violence).

Effective: July 30, 2002.

In 2000, Governor Pataki vetoed a bill that would have authorized the granting of work release to otherwise ineligible inmates convicted of homicide or assault offenses when domestic violence was a substantial contributing factor to their criminal conduct. The Governor cited the lack of a provision in the bill requiring the Department of Correctional Services to consult with prosecutors before granting work release in these cases.

The bill has now been amended to address the Governor’s concern. It authorizes DOCS to grant temporary release (including work release) to an inmate convicted of a homicide or assault offense when: a) the victim was a member of the inmate’s immediate family as that term is defined in Penal Law § 120.40 or the inmate and victim had a child in common; b) “the inmate was subjected to substantial physical, sexual or psychological abuse committed by the victim of such homicide or assault; and c) such abuse was a substantial factor in causing the inmate to commit” the crime. An inmate’s claim of

domestic violence must be corroborated in some manner and the Commissioner must “request and *take into consideration* the opinion of the district attorney . . . and the sentencing court.” [Amends Correction Law § 851]

Chap. 137 (S.3781) (Confidential personnel records—Parole officers).

Effective: July 23, 2002.

Adds peace officers employed by the Division of Parole to the list of employees whose personnel records are confidential under Civil Rights Law § 50-a.

Chap. 413 (A.11521) (Erie County Holding Center).

Effective: August 13, 2002.

Amends Correction Law § 500-a to permit the Erie County Holding Center and the Erie County Correctional Facility to be used for the detention of persons under arrest who are awaiting arraignment.

Chap. 535 (A6038) (NYC Dept. of Correction—private jails prohibited).

Effective: September 17, 2002.

Amends the New York City Administrative Code to provide that “[t]he duty of maintaining the custody and supervision of persons detained or confined by the Department of Correction shall be performed solely by members of the uniformed force and shall not be delegated, transferred or assigned in whole or in part to private persons or entities.”

Family Court Practice

VETOED (S.3434) (Domestic Relations Law – Basic child support obligation).

Domestic Relations Law § 240 (1-b)(d) establishes a \$25 basic child support obligation when any higher amount would reduce a non-custodial parent’s income below the poverty guidelines for a single person. This legislation authorizes a court to find that the \$25 basic support obligation is “unjust or inappropriate” and to order the non-custodial parent to pay an amount the court finds “just and appropriate.”

Chap. 219 (S.6176-B) (Family Court Orders of Protection—Judicial Hearing Officer Pilot Program).

Effective: July 30, 2002; scheduled to sunset 3 years after effective date.

In 2001, the Judiciary Law was amended to give Family Court judges the authority to refer certain applications for orders of protection brought after 5 p.m. to referees for determination. This legislation authorizes a judicial hearing officer pilot program within the 7th and 8th judicial districts (western New York) that would permit

referral of such applications to judicial hearing officers regardless of the hour of day.

Miscellaneous

Chap. 302 (S.6508) (Town and Village Courts—Juror Allowances).

Effective: Applies to jury service on or after April 1, 2003.

Provides that the state shall pay juror allowances in Town and Village courts at a rate of \$10 per day beginning on April 1, 2003 and rising to \$15 in 2004 and \$25 in 2005.

VETOED (S.6165) (Tax Law—*Miranda* warnings).

Requires government employees conducting tax law investigations to recite *Miranda*-like warnings to taxpayer interviewees [Tax Law § 3006-a; NYC Administrative Code § 11-4023].

Chap. 524 (S.7340) (Expungement of DNA samples and records).

Effective: September 17, 2002.

Amends Executive Law § 995-c to provide a mechanism for expungement of DNA samples and records where a defendant is acquitted, or where a conviction is

reversed or vacated and the defendant will not be retried, or where a suspect is not criminally charged after providing a DNA sample.

Sunset Clauses

Chap. 46 (A.9628) (Statewide Child Abuse Register—Expungement of unfounded reports—Sunset Clause Eliminated).

Effective: April 30, 2002.

Eliminates the sunset clause and thereby makes permanent Chapter 555 of the Laws of 2000. This law amended Social Services Law § 422 (5) to permit expungement of an unfounded report from the statewide central register of child abuse when the person who made the report has been convicted of falsely reporting an incident in connection with the matter, or when the “subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse and mistreatment.”

Chap. 163 (S.7124) (Sunset Extended—Closed-Circuit testimony of child witnesses).

Sunset extended to September 1, 2003.

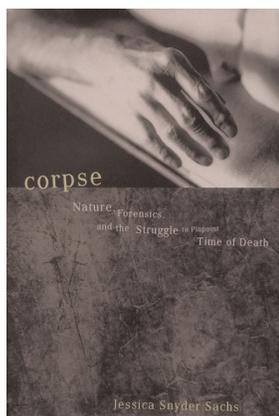
Extends the sunset clause of CPL Article 65 relating to closed-circuit testimony of certain child witnesses to September 1, 2003. ♪

Book Review

(continued from page 8)

We learn that, at the moment, flies and their young (maggots) are the best indicators of the time of death. Certain flies will alight and begin to lay eggs within minutes of death. By judging the maturity of the maggots, one can tell how long someone has been dead. Ah, but still not simple. There are many different species of flies; some like a fresh corpse and some like one that has aged a bit. Unfortunately, the maggots all look pretty much the same, even to experts.

Hairy Maggot does stand out from the horde. It also happens to eat other maggots, which again can screw up a good estimate. Furthermore, the time of year, the location in the world, or the area or state or county,



determines not only what flies are called to the feast but even at what time the dinner bell rings for each. The first to chow down in one place may arrive fashionably late in another location.

To find out all this stuff, scientist have been scattering dead pigs around and watching what happens. But pigs are not people, and there is some argument that they may decompose differently from humans—so human volunteers are used as well. The bodies are placed in different positions, at different times of year, with different clothing or lack of, buried or submerged or left in the open, all to find out what happens to our bodies when we die. The “Body Farm” in Tennessee must be quite a sight.

The book is not all about maggots, although they are by far the most interesting part. It covers time of death estimates by using plants and bacteria, as well as other more familiar methods. It is a must read for anyone needing to prove or refute a time-of-death estimate. It is also a very good read even if you have no need of the information. A much used phrase normally applied to other genres—“Once you start you won’t be able to put it down”—is perfect for this book. ♪

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.

New York State Court of Appeals

Appeals and Writs (Record) APP; 25(80)

Identification (Lineups) IDE; 190(30)

People v Jackson, 98 NY2d 555, 750 NYS2d 561 (2002)

The defense moved to suppress the complainant's lineup identification because the 19-year-old defendant was much younger than the fillers. At a *Wade* hearing, the detective who supervised the lineup testified that he noted the defendant's age, height, and weight and selected four fillers of similar size and skin tone. He photographed the lineup and made a notation that the fillers were of similar body size and their ages were 29, 36, 38, and 41. The hearing court denied suppression based on its examination of the photograph of the lineup. During trial, the detective testified to the identification procedure and said that the original photograph was lost. Without objection, a photocopy of the photo was admitted into evidence and used by defense counsel. The jury conviction was affirmed.

Holding: The record provides ample evidence that the prosecution met their initial burden to establish the reasonableness of police conduct in the pretrial identification procedure. See *People v Chipp*, 75 NY2d 327, 335 *cert den* 498 US 833. Age discrepancy between the defendant and the lineup fillers, without more, is insufficient to create a substantial likelihood that the defendant would be singled out. Because the record supports the suppression court's determination, it is beyond review. That the hearing court based its finding largely upon examination of the lineup photo indicates that the photo was of "substantial importance." See *People v Yavru-Sakuk*, 98 NY2d 56, 60. However, the information contained in the photograph is reflected in the record by other evidence of the fillers' physical attributes, including the detective's testimony and a photocopy that defense counsel used during summation, illustrating that its accuracy was not disputed. Loss of the original photograph did not prevent proper review. Order affirmed.

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

People v Nicholas, 98 NY2d 749, 751 NYS2d 820 (2002)

During *voir dire*, defense counsel asked prospective jurors whether they would give more credence to the testimony of a police officer than to other witnesses. In response, some jurors raised their hands, then nodded. The court repeated the query; "no response" was recorded. Defense counsel challenged for cause specifically-named jurors who responded affirmatively to the police bias question. The challenges were denied and the defense was forced to use its peremptories. The defendant's conviction was reversed on appeal.

Holding: Trial courts have a duty to obtain unequivocal assurances of impartiality from each of the jurors. "[P]otential jurors who express possible bias must be excused unless they provide 'unequivocal assurance that they can set aside any bias and render an impartial verdict based on the evidence.'" *People v Johnson*, 94 NY2d 600, 614 (2000). Denying the defendant's challenges for cause without "unequivocal assurances," forcing the defense to exhaust its peremptory challenges, was reversible error. CPL 270.20(2). Order affirmed.

Appeals and Writs (Record) APP; 25(80)

Grand Jury (General) GRJ; 180(3)

Transcripts (Right to) TSC; 373.5(40)

People v Robinson, 98 NY2d 755, 751 NYS2d 843 (2002)

Holding: The defendants claimed that they had a due process right to access grand jury minutes. Their request for disclosure was denied by the Appellate Division. The defendants failed to show a compelling and particularized need for the grand jury minutes, which is required before a court must begin balancing various factors to assess whether disclosure is appropriate. *People v Fetcho*, 91 NY2d 765, 769 (1998). This procedure satisfies due process. See *gen People v Ramos*, 85 NY2d 678, 684 (1995). The Appellate Division did not abuse its discretion or deprive the defendants of their rights to appellate due process and effective assistance of appellate counsel. Order affirmed.

Arraignment (Delay) ARN; 31(5)

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

People v Ramos, 99 NY2d 27, 750 NYS2d 821 (2002)

The defendant was questioned by police concerning a murder. He was Mirandized, and signed a waiver of counsel form. Ultimately, he gave a written confession. Fifteen hours elapsed between his arrest and arraignment. His motion to suppress the confession as coerced was denied. On appeal, the defendant first raised the claim that his arraignment was delayed (the booking process was interrupted for additional interrogation) to obtain the confession, interfering with his right to counsel. The

NY Court of Appeals *continued*

Appellate Division held that the unpreserved right to counsel claim could be raised, but affirmed the conviction.

Holding: Delay in arraignment for additional police questioning did not establish a claim that the state constitutional right to counsel had been violated. The state right to counsel attaches indelibly when “formal judicial proceedings begin, whether or not the defendant has actually retained or requested a lawyer,” *People v Di Biasi*, 7 NY2d 544; or “when an uncharged individual ‘has actually retained a lawyer in the matter at issue or, while in custody, has requested a lawyer in that matter.’” *People v West*, 81 NY2d 370, 373-374. The defendant’s confession occurred before judicial proceedings began and before counsel was retained or requested. Deliberate delay in arraignment did not violate the state constitutional right to counsel since it had not attached. The delay was only a factor to consider in analyzing the voluntariness of the confession. *People v Hopkins*, 58 NY2d 1079, 1081. Neither voluntariness nor waiver of the right to counsel was raised here. CPL 470.05(2). Order affirmed.

Double Jeopardy (Punishment) **DBJ; 125(30)**

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

People v Gonzalez, 99 NY2d 76, 751 NYS2d 830 (2002)

The defendants were arrested in individual “buy-and-bust” operations and charged with third-degree sale of drugs (Penal Law 220.39[1]) and criminal sale of drugs in or near school grounds (Penal Law 220.44[2]) based on a single transaction. Expert evidence was introduced to explain gaps in time, the absence of pre-recorded money, and the workings of a drug organization. The defendants were given concurrent sentences. On appeal, they claimed the sentences violated the double jeopardy prohibition against multiple punishments for the same offense. *North Carolina v Pearce*, 395 US 711, 717 (1969).

Holding: The defendants’ double jeopardy claims based on multiple punishments were unpreserved. The issue does not involve the jurisdiction or authority of the court, but whether the legislature intended multiple sentences for these offenses (*Missouri v Hunter*, 459 US 359, 366-368 [1983]), based on the punishments authorized. *Whalen v United States*, 445 US 684, 688 (1980). The validity of multiple punishments was a question of statutory interpretation, which had to be preserved at the trial level. CPL 470.05(2). There was no abuse of discretion in admitting expert testimony on street-level narcotics transactions. *People v Brown*, 97 NY2d 500. Order affirmed.

Concurrence and Dissent: [Smith, J] Double jeopardy claims of multiple punishments did not have to be preserved. *People v Michael*, 48 NY2d 1. An illegal sentence claim may be raised for the first time on appeal. *People v*

Samms, 95 NY2d 52. However, the claim was meritless since the legislature intended punishment for both offenses. Expert testimony on street level drug activity was unnecessary in a straightforward drug transaction.

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

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

People v Hitchcock, 98 NY2d 586, 750 NYS2d 580 (2002)

The defendants were charged with endangering the welfare of a child for keeping guns in their homes accessible to young children. Penal Law 260.10(1). Defendant Hitchcock left one of his many guns in an open tool tray in a home with three young children. One of them took the gun, and accidentally shot a neighbor’s child. Defendant Duenas kept a loaded gun hidden in his bedroom. His younger brother found it. The gun accidentally went off and killed another child visiting the home. Both defendants were convicted. On appeal, they challenged the sufficiency of the evidence.

Holding: The defendants had to knowingly engage “in conduct that will present a ‘likelihood’ of harm to a child,” *ie*, there had to be an awareness of the potential for harm. *People v Johnson*, 95 NY2d 368, 372, *see also* Penal Law 15.05(2). The evidence against Defendant Hitchcock showed that he “knowingly possessed and stored his guns in a manner likely to be injurious to the welfare of the children living in his home and their child guests.” However, the facts did not support the charge against Defendant Duenas, who made a significant effort to conceal his gun and was unaware that the child knew of its existence. Possession of a gun at home and injury to a child did not, without more, establish *per se* liability. Order affirmed.

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

Narcotics (Sale) **NAR; 265(59)**

People v Samuels, 99 NY2d 20, 750 NYS2d 828 (2002)

Directed by defendant Samuels to a car with two other men, an undercover police officer attempted to buy crack cocaine. After the officer gave his money to someone in the car, one of the men, defendant Henderson, asked the officer to take a hit from a crack pipe. The backup team came in and arrested the two men in the car. The officer lost sight of the defendant but arrested him a few blocks away. No crack, no pipe, and no pre-recorded buy money were found on the defendants, who were convicted of criminal sale of a controlled substance. Penal Law 220.39(1). Their convictions were affirmed.

Holding: Sufficient facts were presented to show that the defendants had both the intent and the ability to pro-



NEW YORK STATE DEFENDERS ASSOCIATION DEFENDER INSTITUTE 2003 Basic Trial Skills Program June 1-7, 2003

Praise From Past Participants:

"It is innovative and inspiring, and challenges you to question conventional defense lawyering."

"It was thrilling. My confidence has soared. I can do this!"

"It reaffirmed my greatest strength and my belief that the client should be the foundation of my work."

About the Basic Trial Skills Program

The Basic Trial Skills Program is designed to help attorneys with little or no trial experience become skilled in the techniques of jury persuasion and confident of their abilities to conduct jury trials. A second goal of the program is to increase the sensitivity of the participants to the conditions of the lives of their clients and to promote caring, humane and effective representation. The program seeks to foster a long-term commitment to the representation of poor people. In 1989, the Criminal Justice Section of the New York State Bar Association presented the Defender Institute its Award for Outstanding Contribution to Criminal Law Education. The New York State Judicial Commission on Minorities has called the program "... a model for other agencies that provide legal assistance to the poor."

The training includes small group exercises, lectures and demonstrations by attorneys and communication specialists and informal sessions with participants and faculty. Participants are divided into small groups according to experience. Topics covered during the seven-day program include jury persuasion, theory of the case, client interviews, *voir dire*, opening statement, objections, cross-examination, impeachment, demonstrative evidence, direct examination, and closing argument. Trial exercises are accompanied by lectures and demonstrations, as well as videotape critiques.

Please recognize that this program is extremely demanding, with more than 40 hours of breakout sessions, lectures, and demonstrations. To successfully participate in the training, you must commit time prior to the program to be familiar with all case materials you receive as well as prepare daily during the program for participant exercises.

Participants accepted for the Basic Trial Skills Program are responsible for their own transportation to and from the Institute.

Dates

Sunday, June 1 through Saturday, June 7, 2003. The program begins on Sunday with an orientation program and ends on Saturday after a graduation luncheon. **Application Deadline is Monday, April 11, 2003.**

Location and Accommodations

The Defender Institute 2003 Basic Trial Skills Program will be held at Rensselaer Polytechnic Institute (RPI), Troy, New

York. Participants will share a dormitory room in an RPI student residence hall. Single rooms will be available on a limited basis for a fee.

Application and Admissions Process

The Defender Institute seeks to accept individuals from as many counties as possible throughout New York State. The participant population is comprised of full-time defenders, part-time defenders and assigned counsel practitioners who handle a substantial number of criminal cases for poor people in their jurisdictions. Participants are trained by some of the best trial attorneys and communication specialists in the country. Due to the popularity of this program, the large number of applicants and the cost of this program, participants selected are required to make a personal commitment to attend all sessions of the program.

Each year, NYSDA's Defender Institute receives more applications than it can accept. Unfortunately, it must turn down some applicants due to lack of space in the program. Because participants will learn from each other both informally and in small group exercises, a diverse student body is sought. Some of the factors for acceptance are: levels of trial experience; diversity of the participant population; commitment to the representation of the poor; need for training; and the skills or experiences, both in and out of the law, that you can share with fellow participants. Those persons not selected for the program will be placed on a ranked waiting list.

It is extremely important for you to fully complete this application. Application information is subject to confirmation by chief defenders.

MCLE Credit

This transitional program has been approved for all attorneys, including newly admitted lawyers, in accordance with the requirements of the Continuing Legal Education Board for approximately 40 credit hours (depending on the final schedule), of which approximately 4 credit hours can be applied toward Ethics and Professionalism. Tuition assistance for financial hardship is available.

About the New York State Defenders Association

Spurred on by the United States Supreme Court's decision in *Gideon v. Wainwright*, the New York State Defenders Association was incorporated in 1967 to be the voice for defense lawyers in New York State. In 1981, New York State contracted with the Association to run the nation's first Public Defense Backup Center, a clearinghouse that provides consultation, research, expert referrals, training and publications to the state's more than 5,000 public defense attorneys. In 1987, NYSDA established the Defender Institute. The Institute presents the Basic Trial Skills Program and carries out a statewide series of continuing legal education seminars for public defense attorneys.

To Apply: Send a COMPLETED APPLICATION AND RÉSUMÉ to NYSDA by Monday, April 11, 2003. Persons with late applications will be placed on a ranked waiting list.

APPLICATION

It is important that this application be fully completed. **Incomplete applications will not be considered.** Where you need additional space, attach extra sheets. Please print or type.

I. NAME: _____

How I would like my name tag to read: _____

Office Address _____

City _____ State _____ Zip _____

Office Phone (____) _____ Fax Number: (____) _____

Office E-mail Address: _____

Home Address: _____

City _____ State _____ Zip _____

Home Phone (____) _____ E-mail Address: _____

Name of Public Defender, Legal Aid Society, or
Assigned Counsel Program: _____

County(s) Defense Office or AC Program(s): _____

II. EMPLOYMENT (please indicate):

A. Full-time Public Defender or Full-time Legal Aid Attorney

1. Number of years and months in present position _____

B. Part-time Public Defender or Part-time Legal Aid Attorney

1. Number of years and months in present position _____

2. What percentage of your total working hours is devoted to representing poor people accused of crimes?
_____ %

3. Please describe the nature of the balance of your practice _____

C. Assigned Counsel Practitioner

1. Number of years and months on assigned counsel panel _____

2. What percentage of your total working hours is devoted to representing poor people accused of crimes?
_____ %

3. Please describe the nature of the balance of your practice _____

4. Number of assigned counsel cases you have accepted over the past year: _____

D. Caseload Information. Please indicate the number of cases you are currently assigned in each category. Enter "N/A" if you have never handled a case in a particular category.

Homicides: _____ Felonies: _____ Family Court: _____ Parole Cases: _____

Misdemeanors: _____ Violations: _____ Criminal Appeals: _____

III. WRITTEN STATEMENTS (Please attach extra sheets if necessary):

1. Discuss your reasons for choosing to do public defense work. _____

2. Describe your career goals and indicate how long you expect to do public defense work. _____

3. Please tell us why you need this training and what specific concerns you have with the prospect of trying a criminal case. _____

4. What anxieties and concerns do you have in representing your clients? _____

5. Please provide a profile of the public defense clients you typically represent. _____

IV. TRIAL ADVOCACY COURSES ATTENDED:

Trial advocacy courses attended during and after law school: _____

V. TRIAL EXPERIENCE: Number of trials to date. (Participants are placed in groups according to experience level. Please be as accurate as possible.)

A. Criminal: Felony: Jury: _____ Bench: _____

Misdemeanor: . . . Jury: _____ Bench: _____

Violations: Bench: _____

VTL: Bench: _____

B. Civil: Jury: _____ Bench: _____

C. Other hearings (please specify): _____

VI. OTHER EXPERIENCE: In the space below, or on a separate sheet, please explain any additional circumstances which you believe should be considered in reviewing your application.

VII. MISCELLANEOUS INFORMATION:

- A. I am a smoker a nonsmoker
- B. I am visually impaired hearing impaired physically challenged/in need of barrier free access
- C. Diet: Vegetarian (no meat at all)
 Quasi-Vegetarian (no red meat; chicken and fish only)
 Other (please specify): _____
- D. Single room: I would like a single room and agree to pay a fee of **\$33.00** per night (**\$198.00** for six nights) to cover the cost of a single room.
- E. If needed, we will explore child care with you. Do you need child care? Yes No
- F. Are you a member of NYSDA? Yes No
- G. Have you applied to the Basic Trial Skills Program before? Yes No If yes, what year(s)?

VIII. DEMOGRAPHIC INFORMATION:

Please designate:

- A. Race: _____
- B. Ethnicity: _____
- C. Sex: Male Female

The New York State Defenders Association does not discriminate on the basis of race, sex, age, national origin, physical disability, religious belief, sexual orientation or prior criminal record.

IX. PERSONAL COMMITMENT:

If I am accepted, I will send written notice of acceptance to NYSDA. I agree to attend and participate in all training sessions of the 2003 Basic Trial Skills Program of the NYSDA Defender Institute. **I am not engaged in the prosecution of criminal cases.**

Signature: _____ Date: _____

BEFORE YOU SEND THIS APPLICATION, PLEASE MAKE SURE:

1. All questions on the application are completely answered.
2. Your résumé is enclosed.
3. Other documents in support of your application are included.

INCOMPLETE APPLICATIONS WILL NOT BE CONSIDERED.

Please return the COMPLETED APPLICATION and YOUR RÉSUMÉ by April 11, 2003 to:

Defender Institute 2003 Basic Trial Skills Program
New York State Defenders Association
194 Washington Ave., Suite 500
Albany, NY 12210-2314

Phone: 518-465-3524 Fax: 518-465-3249

NY Court of Appeals *continued*

ceed with the sale (*People v Mike*, 92 NY2d 996, 998) including: the officer saw crack in the defendants' possession, was asked to "take a hit" by one of the defendants, who "engaged in conduct typical of drug sale operations with a sophisticated division of labor and methods of thwarting the police," accepted payment, and operated at a known drug-selling location. The court's use of a jury charge based on the statutory language, without the requested language about the need to show a *bona fide* offer to sell and the intent and ability to proceed with a sale, was sufficient. CJI2d on PL 220.39(1). The better practice in cases involving an alleged offer to sell drugs would be to give instructions that proof of intent and ability to make the sale is required. See *People v Mullen*, 152 AD2d 260, 266. Order affirmed.

Larceny (Credit Cards)**LAR; 236(10)****People v Thompson NY2d 38, 751 NYS2d 162 (2002)**

The defendant was charged with grand larceny for stealing a decoy pocketbook containing a dummy credit card from an undercover detective. American Express provided the card under a fictitious name with a \$100 limit. The lower courts rejected his assertion that the dummy card did not qualify as a "credit card" under the grand larceny statute.

Holding: The grand larceny statute only required the object stolen to be a credit card. *People v Mitchell*, 77 NY2d 624, 629. The defendant's knowledge was irrelevant. Penal Law 155.00(7); General Business Law 511. "The card here was issued by a person (American Express) to another person (the New York Police Department) and was capable of 'be(ing) used * * * to purchase * * * property or services on the credit of the issuer'" (General Business Law 511[1]). Order affirmed.

Search and Seizure**SEA; 335(15[p])****(Automobiles and Other Vehicles
[Probable Cause Searches])****People v Mundo, 99 NY2d 55, 750 NYS2d 837 (2002)**

Police watched a car with out-of-state plates make an illegal right turn on a red light. They pulled the vehicle over, but when they approached the car on foot, it sped away, nearly hitting a pedestrian. As they chased the car, they observed the defendant in the back seat make a movement as if he were hiding something. When the car was stopped, an officer pulled down the armrest in the center of the backseat fearing that defendant might have hidden a weapon there. The armrest connected to the trunk, and the officer recognized the odor of chemicals used to prepare cocaine. The officer opened the trunk and

discovered drugs. Suppression was denied and the defendant's conviction was affirmed.

Holding: Police were justified in stopping the car for a traffic violation, and ordering the passengers to exit the vehicle. *People v Robinson*, 74 NY2d 773. Under New York's constitution, police need probable cause to search the interior of a stopped vehicle where the occupants have been removed and patted down for weapons unless there was an "actual and specific danger to the officer's safety." *People v Torres*, 74 NY2d 224, 226. The defendant's suspicious behavior, the driver's disregard of pedestrian safety, and their flight warranted a "limited police intrusion in that area within the vehicle where the furtive movements had been seen." *People v Carvey*, 89 NY2d 707. Order affirmed.

Dissent: [Ciparick, J] "[B]ecause the record lacks any showing which would indicate a substantial likelihood that a weapon was present in the vehicle, or that an 'actual and specific' danger to the police existed, the limited intrusion into the vehicle was not justified."

Flight (General)**FLI; 170(6)****Search and Seizure****SEA; 335(5) (42)****(Appellate Review) (General)****People v Pines, 99 NY2d 525, 752 NYS2d 266 (2002)**

Plainclothes police officers, driving an unmarked car in a drug-prone area, observed the defendant walking down the street with another man and looking around nervously. When the defendant saw the unmarked car following him, his eyes "bulged out." Then he placed his right arm against the side of his jacket bunching it up in a cupping motion. When the police car came parallel to him, he abruptly turned around still cradling the right side of his jacket. As the officers displayed their shields and asked to talk, the defendant ran away. While in pursuit, one officer saw the defendant throw a gun into a garbage can. The court suppressed the gun.

Holding: The Appellate Division reversed, finding that the officer's observations provided founded suspicion that the defendant was involved in criminal activity, justifying a common law right of inquiry under *People v De Bour*, 40 NY2d 210. The defendant's furtive behavior in reaction to the officers, his handling of his coat, and his flight were found to have raised the inquiry to reasonable suspicion justifying pursuit. Reasonable suspicion is the standard for a police stop or detention short of actual arrest. *People v Martinez*, 80 NY2d 444, 447-448. Whether particular circumstances give rise to reasonable suspicion is a mixed question of law and fact beyond Court of Appeals review if, as here, there is support in the record for the lower court's finding. Order affirmed.

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

NY Court of Appeals *continued*

Search and Seizure SEA; 335(5) (42)
(Appellate Review) (General)

People v Roque, 99 NY2d 50, 751 NYS2d 165 (2002)

Holding: Police officers conducted a vertical sweep of an apartment building to find trespassers selling or buying drugs. One officer met someone involved in previous drug arrests, then heard that person’s name being called by the defendant from the floor below. The officer found the defendant near an open apartment door. When the defendant saw the officer, he approached the closed door of another apartment, then walked away. Looking inside the open door, the officer saw several items typically used in drug sales; he found cocaine inside. The defendant said he was visiting a different apartment, whose occupant denied knowing him, and was arrested. A large sum of money in small bills was found on him. He was charged with constructive possession of the drugs in the apartment. His motion to suppress the money was denied. The Appellate Division affirmed his conviction. The finding that police had reasonable suspicion to believe that the defendant was trespassing in the building (Penal Law 140.05) was supported by the record. Such reasonable suspicion justifies detaining a defendant. *People v Martinez*, 80 NY2d 444, 447. There was sufficient evidence to support an inference by the trier of fact that the defendant exercised dominion and control over the open apartment, supporting the conviction based on constructive possession. See *People v Kennedy*, 47 NY2d 196, 201-202. Order affirmed.

Self-Incrimination (General) SLF; 340(13)

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

Matter of Raquel M., 99 NY2d 92, 752 NYS2d (2002)

Holding: The 14-year-old defendant was charged with delinquency for the unauthorized use of a vehicle in which she was a passenger. The car had been taken from a place near where the defendant lived and had a police placard on the windshield. A police officer testified that nothing in the appearance of the vehicle indicated it was stolen. The defendant presented no witnesses and did not testify. Family Court properly applied the statutory presumption that a person who rides in or otherwise uses a vehicle without the owner’s consent is presumed to know that no such consent has been given. Penal Law 165.05(1); *People v McCaleb*, 25 NY2d 394, 404. The defendant did not offer any evidence to rebut the presumption. Application of the presumption did not infringe on the constitutional right to remain silent. See *Barnes v United States*, 412 US 837, 846-847 (1973); *People v Morrow*, 23 NY2d 496, 501. Order affirmed.

Prisons (Civil Liabilities)

PRS II; 300.5(3)

Sanchez v State, No. 150, 11/21/02

The appellant, a prisoner at a maximum-security prison, was attacked by two inmates. The one correction officer who was assigned to supervise about 100 inmates in the large area where the attack occurred arrived at the scene shortly afterwards. He had, as a matter of routine, previously positioned himself where he could not see the hallway where the appellant was required to be while inmates returned to their cells after classes. The appellant, who had no prior warning of the attack, sued the State for negligent supervision. The Court of Claims granted summary judgment to the State, which asserted that the attack was not foreseeable. The Appellate Division affirmed.

Holding: Foreseeability is what is reasonably to be perceived—actual or constructive notice—not what is actually foreseen. *Schittino v State of New York*, 262 AD2d 824, 825-826. The State’s duty of care to protect its inmates from attacks by fellow inmates is limited to risks of harm that were reasonably foreseeable. *Flaherty v State of New York*, 296 NY 342, 346. The Appellate Division improperly eliminated constructive notice from its test for foreseeability. The surprise nature of this attack did not automatically relieve the State of responsibility. Security Post Description and Correction Commission regulations (9 NYCRR 7003.2, 7003.4) required the correction officer to maintain constant contact with inmates and monitor inmate behavior to prevent inmate-on-inmate assaults. Based on the uncontested evidence, summary judgment was improper. Order modified.

Dissent: [Graffeo, J] Absent evidence that the State was or should have been aware of a particular danger of inmate violence, the officer’s failure to keep the appellant under constant surveillance should not give rise to liability.

Alibi (General)

ALI; 20(22)

Counsel (Conflict of Interest)

COU; 95(10)

Impeachment (General)

IMP; 192(15)

People v Berroa, No. 151, 11/21/02

At the defendant’s murder trial, the defense was misidentification. No alibi notice was filed. Two defense witnesses gave alibi testimony. The court read to the jury defense counsel’s stipulation indicating that neither witness had revealed such alibi evidence to counsel. Counsel pursued the misidentification defense in closing and referenced the stipulation regarding the alibi. An ineffective assistance of counsel claim was rejected on appeal.

Holding: Defense counsel’s stipulation contradicting alibi statements proffered by defense witnesses deprived the defendant of conflict free counsel. *People v Longtin*, 92

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NY2d 640, 644. Conflict arose when the court permitted unnoticed alibi testimony and recognized that defense counsel was the only source of impeachment. CPL 250.20(3). The stipulation did not cure the conflict as intended; it exacerbated the conflict by eviscerating the credibility of witnesses for counsel's client, and therefore of his defense. Code of Professional Responsibility DR 5-102 (22 NYCRR 1200.21(d)); *People v Paperno*, 54 NY2d 294, 299-300. Counsel was the only source of impeachment information, putting her credibility at odds with that of the defense witnesses. The "stipulation here did not support defendant's best defense or soften damaging evidence." The decision to offer the stipulation was based on "assumed necessity" and not "legitimate trial strategy." The duty to disclose perjury did not automatically require counsel to provide testimony to rebut the perjury. *People v DePallo*, 96 NY2d 437. Order reversed.

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

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

People v Harris, Nos. 152, 153, 11/21/02

During the defendants' trial on drug charges, counsel for defendant Harris discovered that Harris's pretrial attorney had represented the confidential informant in the case on unrelated charges at the same time. The informant had already signed a cooperation agreement and testified at the grand jury before being represented. A motion for a mistrial was denied. Defendant Wright's trial attorney had previously represented a different prosecution witness. He obtained the witness's consent to use privileged information in cross-examination. The convictions of both defendants were affirmed.

Holding: The defendants were not denied effective assistance of counsel, because the alleged conflicts of interest did not impact adversely on their defense. Defendant Harris's attorney was not aware of the conflict during the pretrial representation; there was no evidence that another attorney would have acted differently. Defendant Wright's attorney eliminated the conflict by obtaining the consent of the witness, his former client, to use confidential information during cross-examination. *People v Lombardo*, 61 NY2d 97, 103. The court's failure to inquire into Wright's conflict allegation was error; better practice would have been to hold a hearing. *Mickens v Taylor*, 122 S Ct 1237, 1244-1245. There was no showing that the conflict had a "substantial relation" to the representation.

The defendants' exclusion from an *in camera* hearing where both defense lawyers were present to assess a seated juror's fitness to serve was not improper. *People v Mullen*, 44 NY2d 1, 5-6. The juror's concern for her safety, which she unequivocally denied had any impact on her decision-making, did not make her grossly unqualified. CPL 270.35. Order affirmed.

Identification (General)

IDE; 190(17)

People v Gee, No. 162, 12/12/02

The defendant was charged with robbing a convenience store. The prosecutor served the defendant with CPL 710.30 notice that the store clerk identified him in a lineup and from still photographs taken from a video surveillance tape. The notice and the *Wade* hearing omitted reference to the clerk viewing the tape shortly after the event. Learning about the viewing for the first time at trial, the defendant moved for preclusion, which was denied. His conviction was affirmed.

Holding: Identification made by a witness viewing a surveillance videotape did not fall under the notification requirements of CPL 710.30. The prosecution was required to notify the defendant of their intention to introduce any testimony regarding an observation of him at the time or place of the offense or on some other relevant occasion to be given by a witness who has previously identified him. CPL 710.30. The clerk's viewing of the tape before any suspects were in custody was not a previous identification. *People v Gissendanner*, 48 NY2d 543, 552. "[T]he clerk was simply ratifying the events as revealed in the videotape, without identifying any known individual as the robber." There was no issue as to the defendant's identity or existence during that viewing. Undue suggestiveness did not apply where the complainant was shown an actual depiction of the robbery she witnessed. No prejudice was created by the complainant's "second look" at the tape shortly after the event. Order affirmed.

Evidence (Sufficiency)

EVI; 155(130)

Robbery (Evidence)

ROB; 330(20)

People v Carr-El, No. 154, 12/17/02

The defendant was charged with robbery and grand larceny for allegedly serving as lookout for an accomplice who took property from a man sleeping in the subway. When the complainant awoke, the defendant warned his accomplice who threatened the complainant with physical force to keep the property. On appeal, the defendant claimed that the threat was not immediate and was insufficient to establish robbery.

Holding: Testimony by the complainant was sufficient to show that a threat of physical violence was made within minutes of the larceny, supporting the robbery con-

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viction. “Even if the gap between the taking and the threat were longer, as the defendant insists, the question whether one immediately succeeded the other would remain an issue of fact, and it cannot be said here, as a matter of law, that the threat was not immediately made.” *People v Woods*, 41 NY2d 279, 282. Order affirmed.

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

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

Matter of George T, No. 158, 12/17/02

The respondent was arraigned on a drug charge in Family Court and held in secure detention. A suppression hearing started a week later and was continued due to unavailability of witnesses and other reasons for 67 days—a total of 74 days after arraignment. The court repeatedly denied the law guardian’s motions for release from secure detention or dismissal based on speedy trial. Suppression was eventually denied. A writ of *habeas corpus* was granted on speedy trial grounds but stayed pending appeal. The Appellate Division reversed. After a month of adjournments, Family Court adjudicated the respondent a juvenile delinquent, which was affirmed.

Holding: The court’s inordinate adjournments to permit additional testimony at the suppression hearing violated the respondent’s right to a speedy trial. Family Court Act 310.2. In cases involving less than a class C felony, the hearing for a juvenile in detention must begin within three days of initial appearance, Family Court Act 340.1 (1), and pre-trial motions decided on an expedited basis before fact-finding begins. Family Court Act 332.2 (4). Good cause adjournments are permitted up to three days for the court or presentment agency, and 30 days for the respondent. Family Court Act 340.1 (4)(a)(b). The respondent objected to the delays and did not consent to any adjournments. The petition should have been dismissed. Order reversed.

Dissent: [Smith, J] Review of the admittedly intolerable delay caused by the suppression hearing was collaterally estopped by the decision in the *habeas* appeal.

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

People v James, Nos. 159, 160, 12/17/02

In two separate cases, attorneys representing defendants James and Jones raised *Batson* challenges to the prosecution’s use of peremptory strikes of African-American panelists. Defendant James raised a claim about one juror, while noting the exclusion of four other African-

Americans. Defendant Jones raised the issue with regard to some excluded jurors, but it was unclear. The courts in each case accepted the prosecutor’s race-neutral reasons. No objections were made by either attorney afterwards. The decisions were affirmed on appeal.

Holding: The defendants’ ambiguous references to excluded African-American jurors and absence of pretextual claims failed to preserve their *Batson* challenges. *Batson v Kentucky*, 476 US 79 (1985). A *Batson* challenge requires the defense to make a *prima facie* showing that the prosecutor used peremptory strikes to remove a cognizable racial group. In response, the prosecutor was required to provide race neutral reasons for every person challenged. “If a defendant does not specifically question a particular strike, the prosecutor is not required to provide an explanation for it.” *People v Manigo*, 165 AD2d 660, 662. Then the defense has the option to contest those race neutral reasons as pretextual. Defendants James and Jones did not clearly challenge all of the excluded panelists or raise pretext arguments. “(A)ny claim of improper discrimination in the selection of jurors must be specific and timely made. . . . It is incumbent upon the moving party to be clear about any person still claimed to be improperly challenged.” Order affirmed.

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Evidence (Uncharged Crimes) EVI; 155(132)

People v Foster, 295 AD2d 110, 743 NYS2d 429 (1st Dept 2002)

The defendant was charged with possession of stolen property, a credit card holder. The complainant had been riding a subway train when it was taken and could not identify the person who took it. Later, the defendant was involved in a commotion on another train, where a passenger who suspected him of taking someone else’s wallet pointed him out to the police, who recovered the credit card holder. The defendant was not charged with taking the wallet, and moved to exclude evidence related to that incident from this trial.

Holding: Uncharged crime evidence of the wallet theft that led to the stop of the defendant, and his ultimate arrest for the stolen credit holder, was not relevant to any material issue here, or probative of the offense charged. *Cf People v Radoncic*, 259 AD2d 428 *lv den* 93 NY2d 1005. It did not relate to the defendant’s identity, motive, knowledge or intent. *People v Molineux*, 168 NY 264, 293. Defense counsel agreed not to question the officer’s credibility or reason for approaching the defendant; the uncharged offense was not needed to “complete the narrative.” The offense was so similar to the credit holder charge that it was unduly prejudicial. *People v Cook*, 42 NY2d 204, 208, 397 NYS2d 697. The court’s limiting instruction did not remove the prejudice. *See eg People v Ventimiglia*, 52 NY2d

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350, 362. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Figueroa, JJ])

Courts (General) CRT; 97(17)

Evidence (Hearsay) EVI; 155(75)

People v Schneiderman, 295 AD2d 137, 743 NYS2d 437 (1st Dept 2002)

Holding: The defendant's proffered testimony at his murder trial about his statement to the arresting officers that the deceased officer had fired at him first was hearsay. The prosecutor did not open the door to this during cross-examination, as the defendant denied an alleged remark that the precluded statement would have allegedly clarified; there was no misimpression created by the prosecution that the precluded statement would counteract. Compare *People v Carroll*, 95 NY2d 375, 385-387. The precluded statement was not admissible for its truth. *People v Reynoso*, 73 NY2d 816, 819.

The defendant challenged the judicial assignment system for capital cases, claiming it allowed manipulation by the prosecution. He did not have a right to have his capital case tried before a particular judge or to decide the way in which the assignment was made. See *Matter of Coastal Oil New York, Inc. v Newton*, 231 AD2d 55 *lv den* 91 NY2d 808. His assertions about the assignment system were totally unfounded; his claim that the prosecutor can influence the selection process by timing charging decisions is without merit. Judgment affirmed. (Supreme Ct, New York Co [Altman, JJ])

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

Sentencing (General) SEN; 345(37) (48) (55) (71)
(Mandatory Surcharge)
(Modification) (Restitution)

People v Wein, 294 AD2d 78, 743 NYS2d 439 (1st Dept 2002)

The defendant pled guilty to an entire indictment, 113 counts of grand larceny and related crimes in a stock fraud case, without the prosecutor's consent. The court imposed concurrent sentences of 1 to 3 years, and ordered partial restitution, provided that defrauded investors waived their right to sue for the remainder. No restitution was set for defrauded brokerage account victims; a \$10,000 fine was imposed instead of restitution as to that count. All payments were to be made to a court-appointed special master who would receive a \$10,000 fee in lieu of the mandatory 5% surcharge. The prosecutor objected to the terms.

Holding: If a court or prosecutor make a sentence promise to a defendant that the law will not permit, the defendant generally must be restored to preplea status or be granted enforcement of the bargain. *People v McConnell*, 49 NY2d 340, 346, 425 NYS2d 794. But an illegal restitution payment plan engineered by the court and the defendant can be modified without allowing the defendant specific performance or a chance to withdraw the plea. This plea agreement had three flaws: Conditioning restitution on releases from civil liability in violation of PL 60.27 (6), (8); appointing the judge's personal friend as special master to administer the funds instead of an official or organization as mandated by CPL 420.10(8)(a); and waiving the 5% mandatory surcharge required by PL 60.27(8). The court and the defendant orchestrated this agreement to circumvent the sentencing laws. *People v Lopez*, 28 NY2d 148, 152. Judgment modified and otherwise affirmed. (Supreme Ct, New York Co [Stone, JJ])

Search and Seizure SEA; 335(75) (85)
(Stop and Frisk)
(Weapons-frisks)

People v Gonzalez, 295 AD2d 183, 743 NYS2d 112 (1st Dept 2002)

Police received a radio call about drug sales at a specific location. The suspect was identified as "a male Hispanic who was carrying an orange shirt over his shoulder and possibly wearing khaki pants." No one at the location matched the description. Circling the block, the officers observed the defendant wearing khaki pants with an orange shirt draped over his shoulder, but no indicia of drug activity. They approached him and asked to speak with him. He ran and was apprehended. A frisk revealed drugs and a large sum of cash. At a suppression hearing, the police officer testified that the reason for the pat-down was her belief that "when (a defendant) run (s) like that it's usually because (he has) a weapon." The motion to suppress was denied and the defendant pled guilty.

Holding: The police officer's subjective belief that defendants who flee usually have weapons did not justify a frisk. The radio call did not report that the suspect was armed, and no bulge indicating a weapon was observed. A frisk is only justified when the police have a particularized reasonable suspicion that the suspect "is armed and may be dangerous." *People v Russ*, 61 NY2d 693, 695. Flight with other factors may be enough for pursuit, *People v Holmes*, 81 NY2d 1056, 1058, but not a frisk. Judgment reversed, motion to suppress granted, indictment dismissed. (Supreme Ct, New York Co [FitzGerald, JJ])

Juries and Jury Trials (Challenges) JRY; 225(10) (60)

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(Voir Dire)

People v Brown, 295 AD2d 184, 743 NYS2d 477 (1st Dept 2002)

During the defendant’s robbery trial, he raised a challenge for cause against a potential juror who had been the victim of a burglary, admitted being unable to pay attention to the case, and was a member of a law enforcement family. In response to the court’s question about holding the prosecution to proof beyond a reasonable doubt, the panelist responded, “I don’t know. I can’t say.” He did indicate that his feelings about law and order would not cause him to vote an innocent man guilty. The defense challenge for cause was denied.

Holding: Once the potential juror expressed doubts about applying the reasonable doubt standard, an unequivocal assurance of impartiality was required. CPL 270.20(1)(b); *People v Chambers*, 97 NY2d 417. The court’s follow-up question about whether his feelings would cause him to “vote an innocent man guilty” did not reveal whether the prospective juror could render an impartial verdict. *People v Arnold*, 96 NY2d 358, 362, 729 NYS2d 51. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Yates, JJ])

Dissent: [Sullivan, J] An expurgatory oath was not required. The trial judge was in the best position to distinguish between true bias and an attempt to evade jury service. *People v Williams*, 63 NY2d 882, 885. Based on the full record, the juror’s law and order views did not raise “serious doubts” about being impartial, and did not require an unequivocal assurance of impartiality.

Counsel (Competence/Effective Assistance/Adequacy) (General) COU; 95(15) (22.5)

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

People v Torres, 295 AD2d 193, 744 NYS2d 369 (1st Dept 2002)

Holding: During the defendant’s robbery and assault trial, lead counsel attempted to split the responsibility of *voir dire* with co-counsel. The request was rejected. The defendant’s right to counsel was not denied by permitting only one of two defense attorneys to conduct *voir dire*. Trial courts retain discretion to control *voir dire* proceedings. *People v Vargas*, 88 NY2d 363, 377. Lead counsel and co-counsel were present in the courtroom and had complete access to each other throughout the *voir dire*, and divided specific responsibilities during the entire trial. The defendant was not prejudiced. Compare *People v Knowles*, 88 NY2d 763. Judgment affirmed. (Supreme Ct, Bronx Co [Williams, JJ])

Juveniles (Abuse) (Disposition) (Molestation) (Visitation) JUV; 230(3) (40) (75) (145)

In re Tamara G., 295 AD2d 194, 745 NYS2d 6 (1st Dept 2002)

The respondent father was accused of sexually abusing his daughter. The child’s mother claimed that her daughter had been raped anally and vaginally. Hospital records reported a normal rectal examination and signs of sexual abuse but not penetration. Based on reports from the mother and the daughter’s therapist, Administration for Children’s Services terminated the respondent’s visitation rights and filed a petition alleging rape. The medical evidence presented by the petitioner and the respondent was contradictory. The court did not find the respondent’s testimony credible. Neither the mother nor the child testified. The respondent was denied visitation “unless and until the child’s therapist and the child deem it advisable.”

Holding: Given the conflicting medical evidence and issues concerning the reliability of the child’s allegations and her mental health, it was an abuse of discretion to deny the respondent’s request to produce the child *in camera* or for an independent forensic exam. *Matter of Jamie EE.*, 249 AD2d 603. There is no absolute right to have an alleged abuse victim testify in an Article 10 proceeding, but here a balancing of the respective interests favors amplifying the record. If the mother does not testify at the next hearing, the court can draw a negative inference about her influence on the child’s allegations. The dispositional order improperly delegated visitation decisions to the therapist. See *Matter of Sullivan County v Richard C.*, 260 AD2d 680, 683. Judgment reversed. (Family Ct, New York Co [Larabee, JJ])

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

In re Chang, 295 AD2d 231, 744 NYS2d 126 (1st Dept 2002)

Holding: The petitioner sought to receive credit on his state sentence for time spent in federal incarceration. His CPLR article 78 petition was properly dismissed. “Petitioner would be entitled to such credit only if he could demonstrate that his Federal incarceration was solely the result of detainers issued by this State (see, Penal Law § 70.30 [3]; *Matter of Peterson v New York State Dept. of Correctional Servs.*, 100 AD2d 73).” This was not such a case. The petitioner was charged with unrelated federal crimes; there is no indication that he was denied bail or was otherwise unable to obtain his release from federal custody due solely to the state detainer. See *Matter of Bentley v Demskie*, 250 AD2d 886 *app dismsd* 92 NY2d 884

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cert den 525 US 1044. Judgment affirmed. (Supreme Ct, New York Co [McCooe, JJ])

Insanity (Civil Commitment) **ISY; 200(3)**

Trial (Trial Order of Dismissal) **TRI; 375(60) (70)**
(Verdicts)

**Matter of Austin v Consilvio, 295 AD2d 244,
744 NYS2d 164 (1st Dept 2002)**

Holding: The petitioner was sentenced to 7½ to 22½ years for manslaughter and possession of a weapon. Upon parole, she was involuntarily committed to a psychiatric center. Under an order pursuant to Mental Hygiene Law 9.33, her stay at the facility was not to exceed six months. She sought rehearing and review by a jury pursuant to Mental Hygiene Law 9.35. The court granted a directed verdict and ordered that the petitioner be released. This was error, as a rational basis exists to support a jury finding in the respondent's favor. *Rhabb v New York City Hous. Auth.*, 41 NY2d 200, 202. The Director of Violence Prevention and Treatment at the psychiatric center, who supervised the petitioner's treatment for 18 months, warned against her release. He testified that she exhibited no remorse, had said that under similar circumstances she would kill again, and had consistently refused psychotropic medication, denying that she was mentally ill. He concluded that for the petitioner's own welfare and the welfare and safety of the community, her continued hospitalization was required. This was supported by the record; any inconsistency between the medical records and the doctor's evaluation would constitute a material question of fact to be determined by a jury. It was error to hold that testimony by the petitioner's treating psychiatrist was essential to the respondent's case. *See Anonymous v Carmichael*, 284 AD2d 182. Granting judgment at the end of a plaintiff's case is not well advised. Judgment reversed. (Supreme Ct, New York Co [Lippmann, JJ])

Bribery (General) **BRI; 63(10)**

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

Trial (Verdicts [Motions to set aside]) **TRI; 375(70[a])**

**People v Canepa, 295 AD2d 247, 745 NYS2d 153
(1st Dept 2002)**

Holding: At trial, the jury found the defendant attorney guilty of bribing a court clerk to expedite the defendant's matrimonial cases. The trial court set aside the verdict as against the weight of the evidence, which was beyond the court's powers. *See People v Colon*, 65 NY2d 888. However, the court properly set aside the verdict

based on legal insufficiency because the prosecution failed to establish the defendant's guilt as to all elements of the crime. Penal Law 200.00 requires the prosecution to establish an "agreement" between the defendant and the bribed individual, as well as an "understanding 'in the mind of the bribe maker that the bribe receiver would effectuate the proscribed corruption of public process and was affected to do so by the *actus reus* of this particular crime' (*People v Bac Tran*, 80 NY2d 170, 177)." A "mere hope that the public servant would be influenced by the benefit offered . . . is insufficient." Here, no evidence supported an inference of either an "agreement" or an "understanding." There was only evidence that the defendant was paid prevailing rates for performing paralegal services for the defendant. The clerk testified that he received nothing extra for expediting cases, and that there was no agreement to that effect. Order affirmed. (Supreme Ct, New York Co [Torres, JJ])

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

Sentencing (Modification) **SEN; 345(55)**

**People v Jones, 295 AD2d 243, 745 NYS2d 15
(1st Dept 2002)**

Holding: The court erroneously imposed consecutive sentences for attempted rape and sexual abuse with respect to counts 12 and 14 of the indictment. Review of the testimony of a witness and the complainant show that these were not separate and disparate acts; the sexual abuse was an integral part of the attempted rape. *People v Jackson*, 169 AD2d 887, 890 *lv den* 77 NY2d 996. These sentences must run concurrently. *See* Penal Law 70.25[2]. The acts with respect to a different complainant were separate and distinct, warranting consecutive sentences. Despite the recently decided case of *People v Maldonado* (97 NY2d 522), the admission into evidence of a police sketch does not require reversal, because there was overwhelming evidence of guilt, including DNA evidence and a voluntary, reliable confession. Judgment modified, and as modified, affirmed. (Supreme Ct, New York Co [Wetzel, JJ])

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

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

**Matter of Race, 296 AD2d 168, 744 NYS2d 29
(1st Dept 2002)**

The respondent attorney was charged with violating the disciplinary rules of the Code of Professional Responsibility by providing false information to police investigating the assault and murder of a police officer 24 years ago. The respondent conceded that he conveyed false information in 1977, but denied that this violated the Code. A referee sustained Counts One (that the respon-

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dent violated DR 1-102(A)(4) forbidding conduct involving dishonesty, fraud, deceit or misrepresentation) and Count Three (that the respondent's actions violated DR 1-102(A)(6), adversely reflecting his fitness to practice law) but dismissed Count Two (that the respondent's conduct violated DR 1-102(A)(5), being prejudicial to the administration of justice). The referee recommended a public censure. A Hearing Panel modified the referee's report by recommending that Count Two be reinstated and that the respondent be suspended for three months. The Departmental Disciplinary Committee moved for confirmation of the determination.

Holding: The respondent's utterance of a fabricated story to the police constitutes prejudice to the administration of justice, violating DR 1-102(A)(5). *See Matter of Eldman*, 212 AD2d 126. A three-month suspension is appropriate in light of the factors considered. Motion for confirming order granted.

Federal Law (Crimes) FDL; 166(10)

Sex Offenses (Sentencing) SEX; 350(25)

**People v Millan, 295 AD2d 267, 743 NYS2d
(1st Dept 2002)**

Holding: The defendant was convicted in federal court of attempting to knowingly receive or distribute child pornography or material containing such pornography. New York's Sex Offender Registration Act (SORA) requires registration for foreign convictions where they are equivalent to a felony under New York Law. The federal statute in question, 18 USC 2252A(a)(2) and (b)(1), was determined after a hearing to most closely resemble Penal Law 263.16 (possessing a sexual performance by a child), a class E felony. Since Penal Law 110.05 provides that an attempt to commit an offense would be classified as one grade lower than the offense itself, the defendant's conviction is equivalent to a class A misdemeanor. However, the court ordered the defendant to register as a level one sex offender under SORA. The prosecution argues for the first time on appeal that the defendant's federal conviction more closely resembles Penal Law 263.15 (promoting a sexual performance by a child), a class D felony, and therefore the attempt conviction is a class E felony. This argument was not raised at the hearing or discussed in the hearing court's decision and so is not preserved for review; the defendant had no opportunity to rebut it. *See People v More*, 97 NY2d 209, 214. The federal conviction does not require registration under SORA, since the analogous New York offense was found to be a class A misdemeanor. Order reversed. (Supreme Ct, New York Co [Stone, JJ])

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

**People v Soto, 296 AD2d 328, 745 NYS2d 159
(1st Dept 2002)**

The defendant was tried on second- and third-degree robbery and second- and third-degree burglary. He was found not guilty of second-degree burglary, guilty of second-degree robbery, and guilty of third-degree burglary. He moved to set aside the robbery conviction as inconsistent with the third-degree burglary conviction. The court dismissed the burglary and sentenced him on the robbery.

Holding: The court told the jury that the sole difference between second- and third-degree burglary is the "display" element, that "when *effecting or while in the building* . . . he displayed what appeared to be a . . . firearm." [Emphasis in original.] The court also charged that to convict on second-degree robbery, the jury must find that in the course of the crime the defendant displayed what appeared to be a firearm. Verdicts of not guilty of second-degree burglary but guilty of third-degree burglary indicate that the jury necessarily concluded that the defendant did not display what appeared to be a weapon. This finding and the finding of guilt of second-degree robbery are "internally self contradictory both logically and pursuant to the charge of the court." *People v Carbonell*, 40 NY2d 948. At an unrecorded sidebar held before discharging the jury, the court rejected defense counsel's assertion that the verdict was repugnant; the challenge was thus preserved. *See CPL 470.05(2)*. The court erred in accepting the verdict and discharging the jury rather than instructing them to return for deliberations consistent with the verdict sheet. Order reversed, conviction vacated, indictment dismissed. (Supreme Ct, Bronx Co [Seewald, JJ])

Trial (Public Trial) TRI; 375(50)

**People v Richardson, 296 AD2d 334, 744 NYS2d 407
(1st Dept 2002)**

Holding: "The trial court's exclusion of defendant's children, ages eight and nine, from the courtroom violated defendant's right to a public trial, there being no support in the record for the contention that these children were being disruptive (*see, People v James*, 229 AD2d 315, 316, *lv denied* 88 NY2d 1021. . . ." Defense counsel's objection to the exclusion of these non-disruptive children, although without specific reference to the right to a public trial, was sufficient to preserve the error. *See People v Nieves*, 90 NY2d 426, 431 n.* While the exclusion of the defendant's younger niece and nephew may have been justified, the above error makes it unnecessary to reach that issue or the claim that the prosecutor's summation denied the defendant a fair trial. (Supreme Ct, Bronx Co [Ruiz, JJ])

Second Department

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

Misconduct (Prosecution) MIS; 250(15)

People v Lauderdale, 295 AD2d 539, 746 NYS2d 163 (2nd Dept 2002)

Holding: The defendant was convicted of first-degree manslaughter as a lesser offense of murder and of second-degree possession of a weapon. He conceded at trial that an innocent bystander was shot but argued that the defendant was justified in firing his gun to ward off a third person attacking him with a bottle. The model instruction read by the court said that the jury was to determine the initial aggressor, "the victim or the defendant" (1 CJI 35.15[2] [a], at 868)." This effectively precluded consideration of whether the defendant justifiably acted to defend himself against the third person. See *People v Morgan*, 290 AD2d 566. The defendant having been acquitted of murder charges, there is no authority to order a new trial on the lesser-included offenses. See *People v Gonzalez*, 61 NY2d 633. The prosecutor also deprived the defendant of a fair trial by making 31 references to the defendant's nickname, "Homicide." The defendant was denied the effective assistance of counsel by, *inter alia*, counsel's failure to object to this. See *Murray v Carrier*, 477 US 478 (1986). Judgment modified, manslaughter conviction vacated and dismissed without prejudice to represent any appropriate charges to a grand jury, possession of a weapon conviction vacated and new trial ordered on that count. (Supreme Ct, Queens Co [Hanophy, JJ])

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

Robbery (Degrees and Lesser Offenses) ROB; 330(10)

People v Boyer, 295 AD2d 529, 744 NYS2d 686 (2nd Dept 2002)

Holding: As the prosecution conceded, the defendant's conviction of third-degree robbery was a concurrent inclusory count of one of the second-degree robbery counts. See *People v Glover*, 57 NY2d 61. Judgment modified, third-degree robbery conviction reversed and dismissed, and as modified, affirmed. (Supreme Ct, Queens Co [Spires, JJ])

Instructions to Jury (Burden of Proof) ISJ; 205(20)

Misconduct (Prosecution) MIS; 250(15)

People v Smith, 295 AD2d 629, 745 NYS2d 175 (2nd Dept 2002)

Holding: The prosecutor improperly said in summation, "I do not have to prove whose bullet was the fatal shot," and the defense objection was erroneously overruled. However, the prosecutor later corrected the error, saying that the fatal bullet came from either the defendant's gun or the accomplice's gun. The court also corrected the error in the final jury charge. The court properly instructed that to convict the defendant of intentional murder, the prosecution had to show that the defendant acted in concert with the accomplice, and when acting in concert shot the innocent third party with intent to kill another person. Judgment affirmed. (Supreme Ct, Kings Co [Gary, JJ])

Family Court (General) FAM; 164(20)

Juveniles (Adoption) (Custody) (Parental Rights) JUV; 230(5) (10) (90)

Matter of Raven Carol L., 295 AD2d 610, 744 NYS2d 209 (2nd Dept 2002)

Holding: Separate from proceedings to terminate the mother's parental rights and commit her child to the custody of the Department of Social Services (DSS) for adoption, proceedings to terminate the appellant putative father's parental rights were commenced on the grounds of abandonment. After a finding of permanent neglect as to the mother, DSS made an internal determination that the appellant was not someone whose consent to adoption was required under Domestic Relations Law 111. The abandonment petition was withdrawn. Alternatively, the court agreed with a DSS determination that under Social Services Law 384-c(2), the appellant was entitled to no more than notice of the proceedings against the mother and an opportunity to present evidence at the dispositional hearing as to the best interests of the child. After so limiting the appellant's presentation of evidence at the hearing, the court found by clear and convincing evidence that the appellant's minimal contact with the child was tantamount to abandonment, and ruled that DSS could consent to the child's adoption without the appellant's consent or further notice. The appellant was denied due process by the withdrawal of the abandonment petition without a finding as to whether his consent was required for adoption (*compare Matter of Kasiem H.*, 230 AD2d 796; *Matter of Christy R.*, 183 AD2d 434.) and the finding of abandonment without a chance for the appellant to be properly heard. See *Matter of Chimere C.*, 259 AD2d 615. Order modified, and as modified, affirmed. (Family Ct, Suffolk Co [Pach, JJ])

Evidence (Sufficiency) EVI; 155(130)

Homicide (Murder [Evidence]) HMC; 185(40[j])

Second Department *continued*

People v Hafeez, 295 AD2d 624, 744 NYS2d 479 (2nd Dept 2002)

Holding: The evidence was legally insufficient to establish the defendant’s guilt of second-degree murder. He and an accomplice lured the decedent out of a bar to beat him in revenge for the decedent’s having assaulted the accomplice. The accomplice stabbed the decedent, who re-entered the bar before collapsing; the defendant did not know the decedent had been stabbed until he and the accomplice had left the scene. There was no evidence that the defendant intended conduct constituting an A felony, so the conviction of fourth-degree conspiracy must also be reversed. The hindering prosecution conviction must also be reversed for lack of evidence that the defendant rendered criminal assistance to a person who had committed an A felony. *See People v Ciardullo*, 106 AD2d 14. There was legally sufficient evidence as to tampering with physical evidence. *See Penal Law 215.40(2); People v Johnson*, 219 AD2d 865; *but see People v Singh*, 191 AD2d 731. Judgment modified, specified convictions reversed and dismissed, and as modified, affirmed. (Supreme Ct, Queens Co [Cooperman, JJ])

Evidence (Hearsay) (Motive) EVI; 155(75)(87)

People v Melendez, 296 AD2d 424, 744 NYS2d 485 (2nd Dept 2002)

Holding: The defendant was convicted of first-degree manslaughter after using a knife to kill her boyfriend during a domestic disturbance. In furtherance of her claim that the stabbing was either accidental or justified, she wanted to introduce her call to 911. The court sustained the prosecutor’s objection that the tape was a prior consistent statement and, therefore, hearsay. The hearsay should have been admitted under the excited utterance or present sense impression exceptions. An excited utterance is a spontaneous statement, made contemporaneously or immediately after a startling event, setting forth observations of that event. *See People v Caviness*, 38 NY2d 227, 231-32. Since the 911 call was made immediately or soon after the stabbing, the defendant did not have time to deliberate on what she said to the operator. Her comments could reasonably be found not to have been made under the impetus of studied reflection. *See People v Edwards*, 47 NY2d 493, 497. That the defendant testified during the trial regarding the contents of her 911 call does not preclude its admission. *See People v Buie*, 86 NY2d 501. The issue of the defendant’s intent was crucial in this case; not allowing the tape into evidence precluded her from entering a valid defense to the charges. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Cooperman, JJ])

Ethics (General) ETH; 150(7)

Misconduct (General) MIS; 250(7)

Matter of Lambert, 296 AD2d 151, 745 NYS2d 543 (2nd Dept 2002)

Holding: In a disciplinary proceeding the respondent lawyer was suspended from practice for being convicted of seventh-degree drug possession (Penal Law 220.03), a serious crime within the meaning of Judiciary Law 90(4)(d). He was also guilty of professional misconduct when he failed to timely file a record of his conviction with the 2nd Department. The respondent does not dispute the charges. He contends that his conduct did not harm any client, that the failure to file the conviction was an oversight, and that drug possession is a victimless crime, making suspension a harsh penalty. He admits that he was under the control of his addiction, but has since successfully completed treatment and is not practicing law. “In view of the nature of the misconduct, the respondent’s diligent efforts to rehabilitate himself, and the absence of harm to any clients, he is censured for his professional misconduct.” Motion granted, respondent censured. (Grievance Committee, 9th Judicial District [Kupferman, J, Special Referee])

Sex Offenses (Juveniles) SEX; 350(12)

Discovery (Witnesses) DSC; 110(35)

Matter of Brown v Blumenfeld, 296 AD2d 405, 745 NYS2d 54 (2nd Dept 2002)

Holding: There is no statutory or constitutional support for an order compelling a 10-year-old complainant in a sex abuse case to undergo a pretrial psychological evaluation by a defense expert. *See People v Earel*, 220 AD2d 899 *aff’d* 89 NY2d 960. A writ of prohibition, pursuant to CPLR article 78, is an appropriate remedy where a court has exceeded its statutory authority by ordering the prosecution to disclose information not required by governing statutes. *See Matter of Pirro v LaCava*, 230 AD2d 909. Here, prohibition is warranted as a matter of discretion after considering “such factors as the gravity of the harm caused, the availability of an adequate remedy on appeal, at law or in equity, and the remedial effectiveness of prohibition.” *Matter of Catterson v Rohl*, 202 AD2d 420, 424. Petition granted, enforcement of the challenged order prohibited. (Supreme Ct, Queens Co)

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

Second Department *continued***People v Cortez, 296 AD2d 465, 745 NYS2d 467
(2nd Dept 2002)**

Holding: While some assertions are based on matter *dehors* the record, the record shows that defense counsel did not provide meaningful representation. This was due to her lack of familiarity with the rules of evidence, failure to review material provided under *People v Rosario* (9 NY2d 286 *cert den* 368 US 866), inability to effectively cross-examine witnesses, solicitation of inadmissible identification testimony when cross-examining a detective and failure to object to further testimony on redirect of that witness, and misstatement in summation that a witness had identified the defendant in court when the witness had not done so. The cumulative effect of these errors was to deprive the defendant of a fair trial. See *People v Zaborski*, 59 NY2d 863, 865. Judgment reversed, new trial ordered, which is to be preceded by a new suppression hearing. (Supreme Ct, Kings Co [Hall, JJ])

Third Department

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

Sex Offences (Sentencing) SEX; 350(25)

**People v Lynch, 291 AD2d 582, 738 NYS2d 116
(3rd Dept 2002)**

Holding: The defendant was charged with multiple counts of possessing a sexual performance by a child, as well as two counts of endangering the welfare of a child for showing some of the images in question to children under age 16. There was no record evidence to show that the materials referred to in the separate counts came into the defendant's possession at separate and distinct times. Cf *People v Cleveland*, 236 AD2d 802 *lv den* 89 NY2d 1033. Imposition of consecutive sentences for the several possession charges was improper. Judgment modified, matter remitted for resentencing on those counts. (County Ct, Columbia Co [Czajka, JJ])

Sex Offenses (Sentencing) SEX; 350(25)

**People v Goodband, 291 AD2d 584, 737 NYS2d 680
(3rd Dept 2002)**

Following a guilty plea with no promise as to sentencing, the defendant received a determinate three year sentence plus three years post release supervision for sexual abuse, a consecutive indeterminate one to three year sentence for attempted sexual abuse, and a definite one year sentence for sexual misconduct. An order of protec-

tion prohibits the defendant from any having any contact with his wife and three children. The convictions related to incidents involving his wife and one infant son. The defendant waived the right to appeal but reserved the right to challenge the sentence.

Holding: References in the presentence report to crimes for which the defendant was not convicted were permissible; they were based on the defendant's own admissions and were relevant to the facts and circumstances of the instant offenses. See *People v Neish*, 232 AD2d 744, 746-747 *lv den* 89 NY2d 927. It was not necessary to limit the order of protection to the two family members who were complainants. An order may cover the household of a victim. *People v La Motte*, 285 AD2d 814, 816-817. The defendant's contention that the aggregate effect of his consecutive sentences could not be considered in calculating the duration of the order under CPL 530.12(5) is rejected. The aggregate maximum here is four, not six, years. See Penal Law 70.30(1)(d). The period of post release supervision must be included in calculating the duration of the order of protection. The sentence imposed will expire in seven years, so the appropriate expiration date is 10 years from when the defendant began serving his sentence Judgment modified and as modified, affirmed. (County Ct, Tompkins Co [Sherman, JJ])

Evidence (General) (Uncharged Crimes) EVI; 155(60) 132)

**People v Tucker, Jr., 291 AD2d 663, 738 NYS2d 710
(3rd Dept 2002)**

Holding: The defendant was tried for falsifying an application and documentation for securing unemployment benefits. The court erred in admitting evidence of various money judgments entered against the defendant and uncharged embezzlement allegations. Some relationship between the debt and the pending charge must be established before evidence of debt or civil judgment can be used to establish motive. See *People v Heiss*, 221 AD2d 562, 563 *lv den* 87 NY2d 1020. The prosecution did not show there was an immediate threat of enforcement of the judgments, that the proceeds of the fraudulently-obtained unemployment benefits were used to pay them, or any other relationship. The error was harmless. Evidence of the uncharged embezzlement was relevant to counter the defense theory that the defendant had no motive to keep working when receiving unemployment, and was more probative than prejudicial. See *People v Toland*, 284 AD2d 798, 804-805 *lv den* 96 NY2d 942. Judgment affirmed. (County Ct, Warren Co [Austin, JJ])

Third Department *continued*

Evidence (Newly Discovered) **EVI; 155(88)**

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

People v Drossos, 291 AD2d 723, 738 NYS2d 724 (3rd Dept 2002)

Holding: The year after the defendant pled guilty to first-degree criminal possession of a dangerous weapon (describing in detail in allocution how he attached an explosive device to a police vehicle), his attorney was informed that a former state police investigator had admitted that a palm print showing the defendant had contact with that vehicle was fabricated. Six years later, the court denied without a hearing the defendant's motion to vacate the conviction as having been obtained by false evidence known to the prosecution. The undisclosed evidence—that the palm print was falsified—did not tend to establish the defendant's innocence. *See People v Lesiuk*, 81 NY2d 485, 490 *affg* 186 AD2d 296. There is no basis for challenging the court's conclusion that the remaining evidence (including incriminating testimony from a police informant, the defendant's girlfriend and two others, plus physical evidence) was overwhelming. *See People v Muniz*, 215 AD2d 881, 884. Nothing contradicts the prosecution's statement that they did not learn the palm print might be falsified until the year after the defendant's plea; their only prior information was that a different state police investigator had admitted fabricating fingerprints in another case. Order affirmed. (County Ct, Broome Co [Mathews, JJ])

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

People v Varnum, 291 AD2d 724, 738 NYS2d 726 (3rd Dept 2002)

Holding: The defendant was resentenced after his initial sentence was found illegal based on the date of the underlying act. His waiver of the right to appeal at his plea does not preclude review of the resentencing, as the plea was entered based on conditions that subsequently changed. *See gen People v Hoeltzel*, 290 AD2d 587. The court had the choice of honoring the promise of a determinate three-year sentence or vacating the plea (*People v McConnell*, 49 NY2d 340, 346) but did neither, instead imposing an indeterminate sentence of 1¾ to 3½ years. If the defendant does not receive good time allowances, he may serve six months more than bargained for. He was entitled to withdraw his plea. Judgment reversed, plea vacated, matter remitted. (County Ct, Saratoga Co [Scarano, Jr., JJ])

Sentencing (Excessiveness)

SEN; 345(33)

People v Demeritt, 291 AD2d 726, 738 NYS2d 727 (3rd Dept 2002)

Holding: The complainant, who was impeached with his extensive criminal record, prior inconsistent statements, and motive to falsify, was the only one to testify that the defendant had shot him. However, another witness corroborated the complainant's immediate identification of the defendant at the scene, other witnesses saw the defendant driving by the complainant's location, and other evidence showed that the defendant had access to a shotgun. The jury's verdict was supported by the weight of credible evidence. A motion to set aside the verdict due to the defendant's overmedicated state when he overrode counsel's advice not to testify at trial was based only on an affidavit of counsel, not facts appearing in the record. CPL 330.30(1). Counsel made appropriate pretrial motions, effectively and extensively cross-examined witnesses, made prompt objections throughout trial, *voir dire*d witnesses, and delivered a cogent summation. At sentencing, he argued for a reduced sentence raising the same mitigating factors relied upon by appellate counsel. *See People v Johnson*, 267 AD2d 609, 610. The record shows that the defendant received competent and meaningful representation. The 53-year-old defendant's criminal record contained only misdemeanor DWI and unlicensed operation convictions. The prosecutor offered a plea to second-degree assault carrying a six-year determinate sentence. The determinate sentence of 25 years—the maximum for second-degree attempted murder (the minimum being a determinate sentence of 5 years)—was excessive. Judgment modified, sentence reduced to a determinate term of 15 years, and as modified, affirmed. (County Ct, Rensselaer Co [McGrath, JJ])

Sex Offenses (Sentencing)

SEX; 350(25)

People v Lee, 292 AD2d 639, 738 NYS2d 903 (3rd Dept 2002)

Holding: The Board of Examiners of Sex Offenders recommended that the defendant be classified as risk level III under the Sex Offender Registration Act (SORA). Correction Law art 6-C. Copies of the risk assessment instrument, case summary, and other documentation accompanied this recommendation to the sentencing court, which notified the defendant that a proceeding would be held to determine his risk level. *See* Correction Law 168-n. Assigned counsel was given copies of the documents. The defendant argued that subjecting him to the registration requirements of SORA was constitutionally improper under the *ex post facto* doctrine and that the court could not consider hearsay evidence without an

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adversarial hearing to test its reliability. The *ex post facto* claims are rejected on the grounds set out in *Doe v Pataki*, 120 F3d 1263 *cert den* 522 US 1122. The court was obligated to set forth findings of fact and conclusions of law as to its determination, but the record contains none. Order reversed, matter remitted for compliance with the statutory mandate. (County Ct, Broome Co [Smith, JJ])

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

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

People v Dickson, 292 AD2d 643, 739 NYS2d 751 (3rd Dept 2002)

Holding: The day after the defendant stabbed the decedent during a barroom fight causing his death, in the presence of counsel, the defendant provided a written statement as part of an agreement with the prosecutor that she would not be sentenced to more than 15 years to life after pleading guilty to second-degree murder. She entered such a plea in satisfaction of a three-count indictment, and was given the agreed-upon sentence. A claim of ineffective assistance of counsel survives a waiver of the right to appeal if it affects the voluntariness of a plea, but the claim must ordinarily be preserved by a motion to withdraw the plea or vacate the conviction. *People v Johnson*, 288 AD2d 501, 502. The record here supports no exception to the preservation rule, nor does it cast doubt on the effectiveness of counsel, who negotiated the minimum possible sentence for the defendant's crime. See *People v Smith*, 263 AD2d 676 *lv den* 93 NY2d 1027. There is no record support for the claim that counsel coerced the statement, and counsel cannot be faulted for failing to convince the prosecutor to accept a plea to a lesser crime. The defendant's failure to state during allocution that her admittedly reckless conduct in stabbing the decedent actually caused death does not clearly cast significant doubt upon the defendant's guilt, as is required to invoke the exception to the preservation rule. See *People v Lopez*, 71 NY2d 662, 665. Judgment affirmed. (County Ct, Schenectady Co [Eidens, JJ])

Arrest (Warrantless) **ARR; 35(54)**

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

People v Montgomery, 293 AD2d 773, 742 NYS2d 126 (3rd Dept 2002)

The defendant was convicted of third-degree possession of drugs after the court denied his motion to suppress, on 5th amendment grounds, his oral statement.

Holding: Police outside an apartment which they intended to search for a suspect in a recent assault saw two baggies thrown from a second-floor window at the time other officers were knocking on the apartment door. When police entered, the defendant and another man were sitting in the room near the window from which the baggies—which contained crack cocaine—had been thrown. No evidence of overt criminal activity or furtive behavior was observed. No drugs or paraphernalia were seen in open view, nor was contraband found during a consensual search of the apartment and frisk of the defendant and his companion. They were arrested and taken to the station, where the defendant admitted that he had thrown the drugs, which were his. The court erred in summarily denying the defendant's CPL 440.10 motion to vacate his conviction. The record reveals no legitimate strategic or tactical explanation for counsel's failure to seek a *Dunaway* hearing claiming that the defendant's statement should be suppressed as having been incident to an unlawful arrest. The defendant's mere presence in the apartment from which the baggies were thrown did not establish probable cause that he possessed the drugs. See *People v Martin*, 32 NY2d 123, 125. In the absence of information singling out the defendant as the one who possessed the crack, the warrantless arrest lacked probable cause. Judgment and order reversed, motion to vacate granted, indictment dismissed. (Supreme Ct, Albany Co [Lamont, JJ])

Accomplices (Corroboration) **ACC; 10(20) (22)**
(General)

People v Dickenson, 293 AD2d 867, 742 NYS2d 398 (3rd Dept 2002)

Holding: The defendant and co-defendant Holman were accused of illegally removing trees from State land. Holman accepted a plea bargain before trial. He and a man named O'Leary, whom the defendant had hired to log the trees, testified. Both O'Leary and Holman said that O'Leary did not know the trees were on State land until later, although he and Holman did sell some of those trees on the side without telling the defendant or giving him any of the proceeds. The court instructed the jury that Holman was an accomplice. An accomplice's testimony must be corroborated by other evidence tending to connect the defendant with the offense. CPL 60.22(1). The court correctly refused to so instruct as to O'Leary. A witness is an accomplice if undisputed evidence shows that witness's complicity in the crime charged or an offense based on the same, or some of the same, facts as the crime charged. See *People v Besser*, 96 NY2d 136, 147. O'Leary's connection to a collateral crime, without knowing partici-

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pation in the offense with which the defendant was charged, did not make him an accomplice. See *People v Brooks*, 34 NY2d 475, 477-480. The court did not need to submit to the jury the issue of whether O’Leary was an accomplice, as there was nothing on which a reasonable jury could base a finding that O’Leary knew he was removing trees from State property. Judgment affirmed. (County Ct, Greene Co [Pulver, Jr., JJ])

Evidence (Hearsay) EVI; 155(75)

People v Cartwright II 293 AD2d 882, 741 NYS2d 301 (3rd Dept 2002)

Holding: The court properly dismissed a six-count indictment alleging that the defendant was involved in an incident in which a woman’s home was broken into, she was thrown to the floor and threatened, and money and property were taken. The only evidence linking the defendant to the charged offenses was a statement by a coconspirator written two weeks later, in which the coconspirator minimized her own involvement in planning the crime and said she was not present when the offenses were committed. Since the prosecution failed to establish a *prima facie* case of conspiracy against the defendant without this statement, it could not be admitted as the statement of a coconspirator. See *People v Tran*, 80 NY2d 170, 179. The prosecution also failed to sustain the heavy burden of establishing the stringent criterion to introduce the statement “as an inculpatory declaration against penal interest’ under *People v Maerling* (46 NY2d 289).” Order affirmed. (County Ct, Cortland Co [Ames, JJ])

Plea Bargaining (General) PLE; 284(10)

Sentencing (General) SEN; 345(37)

People v Roberts, 293 AD2d 916, 742 NYS2d 404 (3rd Dept 2002)

Holding: At the defendant’s guilty plea proceedings, the prosecutor said that sentence would be decided after the court had the presentence investigation report and any information the prosecution and defense submitted. Defense counsel said this was consistent with prior discussions. At sentencing, the prosecutor said that the agreement had been for a sentence of eight years to life “unless the defendant provided valuable cooperation and gave the court reason to give him a lesser sentence.” Claiming that the defendant had not met the requirement, the prosecutor asked for the eight to life sentence. Defense counsel sought a lesser sentence, saying the police had not

contacted the defendant with regard to cooperation and that various factors warranted leniency. The defendant’s waiver of appeal does not encompass a challenge to the sentence as he was not advised on the record of the maximum sentence he faced before executing that waiver. See *People v Shea*, 254 AD2d 512, 513. The court, which concluded that the defendant should be sentenced “as agreed,” erred in relying on terms that were not placed on the record. The claimed agreement as to “valuable cooperation” is inconsistent with the parties’ representations on the record at the time of the plea. The dispute at sentencing over what was required to comply with the cooperation condition underscores the need to have all relevant terms placed on the record. *People v Danny G.*, 61 NY2d 169, 174. Judgment modified, sentence vacated, matter remitted for resentencing before a different judge, and as modified, affirmed. (County Ct, Clinton Co [McGill, JJ])

Prisoners (Conditions of Confinement) (Disciplinary Infractions and/or Proceedings) (Religion) PRS I; 300(5) (13) (21)

Matter of Walker v Senkowski, 294 AD2d 635, 740 NYS2d 891 (3rd Dept 2002)

Holding: The petitioner, a prisoner, was assigned to a 12-step Residential Substance Abuse Program. He initially attended the program during the pendency of his grievance claiming that the program conflicted with his traditional Native American beliefs. Before the grievance was resolved, he unilaterally signed out of the program. After a Tier II hearing he was found to have refused a program assignment despite his assertion that withdrawal was justified. Self-help is not an acceptable way to enforce constitutional rights. See *Matter of Rivera v Smith*, 63 NY2d 501, 505-516. The grievance procedure was the appropriate vehicle for determining and vindicating the petitioner’s rights. Judgment affirmed. (Supreme Ct, Clinton Co [Feldstein, JJ])

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

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

People v Grant, 294 AD2d 671, 742 NYS2d 695 (3rd Dept 2002)

Holding: The defendant negotiated a guilty plea and received the agreed-upon sentence. While a claim of ineffective assistance of counsel affecting the voluntariness of the plea would survive his waiver of the right to appeal, the claim was not preserved by a motion to withdraw the

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plea or vacate the conviction. *People v Johnson*, 288 AD2d 501, 502. The defendant's contention that his sentence is harsh and excessive is encompassed by the unrestricted waiver of the right to appeal. The requirement that a defendant be advised when pleading of the maximum possible sentence to effectuate a waiver of the right to appeal does not apply where there is a specific sentence promise at the time of the waiver. *Cf People v Hidalgo*, 91 NY2d 788; *see People v Lococo*, 92 NY2d 825. To the extent that *People v Seymour* (282 AD2d 871 *lv den* 96 NY2d 907) supports the defendant's contention, it is not followed. Judgment affirmed. (County Ct, Cortland Co [Ames, JJ])

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)**People v Pelkey**, 294 AD2d 669, 742 NYS2d 693 (3rd Dept 2002)

Holding: After an unsuccessful motion to suppress his written statement to police, the defendant pled guilty to several counts of possession of stolen property, forgery, and possession of burglar's tools. Suppression was properly denied. "[T]he issuance of a parole violation warrant does not constitute the commencement of a criminal proceeding such as to invoke a defendant's nonwaivable right to counsel (*see, People v Frankos*, 110 AD2d 713. . .)." The record does not show that the defendant asked for counsel before giving the statement at issue. The defendant's contentions that his sentencing as a persistent felony offender was improper are rejected. Judgment affirmed. (County Ct, Washington Co [Berke, JJ])

Driving While Intoxicated (General) DWI; 130(17)**Instructions to Jury (General)** ISJ; 205(35)**People v Vinogradov**, 294 AD2d 708, 742 NYS2d 698 (3rd Dept 2002)

Holding: When the defendant was arrested in June 1999 for driving while intoxicated (DWI), he refused to submit to a breathalyzer test and to talk without an attorney. At the station, he again refused a breathalyzer test. At trial, the court told the jury, at the prosecution's request, that asking the defendant if he would take the breathalyzer test after he refused to speak without an attorney was not unconstitutional. This was an accurate statement of the law, as the defendant did not specifically ask for a lawyer. *See People v Shaw*, 72 NY2d 1032, 1033-1034. Even though the instruction proved unnecessary, as the defense argument to which it was addressed was never made, there was no harm to the defendant. The court did not err

in telling the jury that an instruction on the lesser included offense of driving while impaired was "required." The defendant had requested the charge (*see* CPL 300.50[2]; *People v Hoag*, 51 NY2d 632, 635) and did not object to it as given. *See* CPL 300.50[1]; 470.05[2]. Judgment affirmed. (County Ct, Ulster Co [Bruhn, JJ])

Civil Practice (General)

CVP; 67.3(10)

Prisoners (Access to Court and Counsel)

PRS I; 300(2)

Matter of Sandlin v State of New York, 294 AD2d 723, 742 NYS2d 171 (3rd Dept 2002)

Holding: The claimant unsuccessfully sought damages from the State for unspecified permanent mental and physical injuries sustained as a result of assaults upon him by other prison inmates. He asserted that his failure to timely file a notice of claim was due to unawareness of the "short filing period" compounded by his incarceration. Ignorance of the law is not an acceptable explanation for a late notice of claim. *See Matter of Galvin v State of New York*, 176 AD2d 1185 *lv den* 79 NY2d 753. Also unacceptable are conclusory allegations that a claimant is incarcerated and without access to legal references. *See eg Matter of Thomas v State of New York*, 272 AD2d 650, 651. Even if each alleged incident was, as the claimant alleges, investigated and the subject of generated reports, this cannot fairly be said to have apprised the State of the precise claim made here, *ie* that the State allowed or is somehow responsible for the attacks. *See gen De Jesus v County of Albany*, 267 AD2d 649. The claim itself is of questionable merit as the claimant has provided no facts or evidence establishing that he was known to be at risk but was not protected or that any of the assailants were known to be dangerous and the State failed to prevent the attacks despite having notice and opportunity. *See eg Smith v State of New York*, 284 AD2d 741, 742. Order affirmed. (Court of Claims [McNamara, JJ])

Evidence (Character and Reputation)

EVI; 155(20)

Impeachment (Of Defendant)

IMP; 192(35)

People v Bolster, 298 AD2d 705, 748 NYS2d 533 (3rd Dept 2002)

Holding: During the defendant's testimony at his rape and burglary trial, he denied having sexual intercourse with the complainant. In rebuttal, the prosecution called a witness "who testified that defendant had a reputation for deceitfulness and dishonesty in the community." The defendant's objection based on lack of a proper foundation was denied. On appeal, he claimed that the character evidence was inadmissible; this ground was

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unpreserved for review as the objection lacked specificity. Rebuttal testimony related solely to the defendant’s community reputation for truthfulness was admissible, so long as it did not touch upon his general character. *See People v Pavao*, 59 NY2d 282, 290. Judgment affirmed. (County Ct, Tompkins Co [Barrett, JJ])

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

People v Creighton, 298 AD2d 774, 749 NYS2d 309 (3rd Dept 2002)

Holding: The defendant pled guilty to burglary in satisfaction of other pending indictments, including one for murder. At sentencing, the court issued an order of protection for a witness in the murder case and the family members of the complainants in the burglary case. The defendant challenged the validity of the order as beyond the scope of the statute. CPL 530.13 (4). Under the statute that is currently in effect, orders of protection can only be issued for victims of the offense for which the defendant was convicted. CPL 530.13 [4] [a]. The order covering a witness to an unrelated charge was invalid. The order of protection in favor of the decedent’s mother and stepfather, who owned the home that was the subject of the burglary charge, was proper, but the further provision in favor of their immediate family members should have named the individuals to whom it extended. Judgment modified, as modified affirmed, and remitted to remedy the defect in the order. (County Ct, St. Lawrence Co [Nicandri, JJ])

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

People v Davila, 750 NYS2d 196 (3rd Dept 2002)

Holding: Before being released from prison for sex-related crimes, the defendant was assessed by the Board of Examiners of Sexual Offenders. They recommended a risk level II classification under the Sexual Offender Registration Act. Correction Law art 6-C. On the day of the classification hearing in County Court, the prosecutor orally requested an increase to level III. Based on the violent nature of the crime, the court raised the assessment level. The prosecution’s failure to file a written statement 15 days before a hearing to determine risk level classification violated the defendant’s right to notice under Correction Law 168-d (3), and invalidated the court’s risk level increase. Failure to adhere to any of the statutory requirements for notice deprived the defendant of a meaningful opportunity to be heard on the issue. *See*

People v McNeil, 283 AD2d 835, 836. Judgment reversed. (County Ct, Columbia Co [Leaman, JJ])

Evidence (Rebuttal) **EVI; 155(123)**

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

People v McKee, 749 NYS2d 337 (3rd Dept 2002)

Holding: At the defendant’s rape trial, he testified that the sexual act was consensual. In rebuttal, the prosecution introduced testimony from a medical doctor who examined the complainant’s hospital records and photographs. According to that witness, the complainant’s bruises and abrasions were consistent with the application of force. While expert medical evidence cannot be used to prove the occurrence of a sexual assault, it is admissible to “clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror.” *People v Bennett*, 79 NY2d 464, 473. The testimony here, in rebuttal to the defendant’s claim that the encounter was consensual, was within the discretion of the trial court to admit. *See People v Miller*, 91 NY2d 372, 379. This testimony, the complainant’s testimony, and the observations of the responding officer as to the complainant’s condition constituted sufficient evidence to support the conviction. The court’s refusal to allow the defense to re-address the jury after opening argument, once evidence came to light that the complainant had refused treatment at two hospitals rather than one, was not reversible error where the defense had ample opportunity to cross-examine the prosecution’s witness using the allegedly exculpatory material. *People v Tessitore*, 178 AD2d 763, 764 *lv den* 79 NY2d 1008. Judgment affirmed. (County Ct, Columbia Co [Czajka, JJ])

Evidence (Privileges) **EVI; 155(115)**

People v Strawbridge, 751 NYS2d 606 (3rd Dept 2002)

Late at night, alone, the 21-year-old defendant gave birth. Prosecutors presented medical evidence that the baby had been alive before the defendant placed it in a plastic bag and left it in a dumpster. Defense experts raised doubts about whether the infant was alive at birth. The defendant was convicted of and sentenced to 19 years to life for the depraved indifference murder of the baby. Penal Law 125.25 [4].

Holding: The physician-patient privilege did not cover statements or observations made by nonmedical personnel at a time when the patient was not being attended. CPLR 4504 [a]. Nor did the privilege apply to the preemployment examination at which the defendant’s pregnancy was discovered. *Forrester v Zwanger-Pesiri Radiology Group*, 274 AD2d 374, 374. It did cover information obtained by medical personnel in the course of treatment afterwards. *See Desai v Blue Shield of Northeastern NY*,

Third Department *continued*

146 AD2d 264, 266. The defendant did not expressly waive the privilege or place her condition at issue so as to waive the privilege as to all confidences. She only waived the privilege as to specific facts in her statement to police. *See Farrow v Allen*, 194 AD2d 40, 44. Admission of this privileged evidence was harmless error. The sentence was reduced to 15 years to life in the interests of justice given the extenuating and extraordinary circumstances surrounding the birth, the defendant's youth, clean record, educational and employment record, and impaired emotional and mental health. CPL 470.15 [6] [b]; 470.20 [6]; PL 70.00 [2] [a]; [3] [a] [i]; *See People v Wernick*, 215 AD2d 50, 632 NYS2d 839 *aff'd* 89 NY2d 111. Judgment modified. (Supreme Ct, Albany Co [Lamont, JJ])

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

Sentencing (Aggregated Penalties) **SEN; 345(5)**

People v Chase, 750 NYS2d 182 (3rd Dept 2002)

The defendant had filed an insurance claim for water and subsequent fire damage to his new home. The insurance company issued a single check without parsing the payment between water and fire losses. Later the defendant was charged with multiple counts of insurance fraud and arson based on this claim and other acts involving other insurance companies. Upon conviction, he received an aggregate prison term of 14 to 42 years. The court did not order restitution to the first insurance company.

Holding: Unapportioned payment for losses due to fire were insufficient to sustain a felony charge of insurance fraud, since they did not prove that the defendant fraudulently received "property with a value in excess of fifty thousand dollars." Penal Law 176.25. Although the insurance company paid defendant \$100,000, it did not identify what part of the payment was for the fraudulent fire claim, and what was for the non-criminal water damage claim. Therefore, the defendant's conviction on this count must be reduced to the lesser-included offense of fifth-degree insurance fraud. *See* Penal Law 176.10; CPL 470.15 [2] [a]. Having served the sentence on this count, he should be resentenced to time served. His aggregate prison sentence exceeds the 20-year maximum of Penal Law 70.30(1)(e) and must be reduced to a term of 10 to 20 years. *People v McRae*, 284 AD2d 657, 659 *lv den* 96 NY2d 921. Judgment modified and as modified, affirmed. (County Ct, Washington Co [Hemmett Jr., JJ])

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

People v Peters, 749 NYS2d 608 (3rd Dept 2002)

Holding: The defendant pled guilty to larceny and related charges connected with the theft of money from a department store where she worked. The court sentenced her to prison and ordered restitution in the amount of \$886,000 without a hearing. A restitution hearing was required where there was not sufficient evidence to determine the actual amount of losses. *See* Penal Law 60.27(2); *People v Kim*, 91 NY2d 407, 410. While the defendant did not ask for a restitution hearing, her plea allocution did not include facts to support the amount claimed and she did dispute the amount at sentencing. *See People v Consalvo*, 89 NY2d 140, 145-146. An unsubstantiated submission containing the department store's calculation of losses was also inadequate. *People v Ashley*, 162 AD2d 883 *lv den* 76 NY2d 852. The grand jury minutes relied upon by the court were not included in the record on appeal. There must be a hearing to determine the proper amount of restitution. Judgment modified, matter remitted, and as modified, affirmed. (County Ct, Sullivan Co [La Buda, JJ])

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

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

People v Bates, 751 NYS2d 73 (3rd Dept 2002)

Holding: The defendant was sentenced as a second felony offender after being convicted of burglary. There was no conflict of interest or appearance of impropriety where defense counsel had been an assistant prosecutor when the defendant's case was pending and plea negotiations were being held with an accomplice. There was no risk of prejudice based on an abuse of an attorney-client confidence as required in *People v Shinkle*, 51 NY2d 417, 421.

The predicate felony was a Rhode Island forgery and counterfeiting conviction. RI Stat Annot 11-17-1. The defendant admitted the allegations in the predicate felony statement at sentencing. CPL 400.21 [3]. His challenge to the second felony offender status based on the out-of-state conviction, though unpreserved, warranted review under interest of justice jurisdiction. CPL 470.15 [3] [c]; *People v Williams*, 289 AD2d 117, 118 *lv den* 97 NY2d 734. A prior out-of-state conviction can be a predicate felony if it carries a prison term of over one year and a sentence over one year is also authorized for the New York offense. *People v Gonzalez*, 61 NY2d 586, 589, 475 NYS2d 358; *See* PL 70.06 [1] [b] [i]. Rhode Island's forgery statute is similar to New York's Penal Law 170.10, a class D felony. However, some actions covered by the Rhode Island statute could be New York misdemeanors. The accusatory instrument in the out-of-state case was unavailable to determine if that conviction was equivalent to a New York felony. Judgment modified, matter remitted for resentencing, and as modified, affirmed. (County Ct, St. Lawrence Co [Nicandri, JJ]) ⚖

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