NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center
REPORT

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Defender News

Persistent Felony Statute Violates Apprendi

New York's discretionary persistent felony offender statute (Penal Law 70.10) applies to anyone convicted of a felony with two prior felony convictions. It increases punishment to the level of a class A-1 felony. The law requires that the sentencing court, not a jury, make factual findings about a defendant's history and character and the nature of the offense before imposing persistent felony offender status. This judicial discretion violates *Apprendi v New Jersey,* 530 US 466, 490 (2000), according to a New York federal court. In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime must be submitted to a jury, and proved beyond a reasonable doubt." The court in *Brown v Greiner*, *NYLJ*, 3/31/03 (EDNY), stressed that existence of prior convictions alone is insufficient to trigger an enhanced sentence; particularized factual findings about the defendant are required. For that reason, the court disagreed with the NY Court of Appeals, which refused, in *People v Rosen* (96 NY2d 329), to apply *Apprendi* under similar circumstances. "To the extent *Apprendi* was applied at all in this case and in *Rosen*, it was applied not just incorrectly, but unreasonably."

What Lawyers Owe When Client Cannot Pay

Failure to Investigate Crime Scene Was IAC

A prosecution witness claimed to have seen the defendant on the decedent's fire escape shortly before a murder—but did she? An inspection of the crime scene would have revealed that it was impossible for the witness to have seen the fire escape from her vantage point. The defense attorney did not view the scene and did not raise this issue at trial. A federal *habeas corpus* claim, after the murder conviction was affirmed, asserted ineffectiveness of counsel under *Strickland v Washington,* 466 US 668 (1984). The court granted the motion. "Although defense counsel's performance was, in general, highly professional and efficacious, his failure to perform an adequate investigation in preparation for trial rendered his performance constitutionally ineffective." Defense counsel's inaction was compounded by not seeking funds to hire an investigator to examine the scene. Privately retained, he was doubtful that the family who hired him would have been willing to pay the additional expense. But no attempt was made to seek funds from the court under County Law 722-c. The judge said that "even if no funds were forthcoming either from the defendant, defendant's family or the county, counsel still had a professional, ethical obligation to conduct the investigation himself." *Thomas v Kuhlman,* No. 97-CV-2096 (EDNY 4/7/03).

Attorney Ethics When the Money Runs Out

The *Thomas* court relied upon an earlier analysis of a defense attorney's obligations to a client whose financial situation changes. In *Jelinek v Costello,* No. 97-CV-2327 (EDNY 2/27/03), the defendant had been

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convicted of sodomy and sexual abuse. He sought habeas corpus relief, claiming ineffectiveness of counsel among other things. Deciding that his constitutional claims needed to be exhausted in state court, the judge noted that the defendant's private attorney sought withdrawal when the client was unable to pay his fee. The court added that at trial, the defense attorney "performed his basic, professional duties on behalf of defendant, but appears to have made no extraordinary effort for a client who had admittedly reneged on his fee." The court further noted: "Had Jelinek been wealthy (or, with respect to some matters, poverty stricken), the instant case might have turned out somewhat differently. The defendant would have been out on bail instead of in jail awaiting trial, so that he and investigators would have been helping his attorney round up the witnesses he needed for his defense. He would have been under intense psychiatric treatment in an effort to demonstrate to the district attorney and the court that he was never, or is no longer, a danger to the community. He would likely have negotiated a plea, pled to reduced charges, and received a shorter prison term. . . . In this respect, Jelinek's predicament is one faced by many in the lower-middle class, who are neither sufficiently wealthy to afford a first-rate defense nor sufficiently impoverished to qualify for competent state-financed counsel."

Courts and Legislature Focus on AC Fees

The year 2003 may be a pivotal one with regard to assigned counsel rates in New York State. The low fees have contributed to a crisis in public defense services across the state, and are at the center of current efforts to improve how defense services are provided. (See "From My Vantage Point," p. 8.)

Administrative Review of Assigned Counsel Fee Awards Stands

Several members of the NY City Assigned Counsel Plan brought a lawsuit challenging an amendment to a section of the Rules of the Chief Administrator of the Courts, 22 NYCRR 127.2 (b), which empowered administrative judges to review "extraordinary circumstances" fee awards by trial judges under County Law 722-b. The 1st Department rejected the Article 78 action on procedural grounds. It was then filed in Supreme Court as a motion for declaratory judgment. That court took into consideration the 18-B crisis (evidenced by Chief Judge Kaye's State of Judiciary speech and the recent decision in *New York County Lawyers' Association v State of New York, NYLJ,* 2/13/03; see the last issue of the Backup Center *REPORT*). Justice Abdus-Salaam noted: "Like my colleagues. . . , I empathize with assigned counsel, who, all acknowledge, are grossly underpaid, and am concerned about the deleterious impact the failure of the legislature to raise assigned counsel rates for nearly two decades has had on the courts' ability to function." Still, the court found on Mar. 25, 2003 that the Chief Administrative Judge validly exercised supervisory administrative authority, and did not exceed state constitutional or statutory authority. *Levenson v Lippman, NYLJ* 4/9/03 (3/25/03 Sup Ct NY County).

If the case is again heard by the 1st Department, the plaintiffs may have the support of the Association of Justices of the Supreme Court of the State of New York. Association President Justice Rose H. Sconiers of Buffalo indicated that they will probably file an *amicus* brief supporting the challenge to the rule on appeal. The Justices Association filed an *amicus* brief at an earlier stage of the case in which they criticized the rule as infringing on "judicial independence." (*NYLJ*, 3/14/03.) Another brief was filed by NYSDA, the New York State Association of Criminal Defense Lawyers, and the National Association of Criminal Defense Lawyers.

The results of administrative review of "extraordinary circumstance" awards since the procedure was created in 2001 have been mixed, underscoring the problems of implementation. A fee increase might be upheld in one county and denied in another, or upheld in a criminal case and denied in a family court matter in the same county. Another layer of complexity—the source of funding (state or local)—is added depending on whether the case involved adults or juveniles. The various departments of the Appellate Division have developed different views of state and county funded awards, creating confusion among local judges unaware of Appellate Division policy or practices in reviewing awards. A Madison County Family Court judge was disconcerted to learn that "the Third Department has a 'policy' or 'directive' that is 'nei-

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ther written nor recorded,' which interprets the extraordinary circumstances exception to authorize only the lifting of statutory caps, not the statutory rates of $40 and $25 an hour." (*NYLJ*, 2/25/03.)

Case Dismissed Due to Overburdened 18-B Lawyer

In one case, a judge seeing the results of the continuing 18-B crisis went beyond increasing assigned counsel fee awards. A New York City defendant was incarcerated pending grand jury presentation on sodomy charges. After a series of adjournments by his Legal Aid attorney, the court assigned an 18-B lawyer. Throughout, the defendant voiced his intent to testify before the grand jury. However, assigned counsel already had several more urgent grand jury assignments, and other cases pending, so he requested another adjournment. On the next date, the prosecutor revealed new evidence; since the attorney already had seven other matters scheduled for that day he did not have time to confer with his client and requested more time. Eventually, the case was voted by the grand jury without the defendant's testimony. The court held that the defendant's right to testify was violated and dismissed the indictment, saying: "This defendant cannot be held liable for the workload assigned by a court to his attorney." *People v Quiones, NYLJ,* 2/27/03 (Sup Ct Bronx County).

Legislature Votes Relief

At the end of April, the New York State Legislature passed a bill to increase assigned counsel rates (to $60/hour for misdemeanors and $75/hour for felonies and all other eligible cases) effective in January of 2004. The law also raised the statutory per-case caps and caps on expert and investigative services. While not the system-wide reform that some had hoped for, the bill creates a dedicated funding stream called the Indigent Legal Services Fund and calls for state funds (estimated at $40 million) to be distributed by formula based on local expenditures for all types of public defense services, not just assigned counsel fees. The Fund is to be administered by the State Comptroller. One provision with a sunset date of 2006 calls for a Task Force to review the sufficiency of assigned counsel rates. (NYS Legislature Press Release; *NYLJ* 4/30/03).

The measure had not been signed by the Governor when this was written. Headlines and speculation, but no firm information, also existed as to any Fiscal Year 2003-2004 state moneys for public defense services, including NYSDA.

Prior to passage of the bill, the Committee on Fire and Criminal Justice Services of the Council of the City of New York held a hearing on a resolution asking the Governor and Legislature to increase the rates to $90 per hour, with an inflation index, no per-case caps, and full state funding of the increase. NYSDA Executive Director Jonathan E. Gradess provided a statement to the Committee, praising their concern about public defense services, and alerting them to the fact that the current crisis is about more than money. The resolution passed on April 30. A copy of the NYSDA statement (and the resolution) is available from the Backup Center.

REPORT Case Summaries Now on the Web

You can now search through every case summary you ever read in the *REPORT*. More than 7000 summaries published by NYSDA since 1987 are available for ***free*** on the web: http://www.asksam.com/web/nysdacds/default.htm. Browse the latest cases or keyword search through the entire collection. The search engine, created by askSam, offers a great way to start research on a topic or find the citation to a familiar case. It's like having another attorney in the office. Case Digest System subscribers can receive the entire database on CD-ROM, updated three times a year, along with bonus materials that include the *NYC Assigned Counsel Expert Witness Directory* and the *NYS Chief Defenders List*. For information on subscribing, contact NYSDA at (518) 465-3524.

40th Anniversary Marked on Gideon Day

The Gideon Coalition, NYSDA, and others marked the 40th anniversary of *Gideon v Wainwright,* the landmark US Supreme Court case, with a variety of events on March 18.

Former defendants and those who care about them, public defense lawyers, and others with first-hand knowledge of the state of public defense services in New York State spoke out about *Gideon*'s legacy and the present state of public defense services in New York. Yusef Salaam, one of those wrongly convicted of the notorious attack on the Central Park jogger, along with his mother, Sharonne Salaam (who founded People United for Children, a grassroots organization dedicated to building bridges between incarcerated children and their communities), and his post-conviction attorney Myron Beldock, of Beldock Levine & Hoffman, were among the more well-known speakers.

Karla Andreu, a NYSDA community organizer funded by a grant from the Open Society Institute, and the Association's Advisory Board helped make the Gideon Day Client-Defender Speak Out a success. Co-sponsors of the event included the League of Women Voters of New York State, the New York State Community Action

Agency Association, and the Committee for an Independent Public Defense Commission.

Meanwhile, not far from the church hall where the Speak Out was held, a troupe of four actors—the Gideon Players—presented scripted skits and improv related to *Gideon* in the concourse entryway to the Legislative Office Building. Passers-by, entertained and encouraged to focus on right-to-counsel issues, picked up printed material including a high school lesson plan on Gideon created by the National Association of Criminal Defense Lawyers (NACDL). [The lesson plan is available at http://www.nacdl.org/public.nsf/GideonAnniversary/lesson].

Public defense lawyers came to Albany for Gideon Day. They also commemorated *Gideon*—and addressed problems in public defense—locally and in print. NYSDA Board Member and Chief Assistant Dutchess County Public Defender David Steinberg urged in the *Poughkeepsie Journal* that "As we cherish the ideal, we must deliver on the promise" of Gideon. Reaching both local and state audiences through the Legislative Gazette and the *New York Law Journal* that week, Albany County Assistant Public Defender Raymond A. Kelly, Jr. urged New York State to "write Gideon into our budget and laws in indelible ink." The observance of Gideon's 40th anniversary will continue at NYSDA's upcoming Annual Meeting and Conference (see pgs. 1 and 10).

Sequential Lineups Accepted Upstate

Sequential lineups have gained ground in northern New York. Rochester Attorney Donald M. Thompson made an oral motion for a sequential and double-blind lineup in a robbery case. The prosecutors were not opposed and the judge granted it in part, denying the double-blind lineup request. It has been nearly a year since the first sequential lineup was held in Staten Island. (*NYLJ*, 4/29/02). Thompson's client was not identified by the witness in the lineup.

A sequential and double-blind lineup was ordered in an Erie County case based on the "dangers inherent in lineup identifications." The court was persuaded by defense studies on witness misidentification cited by Attorney Sabatino C. Santarpia. According to the prosecutor's office, no lineup has been held since a plea negotiation was in progress.

These cases are the latest in the mixed bag of decisions on the new lineup procedures. (*NYLJ* 3/13/03.) Among prosecutors, Brooklyn District Attorney Charles Hynes has been the only one to endorse double-blind lineup procedures in his county. (*NYLJ*, 12/13/02.) For more information, visit the Eyewitness Evidence page on the NYSDA web site: http://www.nysda.org.

Need advice on how a criminal case can affect immigration status?

NYSDA's Immigrant Defense Project (IDP) may be able to help.

Call the ***IDP hotline***. Hours are Tuesdays and Thursdays from 1:30 to 4:30 p.m.

☎ **Note new hotline number: (212) 898-4132.**

Or write: NYSDA Immigrant Defense Project, c/o NYANA, 2 Washington Street, 7 North, New York NY 10004

The IDP is supported in part by grants from the New York Foundation, the Fund for New Citizens of the New York Community Trust, the Open Society Institute, and the Ford Foundation.

Parole Board Improperly Relied on Executive Policy

A prisoner at the Arthur Kill Correctional Facility serving time for a manslaughter and robbery conviction made good use of his time and took every opportunity for rehabilitation. By the time he appeared before the Parole Board, he had earned a college degree in business with honors, became a certified computer programmer, and received commendations for his work as a trainer in the inmate Aggression Replacement Program. He received high ratings for his job assignments in the prison, which ran the gamut, and was given clearance to work outside the facility. Lastly, his record had no disciplinary infractions. At the hearing, the prisoner demonstrated he had a supportive relationship with his parents, with whom he would live upon release, and a promise of employment. He expressed remorse over his acts. The Board denied his release.

Reviewing an Article 78 challenge to the Board's decision, the Supreme Court found that the Board's decision was arbitrary and placed too much emphasis on admitted past gang affiliation and the nature of the crimes. No rational based existed to deny parole; the prisoner's offense was parole eligible. "There is no exception for persons convicted of manslaughter, gang related crimes, weapons or other violent crimes." The Board did not cite any aggravating or egregious circumstances or consider whether the prisoner would "live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law." Executive Law § 259-i(2)(c)(A). Evidence of rehabilitation, recommendations and all positive aspects of the prisoner's incarceration were given little notice.

The court found: "it appears on this record that petitioner was denied parole in furtherance of an Executive policy to deny him release because he is among the class of persons convicted of violent felony offenses and without due regard, as statutorily required, to petitioner's rehabilitation and the other factors set forth in Executive Law § 259-i." *Chan v Travis, NYLJ*, 2/27/03 (2/26/03 Sup Ct Albany County). A copy of the decision is available from the Backup Center.

EMT Covered by Doctor-Patient Privilege

A Bronx Criminal Court has extended the doctor-patient privilege to emergency medical technicians (EMTs). In *People v Mirque, NYLJ*, 3/14/03 (NYC Crim Ct Bronx County) the defendant was treated by an EMT after crashing his vehicle. En route to the hospital, he admitted to the EMT that he had been drinking. A similar statement made to a police officer at the hospital was suppressed along with the defendant's refusal to take a breathalyzer. At a pre-trial hearing in the defendant's DWI and reckless driving case, he moved to suppress the admission to the EMT. Although EMTs are not specifically mentioned in CPLR 4504, the privilege has been extended beyond the enumerated medical professionals. The purpose of the privilege was to encourage candor between patient and physician or health care professional. The court rejected the theory that an EMT must be a physician's agent for the privilege to apply: "A patient bound for the hospital by ambulance should not be required to master the rules of agency before speaking freely."

Handcuffs Taken Off Investigations Into Political Activities

Surveillance of political activities by the NYC Police Department has been limited by an agreement known as the Handschu Agreement for 18 years. Recently, a federal court approved modification of that agreement through the implementation of new guidelines that track the ones used by the FBI. New York City police will not need specific information of criminal activity before investigating a political group or permission from the Handschu Authority to start an investigation. An avowed need to investigate terrorist activity prompted the change. The court's ruling did require the Handschu Authority to review allegations of warrantless surveillance, and written approval and retention of documents related to authorized investigations for five years. *Handschu v Special Services Division, NYLJ*, 3/18/03 (SDNY) (*NYLJ*, 3/12/03.)

Lights, Camera, Justice?

Running a red light may be considered minor by some, but delegating the administration of justice regarding such violations to a camera ensconced on top of a street light has received a major challenge. Michael Pulizotto was charged with passing through a red light based on a picture taken by one of 50 cameras in New York City set up to catch violators. The fine was $50—the City earns more than $10 million annually from the program. At his hearing before the Parking Violations Bureau in Brooklyn, it appeared to Pulizotto that there was a presumption of guilt and bias against him. "You have a judge acting as a prosecutor?" Pulizotto said. "That is not someone who is fair and impartial." Pulizotto raised the first due process challenge to the use of these cameras in New York—the second challenge in the nation. His case is on appeal and a decision is pending. (*Staten Island Advance*, 3/15/03.)

Justice by camera became an issue in another context during the first negligence trial in Nassau County to rely on closed-circuit witness examination. A videoconference was arranged with a witness from the Mercer County Correctional Facility in New Jersey, where he was serving a 25-year sentence for the crime underlying the lawsuit. Examining the witness remotely was more difficult and less effective than expected. Justice Winslow, who presided over the trial, was not impressed with the technology. Due to delays in audio transmission, questions were often answered while an objection was pending. The quality of the sound was poor at times, complicating the work of the court reporter, and the proceeding ended prematurely when the connection was lost. It was reportedly much cheaper to use close-circuit television to examine the witness than to transport him from prison. (*NYLJ*, 2/27/03.) In view of the poor showing in this civil case, criminal defendants and their lawyers should be wary of closed-circuit proceedings that claim to balance justice and economy.

NYU Metropolitan Trainer Wows for 17th Year

The Association, in cooperation with a number of downstate programs, presented another successful Metropolitan New York Trainer at the New York University Law School. This was the 17th Annual NYU trainer, and the presentations included long-standing favorites and new faces. Edward Nowak began the program with Recent Developments in Criminal Law and Procedure, and Peter Gerstenzang presented a DWI Defense Update. Rodney Uphoff discussed Ethical Issues in Criminal Defense Practice. The trainer concluded with a panel of experts on important, so-called "collateral consequences" of guilty pleas: McGregor Smyth on Public

Benefits/Welfare, Student Loans, Housing, and Family Law, Anita Marton on Employment, Military Service, and Licensing, Manny Vargas on Immigration, and Steve Wasserman on Forfeiture. Over 250 attorneys attended. Materials from the trainer are available from the Backup Center for $25.

8th Judicial District Chiefs Meet

The Chief Defenders in the 8th Judicial Circuit met in Batavia on Feb. 28, 2003 to discuss matters of mutual concern. Major topics included the status of proposed 18-B legislation, the creation of an independent public defense commission, and current practices in specialty courts in the region. This meeting marked the first of what the group hopes to be quarterly events in which they can compare trends and exchange ideas to enhance the services they provide in their respective jurisdictions. Representatives from Cattaraugus, Chautauqua, Erie, Genesee, Niagara and Orleans Counties were present. The next scheduled meeting is May 30, 2003 in Buffalo.

IDP Nominee Receives Award

Christopher J. Meade of Wilmer, Cutler & Pickering was one of 14 honorees receiving a New York State Bar Association President's Pro Bono Service Award for 2003 in the individual attorney category. Meade provided *pro bono* assistance for 13 clients in 2002, defending immigrants' rights, challenging mandatory immigration detention, and representing one immigrant who was literally enslaved. Saadia Aleem, a Staff Attorney at NYSDA's IDP, nominated Meade. In addition to his work in immigration matters, Meade also assisted individuals in death penalty cases.

Serving Two Masters: When Prosecutors Becomes Defense Attorneys

The defendant had been represented by the St. Lawrence County Public Defender when he entered into a plea bargain that resulted in felony probation. After being sentenced to prison for a violation of probation, he filed a *pro se* CPL 440.10 motion claiming that his original attorney had a conflict of interest because she had previously prosecuted him on several of the charges involved in the plea bargain. His motion was denied and affirmed on appeal. Assuming for the purpose of the appeal that a conflict existed, the Court of Appeals focused on the conflict's impact on the conduct of the defense. The defendant knew about the conflict from the start and did not object. The record supported the Appellate Division finding that the conflict did not operate on the defense. The court refused to adopted a *per se* rule requiring reversal. Judge Smith dissented, noting that the attorney's conduct appeared to violate Judiciary Law 493. *People v Abar,* No. 8 (2/18/03). (A summary of the opinion is found at p. 19.)

Meanwhile, a Texas judge replaced a defendant's attorney with a lawyer who assisted in his prosecution. Johnny Paul Penry, whose death sentence has been litigated by the same defense attorney for almost 25 years, has been assigned new counsel by an East Texas judge, based on a theoretical conflict of interest with Penry's current lawyer, should Penry choose to raise ineffectiveness of counsel in the future. As NYU Law School Professor Stephen Gillers observed: "The fundamental point of illogic is that the prosecution is hypothesizing a conflict based on an imaginary problem that no one has a reason to think exists." Whether Penry will be punished for having an attorney who has been too effective may yet be decided by the US Supreme Court. (*NYT*, 3/24/03.)

Alleged Defender Policy Under Fire

A former defendant's lawsuit has drawn attention to the civil liability of public defenders for policy decisions. Roberto Hernandez Miranda was sentenced to death for murder in Nevada and spent 14 years on death row.

Having been represented by the public defender at trial, he claimed that his lawyer was inexperienced and that the lawyer's approach to the case "ranged from the halfhearted to the nonexistent." Miranda's ineffectiveness claim was sustained by the state supreme court; he was released in 1996 and never retried. Now he is suing the Public Defender in charge of the office during his representation for violating his civil rights. The crux of the 18 USC 1983 claim is that the defender office used lie detector tests of clients to make resource decisions in their cases. The office disputes that assertion.

Public defenders are immune from civil rights claims under *Polk County v Dodson*, 454 US 312 (1981), since they are not state actors. However, the 9th Circuit Court of Appeals in *Miranda v Clark County*, No. 00-15734 (9th Cir. 2/3/03) found that the administrative head of the office could be held liable as the policymaker, while the attorney who represented Miranda could not. The case has been remanded for further action. "It is a big deal," according to Norman Lefstein, Chair of the ABA Advisory Group on Indigent Defense. "If it is sustained, it has significant implications and should make public defenders, and assigned counsel for that matter, very concerned about the kind of representation and investigation they provide." (*ABAJ*, 2/14/03.)

New Standards for Death Penalty Lawyers

At its Mid-Winter Meeting in Seattle, the American Bar Association (ABA) adopted revised guidelines for handling death penalty cases. This follows nationwide criticism of death penalty procedures and the poor quality of representation. *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA 2003) focuses on appointment and performance of counsel, and the need for investigators and mitigation specialists, and other experts. A report accompanying the Guidelines suggests establishing independent offices to make appointments to assure the integrity of the selection process and appropriate compensation.

Major changes have occurred since the ABA's first *Guidelines* were issued in 1989. According to Robin Maher, Director of the ABA's Death Penalty Representation Project, "the guidelines need modification because of sweeping changes in federal law in 1996 that dramatically limited the scope of death penalty appeals and for the first time imposed a one-year statute of limitations for filing constitutional challenges in US court." (*LA Times* 2/18/03.) Among the many persons acting in an advisory capacity during revision of the *Guidelines* was NYSDA Staff Attorney Mardi Crawford. A copy of the Guidelines is available from the ABA web site: http://www.abanet.org/deathpenalty/guidelines.pdf.

Annoying "Popups" Arrested by Donation of PopUpCop

It has become increasingly difficult to do research on the Internet because of an almost constant barrage of irritating, commercial browser "SPAM" windows popping up unannounced and, seemingly, uncontrollably. More than a mere annoyance, they result in decreased productivity as well as a significant amount of unnecessary mouse clicking which can increase the risk of repetitive stress injuries.

To fight back, many "popup blocker" programs have hit the market. Many are free and, with a lack of features, their own popup "ads," bugs, and non-existent tech support, tend to prove that you do "get what you pay for." Most, however, are shareware ranging in price from $19.95 to $49.95.

NYSDA evaluated several of these programs, including free ones, and found that one, priced at the low end of the range at $19.95, stood out from the rest as far as features, user-friendliness, ease of installation and, most importantly, effectiveness. As shareware, it comes with a 30-day trial and is available for download (www.edensoft.com).

The program, called PopUpCop, installs easily and puts a feature-rich drop down menu on the browser toolbar that displays its current settings and makes access to them easy. This is helpful because there are times when settings need to be changed "on-the-fly." For example, when using Internet access to email through a web browser, individual messages may need to be "popped up" in order to reply. A simple one-click selection from PopUpCop's drop-down menu will permanently allow popups from any site. Easy to do, easy to find—which was not true with other blockers tested.

PopUpCop stops cookies, "flash" movies, changing of your homepage, playing background music or sounds, resizing the browser window, and other inconsiderate behaviors. More importantly, dangerous ActiveX controls, scripts and Java applets are also "arrested" by PopUpCop.

One reason that downloading and installation are quick and the program space demands on one's computer is small is that the built-in Help function is actually a "call" to the PopUpCop website. All features are explained, and there is a FAQ and Quick Start guide. Balloon help is also active.

In summary, many or most of the website annoyances were blocked by the other blocking programs we tried, but PopUpCop really seemed to work best. This made the donation of licenses by Edensoft to NYSDA especially exciting. We thank Edensoft for their commitment to assist in NYSDA's mission. ⚖

*From My Vantage Point**

By Jonathan E. Gradess

Small Victories are Victories Nonetheless

In the midst of the largest fiscal crisis in a quarter century, the Legislature in early May passed a reform of indigent defense services in New York State. While it will not end the crisis in public defense services, it does begin to pave the road in the right direction. For the first time in 38 years, during this 40th anniversary year of *Gideon*, the State has agreed to support the public defense function by providing a projected 20 percent on top of what localities are already paying.

As part of the two-house budget bill, the Legislature enacted changes substantially the same in form as the Governor's proposed 18-B reform. Fees for misdemeanors will be raised to $60.00 per hour. Fees for all other cases (felonies, appeals, family court cases, law guardian representation and other appointments governed by Article 18-B of the County Law and Article 35 of the Judiciary Law) will be raised to $75.00 per hour. While the distinction between misdemeanors and other cases is unfortunate, the abolition of the in and out of court differential is important and long overdue.

Against our advice and urging, caps are retained in the statute, but they are substantially raised. In jurisdictions that have strictly applied caps, this will be a blessing. The misdemeanor cap is increased threefold to $2400 per case, and the cap in felony and other cases is increased to $4400 per case. Importantly, in raising the amount for experts and investigators, the bill makes clear that the new rate under County Law section 722-c is $1000 "per investigative, expert or other service provider." Exceptions to all these limits may be sought by showing that extraordinary circumstances require higher hourly or total case payments.

The effective date for raising these fees is January 1, 2004. Under the terms of the bill, any jurisdiction may, by local law, increase assigned counsel fees immediately.

Despite our recommendation that the Legislature index assigned counsel fees to the cost of living, and despite a provision in the Volker/Lentol New York State Public Defense Commission Act (S.1894/A.5394) that would have accomplished this, the enacted bill instead creates a seven member task force to evaluate the sufficiency of the rates and to report back three years hence. This task force, with members appointed by the Governor, Assembly, Senate, and Judiciary, also includes candidates recommended by the New York County Lawyers Association, the Association of the Bar of the City of New York, and the New York State Bar Association. It must hold at least two public hearings on the subject and make a report in January 2006.

The bill creates an Indigent Legal Services Fund in the custody of the Comptroller and the Commissioner of Taxation and Finance. Four revenue streams feed this fund, which it is estimated will generate $65 million per year. Of this amount, $25 million is designated for law guardian payments; the remainder is to be distributed pursuant to a formula to counties and the City of New York. Localities may use these funds as they see fit as long as the funds are used to improve the quality of the local public defense system (public defender office, assigned counsel program or legal aid society).

Distribution of funds to localities begins in 2005 and will be made under a formula based on the amount spent by a jurisdiction in the preceding year. A locality's local expenditure will be calculated by the Comptroller as a percentage of total indigent expenditures by counties and New York City. That same percentage of the fund will be returned to localities, which must certify that they spent the same amount in the preceding fiscal year as the year before or that a measurable increase in quality can be demonstrated. For the first time in New York State history, the examination of the use of experts and investigators, caseload limits, training, resource and similar issues is part of the funding calculus.

The Legislature wisely kept the administration of this new system out of the Division of Criminal Justice Services and the Office of Court Administration. Whether it was wise or even constitutional to place it in the Comptroller's office remains to be seen. We will offer assistance to the Comptroller in an effort to make this scheme work.

Could there have been more? Yes. New York could have achieved real oversight in an independent public defense commission. As an alternative or in combination with a Commission, standards could have been written into the bill. The Legislature could have staffed an effort to provide real assistance to improve county systems. All of these options could have been exercised, but we are where we are.

We know that the problems we daily see and you daily live through will not go away because of this bill, which not been signed when the *REPORT* went to press. Yet, we are happy with any step forward. What is imperative is that we continue to strive for quality public defense systems, standards, oversight, and the assurance that our clients not be lost in the celebration of small victories.

That said, we should celebrate this small victory. Thirty-eight years is a long time. ⚖

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

Resources Sighted, Cited, or Sited

NYSDA continually monitors the Internet for resources to aid criminal defense attorneys in their daily practice, and help them make the most of the web. Here are a few of the many recent sightings of interest that can be found on the NYSDA web site, www.nysda.org

✇ *Jailhouse Lawyer's Manual Supplement* (Columbia Human Rights Law Review). The 2002 supplement to the 5th edition of the well-known *JLM* is now available. It contains updates on parole, Article 440, Prison Litigation Reform Act, assault, 1983 claims, disciplinary proceedings, federal habeas corpus, and criminal appeals, as well as new chapters on post-conviction DNA testing, classifications and solitary confinement, ineffective assistance of counsel, plea bargaining, juvenile rights, right to an interpreter, and special concerns of sex offenders. A JLM Order Form is available online: http://www.columbia.edu/cu/hrlr/JLM yvette/JLM/index.html. A printed version can also be requested from the Backup Center.

✇ *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants* (MacArthur Foundation 2003). This report examined the question of whether the intellectual and emotional immaturity of juveniles impacted their competence to stand trial. Hundreds of adolescents were evaluated using standardized tests. Most youths showed impairment similar to adults found incompetent to stand trial and made choices about plea agreements that were deferential to authority. http://www.mac-adoldev-juvjustice.org/index.html

✇ *Death Penalty in 2002* (DPIC). This is the annual report of the Death Penalty Information Center concerning capital punishment developments in the United States. It includes a statistical analysis of death row inmates and executions; review of Supreme Court and federal court decisions, reports, legislation and other actions in the states; and a summary of international developments. http://www.deathpenaltyinfo.org/yrendrpt02.pdf

✇ *Role of Mental Health Courts in System Reform* (Bazelon Center 2003). The Bazelon Center for Mental Health Law conducted a review of 20 mental health courts around the country, and examined about a dozen intensively. Their research into the operations and effectiveness of these courts showed that mental courts did not follow a single model, and included many burdensome procedures affecting the result and defendants' rights. The report recommended that mental health courts operate within a broad framework meeting the needs of the mentally ill, while protecting the rights of defendants appearing before them. http://www.bazelon.org/issues/criminalization/publications/mentalhealthcourts/index.htm

✇ *Data Collection Resource Center* (Institute on Race and Justice at Northeastern University). The Institute publishes research on data collection measures and methods intended to forestall or remedy racial profiling by law enforcement. It serves as a clearinghouse for police agencies, legislators, community leaders, social scientists, legal researchers and journalists. Information published online includes: background of data collection, jurisdictions, legislative developments and resources for data collection. http://www.racialprofilinganalysis.neu.edu/about_us.php

✇ *How to Correctly Collect and Analyze Racial Profiling Data* (COPS 2003). This report reviews the methods used by law enforcement agencies in four cities to collect racial profiling data in traffic stops. It includes an assessment of current techniques, a list of recommended practices and a review of the literature. This project was funded by the Office of Community Oriented Policing Services. http://www.cops.usdoj.gov/default.asp?Open=True&Item=770

✇ *Imbalance of Powers: How Changes to US Law and Policy Since 9/11 Erode Human Rights and Civil Liberties* (LCHR 2003). The Lawyers Committee for Human Rights prepared a report describing the impact of government policies and actions since 9/11 on human rights and civil liberties. It concentrates on four areas: (1) Open Government; (2) Right to Privacy; (3) Treatment of Immigrants, Refugees and Minorities; and (4) Security Detainees and the Criminal Justice System. The last chapter concerns the impact of US policies on human rights internationally. http://www.lchr.org/us_law/loss/imbalance/powers.pdf

✇ *New York Court of Appeals Oral Arguments Videotapes* are once again available from the Albany Law School Government Center. The collection extends back to 1989. Information on pricing and an order form can be found on their web site: http://albanylaw.eventurenow.com/centers/editor.cfm?ID=147

✇ *Income Eligibility Guidelines* (LSC 2003). This is the annual calculation of client income eligibility guidelines prepared by the Legal Services Corporation and published in 45 CFR Part 1611. It is based on 125% of the Federal Poverty Guidelines published by the US Department of Health and Human Services. National standards are in agreement that eligibility determinations should be made on a case-by-case basis. Use of income guidelines as the sole determinant for eligibility threatens the constitutional right to counsel. As NYSDA notes in "Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center" (available on our web site), many factors, including the defendant's assets and debts, the seriousness and complexity of the case, the expense necessary for a defense, and the cost of private representation in the community where the defendant is charged, need to be considered in determining eligibility for appointed representation. http://a257.g.akamaitech.net/7/257/2422/14mar20010800/edocket.access. gpo. gov/2003/pdf/03-3780.pdf

✇ *How Many Cases Should a Prosecutor Handle? Results of the National Workload Assessment Project* (NDAA). The National District Attorney's Association published a study examining prosecutor caseloads nationwide. The study weighed various factors that impacted on prosecutors' ability to handle a set number of cases, and reached conclusions about the efficacy of caseload standards. The report is only available in print. The price is $10.00. To order a copy, contact Cathy Yates at NDAA, cathy.yates@ndaa-apri.org or call (703) 549-9222. http://www.ndaa-apri.org/newsroom/pr_landmark_study_prosecutors_success_jan_9_2003.html

✇ *Forensics Library* (NLADA). This is a web-based clearinghouse of information on forensic science based on peer-reviewed

(continued on page 15)

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Dates and Places: May 30, 2003 Brooklyn, NY
September 6, 2003 Ithaca, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; website www.nysacdl.org

Sponsor: National Legal Aid and Defender Association
Theme: Defender Advocacy Institute
Dates: May 30-June 4, 2003
Place: Dayton, OH
Contact: Steve Stall: tel (202)452-0620 x213; fax (202)872-1031; e-mail s.stall@nlada.org; website www.nlada.org

Sponsor: Association of Black Women Attorneys
Theme: Annual Conference
Date: May 31, 2003
Place: Brooklyn, NY
Contact: ABWA: tel (212)578-1143; fax (212)743-0634; e-mail abwagroup@yahoo.com

Sponsor: New York State Bar Association
Theme: DWI on Trial—The Big Apple III Seminar
Dates: June 5-6, 2003
Place: New York City
Contact: NYSBA CLE Registration Office, (518)463-3200 x5600; e-mail cle@nysba.org; website www.nysba.org

Sponsor: Prof. Anthony G. Amsterdam, NYU School of Law, National Institute of Trial Advocacy and others
Theme: The Habeas Institute: Federal Post-Conviction Skills Seminar
Dates: June 19-22, 2003
Place: New York City
Contact: NITA: tel (800)225-6482; fax (574)271-8375; e-mail nita.1@nd.edu; website www.nita.org

Sponsor: **New York State Defenders Association**
Theme: **36th Annual Meeting and Conference**
Dates: **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**

Don't Miss the Training You Need!

Check our web site 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.

Sponsor: National Association of Criminal Defense Lawyers
Theme: 21st Century Forensics & the Defense of a Criminal Case
Dates: July 30-August 2, 2003
Place: Denver, CO
Contact: Viviana Sejas: tel (202)872-8600 x232; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org

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

Sponsor: National Association of Criminal Defense Lawyers
Theme: Annual DUI Seminar
Dates: October 15-18, 2003
Place: Las Vegas, NV
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; website www.nacdl.org ⚖

The Gideon Players perform in Albany on Gideon Day. From left: Terry Rabine, Lawanda Horton, Leigh Strimbeck, and Tomas Bell. (See story on p. 3.)

Job Opportunities

The GENESEE COUNTY PUBLIC DEFENDER OFFICE seeks a **First Assistant Public Defender** or **Assistant Public Defender**. Deadline for applications 5/16/03. Send resume to Gary A. Horton, Esq., Genesee County Public Defender, 1 West Main Street, Batavia, NY 14020. tel (585)344-2550 x2280; fax (585)344-8553.

Assistant Public Defender sought for BROOME COUNTY PUBLIC DEFENDER OFFICE. Required: admitted in New York; experienced in criminal defense; willing to work as an assistant public defender; and ability to handle criminal trial work, administrative proceedings, parole and appellate proceedings. Salary DOE. Send resume to: Jay L. Wilber, Broome County Public Defender, 229-231 State Street, Binghamton, NY 13901

The NEIGHBORHOOD DEFENDER SERVICE, an innovative Harlem-based public interest law office, seeks **Director of Development** to be responsible for fundraising from foundations, law firms and individuals. Job entails grant writing, special events planning and direct mail. Required: at least 5 yrs experience; strong writing skills; excellent interpersonal and communication skills; initiative; and the ability to work with a small team. E-mail cover letter with salary requirements and résumé to segarra@ndsny.org or mail to: Y. Segarra, NDS, 2031 5th Avenue, New York, NY 10035.

The CAPITAL POST-CONVICTION PROJECT OF LOUISIANA (CPCPL) seeks an **mitigation investigator**. Required: ability to travel ; facility in locating and interviewing witnesses, obtaining signed statements, securing documentary evidence, and constructing detailed social histories and chronologies Desired: 3+ years experience investigating capital cases at trial or in post-conviction, with emphasis on mitigation investigation, and work with expert witnesses; understanding of mental health evidence. Salary $35,000–$40,000, DOE, + benefits. CPCPL is a non-profit law office, established to assist indigent death-sentenced men and women in Louisiana by providing direct representation, pursuing collateral relief in state and federal post-conviction, securing counsel for all Louisiana death-sentenced indigent persons in post-conviction, and providing assistance to law firms representing capital post-conviction clients pro bono. The office employs a client-centered, team approach; all staff members are expected to participate at every stage of the case. CPCPL provides substantial training to all staff. AAE. Send letters of interest and resumes to: Jenni Trovillion, Litigation Coordinator, Capital Post-Conviction Project of Louisiana, 144 Elk Place, Suite 1606, New Orleans, LA 70112. tel (504)212-2110; fax (504)212-2130; e-mail jtrovillion@cpcpl.org

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.

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

The 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 **experienced Trial Attorney**. Significant felony trial experience critical; capital defense experience important. Must be willing to sit for 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@thejusticecenter.org

The HISCOCK LEGAL AID SOCIETY in Syracuse seeks a **Staff Attorney** to represent persons unable to hire counsel in criminal matters and a **Staff Attorney** to handle civil matters. Required: ability to handle high volume caseload and a demonstrated commitment to public interest law and to serving the indigent. Admission to NYS bar preferred. Salary $30,000+ DOE, generous benefits. EOE—persons of color and bilingual persons encouraged to apply. Send cover letter, resume, and three references to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse, NY 13202. ⚖

Immigration Practice Tips

Defense-Relevant Immigration News

By Saadia Aleem, Manny Vargas, and Marianne Yang*

2nd Circuit Says More Drug Offenses May Be Deemed "Aggravated Felonies" for Illegal Reentry Sentence Enhancement Purposes

The federal Court of Appeals has held that a New York misdemeanor drug offense may be considered an aggravated felony for purposes of the sentence enhancement for illegal reentry after deportation subsequent to an aggravated felony conviction. *US v Simpson*, 319 F3d 81 (2nd Cir 2002, as amended 2/7/03).

The 2nd Circuit had previously held that a state felony drug offense, even for simple possession, would be deemed an aggravated felony for purposes of the sentence enhancement for illegal reentry. *See eg, US v Pornes-Garcia,* 171 F3d 142 (2nd Cir), *cert den,* 528 US 880 (1999). It had been unclear whether certain state misdemeanor drug offenses might also be deemed aggravated felonies in the illegal reentry context.

In the Dec. 24, 2002 *Simpson* decision, the court held that, for illegal reentry sentence enhancement purposes, a state drug offense would be considered an aggravated felony if it is classified as a felony under state law or can be classified as a felony under federal law. Applying the hypothetical federal felony approach, the court found a New York criminal sale of marijuana, 4th degree misdemeanor conviction (Penal Law 221.40) to be an aggravated felony because it would be punishable as a felony under federal law. A second or subsequent New York conviction for criminal possession of marijuana (Penal Law 221.15), also a state misdemeanor, was also found to be an aggravated felony because such an offense would be punishable as a federal felony under 21 USC 844(a).

The 2nd Circuit ruling is bad news for any non-citizen arrested for illegal reentry after previously being convicted of such New York misdemeanor drug offenses. In addition, although the *Simpson* court expressed "no comment" on whether the misdemeanor convictions at issue there would constitute aggravated felonies outside the illegal reentry context, its analysis conflicts with the approach adopted in a series of earlier decisions by the Board of Immigration Appeals (BIA). This leaves unclear whether misdemeanor sale of marijuana or a second conviction for a misdemeanor simple possession offense (for marijuana or other controlled substance) in New York constitutes an aggravated felony for immigration purposes. Conviction of an aggravated felony has numerous and very harsh potential immigration consequences, including probable mandatory deportation, possible mandatory detention, ineligibility for asylum, and ineligibility to return legally to the US after deportation, in addition to greatly enhanced sentencing for illegal reentry.

In the immigration context, the BIA states that it determines whether a state drug offense may be deemed an aggravated felony by reference to the law of the jurisdiction in which the immigration case arose. *Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 5/13/02). Purporting to adopt the 2nd Circuit's approach in the illegal reentry context and citing *Pornes-Garcia*, the BIA held in October 2002 that, for immigration cases arising in the 2nd Circuit, a state drug offense would be deemed a "drug trafficking crime" aggravated felony *only* if the convicting state classified the offense as a felony (no hypothetical federal felony approach). *Matter of Elgendi,* 23 I&N Dec. 515 (BIA 10/31/02) (declining to follow the 2nd Circuit's decision in *Aguirre v INS,* 79 F3d 315 (2nd Cir 1996), which had deferred to prior BIA precedents to hold that a New York felony simple possession conviction was not an aggravated felony for immigration purposes).

At least one district court has recently held that, in light of Simpson, the BIA in *Matter of Elgendi* did not properly apply 2nd Circuit law and therefore should not control in immigration cases on the issue of whether a state misdemeanor drug offense may constitute an aggravated felony for immigration purposes. *See Copeland v Ashcroft,* 2003 US Dist LEXIS 2691 (WDNY 2/10/03) (denying habeas relief after finding petitioner's convictions for NY criminal sale of marijuana, 4th degree, to constitute aggravated felonies). A motion for reconsideration is currently pending.

The Bottom Line: As a result of *Simpson*, defense lawyers should be aware that the 2nd Circuit will now deem a New York plea to criminal sale of marijuana, 4th degree, or a plea to any second or subsequent NY misdemeanor drug possession charge, to be an aggravated felony for illegal reentry sentencing purposes. While the 2nd Circuit specifically expressed no comment on whether such offenses would also be deemed aggravated felonies in the immigration context, defense lawyers should be aware that the government has already argued that NY CSM 4 is an aggravated felony in the immigration context, and may now also argue that conviction of a misdemeanor drug possession charge preceded by a final prior possession conviction is an aggravated felony for immigration purposes. Therefore, despite the BIA's hold-

*Staff of NYSDA's **Immigrant Defense Project** (IDP), which provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. **Manny Vargas** is Director of the IDP, and **Saadia Aleem** and **Marianne Yang** are Staff Attorneys. For hotline assistance, call the Project on Tuesdays and Thursdays from 1:30 to 4:30 P.M. at the **IDP's new hotline number: (212) 898-4132**.* *The IDP is supported in part by grants from the New York Foundation, the Fund for New Citizens of the New York Community Trust, the Open Society Institute, and the Ford Foundation.*

ing in *Elgendi*, one can no longer advise a non-citizen that such a misdemeanor offense would definitely not be considered an aggravated felony for immigration purposes. In any event, however, it continues to be true that a *first* misdemeanor drug possession charge, although it may trigger removability under the controlled substance ground of deportability or inadmissibility, should still avoid the negative consequences of an aggravated felony conviction.

2nd Circuit Issues Unfavorable Rulings on Retroactive Application of Bar on Relief from Deportation to pre-1996 Trial Convictions

The 2nd Circuit recently issued two negative opinions in cases where immigrants challenged the retroactive application of 1996 amendments barring relief from deportation to pre-1996 trial convictions. *Theodoropoulos v INS*, 313 F3d 732 (2d Cir 2003), and *Rankine v Reno*. 319 F3d 93 (2d Cir 2003) (*amicus curiae* brief filed by NYSDA, The Legal Aid Society of the City of New York, and the New York State Association of Criminal Defense Lawyers). In both cases, three judge panels found that "a petitioner convicted after a trial rather than on a guilty plea has not faced a substantial change in expectations… [because a] jury's verdict, not the potential of discretionary waiver or the IIRIRA's removal thereof, determined the legal consequence of the decision to seek trial." *Rankine*, 319 F3d at 100 (quoting *Theodoropoulos*, 313 F3d at 739-740 (internal citations omitted)). Petitions for panel rehearing or rehearing en banc are pending in both cases. A federal district court in Pennsylvania earlier issued a favorable ruling on the trial conviction issue in a case also involving a New York immigrant. *Ponnapula v Ashcroft*, 235 FSupp2d 397 (MD Pa 2002) (*amicus* brief filed by NYSDA in earlier district court proceedings in New York).

Before 1996, most lawful permanent residents (LPRs or green-card holders) who had served less than five years for any single crime were allowed to file for "212(c)" discretionary relief before an Immigration Judge in removal proceedings. This form of relief allowed many LPRs with significant ties to this country to stay here; in fact, about 50% of the people who applied for the relief received it. The availability of this relief was relied upon by LPRs making decisions about their defense; in fact, some LPRs structured plea agreements so their sentences would just fall short of five years, thus ensuring that they could apply for 212(c).

In a series of amendments to the Immigration and Nationality Act in 1996, 212(c) relief was repealed, and a new form of relief called Cancellation of Removal was put in its place. Cancellation is not available to individuals with "aggravated felonies" regardless of sentence or time served. The government subsequently argued that individuals they are currently putting in proceedings should not be allowed to apply for 212(c) relief because it no longer exists. In 2001, however, the Supreme Court held that LPRs who pled guilty before 1996 could not be retroactively barred from applying for 212(c) relief. *INS v St Cyr*, 533 US 289 (2001). The court did not address the issues of (1) whether LPRs with trial convictions predating the 1996 changes in the law could apply for 212(c) relief and (2) whether LPRs whose conduct predated the 1996 changes in the law could apply for 212(c) relief even if their conviction occurred after. These issues have been the subjects of intense litigation throughout the country.

Although the 2nd Circuit has now ruled adversely to LPRs on the trial conviction issue, there is still some hope that the court will issue a favorable ruling on the broader conduct issue.[1] Among the pending cases raising this issue are *Zgombic v Farquharson* (*amicus* brief filed by NYSDA), *Mohammed v Reno,* and *Beharry v Reno.*

IDP Alert Prepared for Noncitizens Subject to Special Registration Who Have Arrests or Convictions

In response to the federal government's requirement that certain male citizens or nationals of mostly Middle Eastern or Muslim majority countries must register with the federal government, NYSDA's Immigrant Defense Project has prepared an alert. The alert, below, is aimed at those required to special register who have past criminal arrests or convictions. To date, countries included on the special registration list are: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen.

ALERT FOR INDIVIDUALS REQUIRED TO SPECIAL REGISTER WITH CRIMINAL ARRESTS OR CONVICTIONS

If you are required to register with the Immigration and Naturalization Service under the special call-in registration program and you have been arrested for a crime during your stay in the United States, you should be aware of the following:

- ***You may be deportable from the United States and subject to immediate detention***

If you have been arrested and charged with a crime during your current or a prior stay in the United States, you may be subject to detention by the US Immigration and Naturalization Service (INS) and deportation from the United States.

(alert continued next page)

[1] The 2nd Circuit had issued an opinion prior to *St. Cyr* called *Domond v INS*, 244 F3d 81 (2001), which held that 212(c) was not available to individuals simply because their conduct predated the 1996 amendments. However, the line of reasoning employed in *Domond* was explicitly rejected by the Supreme Court in *St. Cyr.*

(alert continued from previous page)

The U.S. immigration laws list several types of crimes that may subject a noncitizen to detention and deportation from the United States. For a general list of the categories of offenses that may subject a noncitizen to detention and deportation from the United States, see the first column ("Grounds for Deportation") in the Immigration Consequences of Convictions Checklist [available from the IDP or the Backup Center]. The law in this area is very complicated and confusing. If you have a past arrest, you are strongly advised to consult with an attorney or other immigration law expert *before you register.*

- ***If you fail to register, you may lose any opportunity to obtain a "green card" or other lawful admission status in the United States in the future***

If you are required to register with the INS and willfully fail to do so, there may be serious negative consequences—potentially including arrest, detention, deportation, and criminal penalties. Failure to register may also cause problems with any current or future application that you make for any status or benefit under the US immigration laws. For example, if you have applied for a "green card" (lawful permanent resident status), or intend to do so in the future, failure to register may result in such status being denied to you.

The US immigration laws list several types of crimes that prevent a noncitizen from obtaining lawful admission —whether permanent or temporary—to the United States. For a general list of the categories of offenses that prevent lawful admission of a noncitizen to the United States, see the second column ("Grounds of Inadmissibility") in the Immigration Consequences of Convictions Checklist [available from the IDP or the Backup Center]. Note that there are certain crimes that may make you deportable from the United States, but do not prevent you from being able to seek lawful admission status (for example, a misdemeanor theft offense may qualify for the petty offense exception—see explanation under "crime involving moral turpitude" column in the Checklist). The law in this area also is very complicated and confusing. If you have a past arrest, you are strongly advised to consult with an attorney or other immigration law expert *before you register.*

- ***If you have been arrested and charged with a crime at any time during your current or a prior stay in the United States, seek expert legal help***

If you have been arrested and charged with a crime at any time during your current or a prior stay in the United States, you are strongly advised to consult with an attorney or other legal expert with experience in criminal and immigration law. You have the right to bring an attorney with you when you register. If you or your attorney have a question regarding the legal effect of a past criminal arrest, you may contact the Immigrant Defense Project hotline (212) 367-9104 on any Tuesday or Thursday between 1:30 and 4:30 p.m.

Draft Patriot Act II Would Further Limit Long-time LPR's Ability to Avoid Deportation Based on Past Criminal Convictions

The US Justice Department has drafted a new bill that includes a section that could severely further limit the already very limited ability of long-time lawful permanent resident immigrants to avoid deportation based on past criminal convictions. The new bill would do so no matter how minor the crime, no matter how long ago the crime, and no matter what adverse effect deportation would have on US citizen family members, US citizen employees, or US interests generally. The Justice Department has not yet officially released the bill—drafted by the staff of Attorney General John Ashcroft and entitled the "Domestic Security Enhancement Act of 2003" (DSEA) or "Patriot Act II"—but the Center for Public Integrity obtained a copy of a draft dated January 9 and has posted the draft on its website at http://www.incunabula.org/DSEA/INDEX.HTM. The section that relates to immigrants with past criminal convictions is Section 504, entitled "Expedited Removal of Criminal Aliens." The bill also includes several other provisions that would have a severe negative impact on immigrants. (For a brief summary of them, contact the Backup Center.) It is unclear when the Justice Department will seek to have the bill introduced in Congress, or whether it will remain in its current form.[2]

Through DIP, New Jersey Defense Lawyers and New York Public Defense In-house Experts Receive IDP Help

NYSDA's IDP has initiated new efforts to defend the rights of immigrants accused of criminal conduct as part of its collaboration with other immigrant defense organizations across the country. These efforts are part of the Defending Immigrants Partnership (DIP).

As part of its DIP work, the IDP is expanding its technical legal assistance, training, and resource material offerings to immigrants accused of crimes in New Jersey. The IDP teamed up recently with the Office of the Public Defender in New Jersey to hold trainers for public defenders and other criminal defense attorneys. New Jersey is a high-immigrant state where it appears there has been virtually no training or formal back-up support provided previously to defense lawyers on the immigration consequences of criminal convictions. For this trainer and the preparation of training materials geared to New Jersey, the IDP has had the assistance of Assistant Clinical Professor Joanne Gottesman at Rutgers Law School-

[2] According to an Associated Press article on Fox News online 4/16/03, this draft "was never reviewed by Attorney General John Ashcroft and about two-thirds of it will not be proposed to Congress, according to Justice Department officials speaking on condition of anonymity."

Camden, and lawyers from Legal Services of New Jersey, the Center for Law and Social Justice in Camden, New Jersey, and lawyers in private practice in New Jersey. Two separate trainers were held to cover the southern and northern parts of the state. The Mar. 7 trainer in Camden attracted approximately 50 attendees, including representative from most southern offices of the New Jersey Office of the Public Defender. The April 4 trainer, in Newark attracted approximately 70 attendees. A working draft of a chart of the immigration consequences of common New Jersey offenses, prepared by Assistant Clinical Professor Gottesman, with IDP review and input, was distributed.

Another aspect of DIP work involves planning and setting up of two intensive trainers for a group expected to become a corps of in-house immigration experts at criminal defense legal services provider offices throughout the state of New York. Two intensive trainers—one in the New York City and one upstate—were in final planning as the *REPORT* went to press. For these trainers, the IDP teamed up with attorneys from Bronx Defenders and The Legal Aid Society of New York who already serve as expert immigration specialists at their respective organizations. Plans are to distribute an early draft of the 2003 third edition of the IDP immigration manual for New York defense lawyers—*Representing Noncitizen Criminal Defendants in New York State*—at these trainers. Watch the NYSDA web site, www.nysda.org and future issues of the *REPORT* for an announcement that the third edition is final.

In order to help with DIP special projects as well as the IDP's ongoing work, the Project took on a new staff attorney, Marianne Yang, in January 2003. A graduate of Harvard College and the New York University School of Law, Marianne formerly worked for six years as an associate at Simpson Thacher & Bartlett. During that time, she negotiated a unique arrangement with her firm to work for two years as a part-time volunteer attorney at the Immigration Unit of the Legal Aid Society of New York. Her IDP responsibilities include updating and supplementing of the immigration manual and coordination of the intensive trainers for New York defense office in-house experts.

Partners with the IDP in these DIP actions are the National Immigration Project in Boston and the National Legal Aid and Defender Association in Washington, DC. The DIP is funded in part by The Gideon Project of the Open Society Institute and by the Ford Foundation.

Updated IDP Resource Materials Posted on NYSDA's Website

The IDP has prepared, distributed, and published on NYSDA's free-access website several updated resource materials for criminal defense lawyers who represent immigrants, as well as for immigrant advocates and immigrants themselves, regarding criminal/immigration issues. These resource materials include:

- *Immigration Consequences of Convictions Summary Checklist,* legal resource for immigrants and lawyers who represent immigrants in criminal or immigration proceedings, updated through Nov. 15, 2002.
- *Quick Reference Chart for Determining Key Immigration Consequences of Common New York Offenses*, updated through Feb. 1, 2003.
- *Aggravated Felony Practice Aids*, updated through Feb. 1, 2003
- *"Particularly Serious Crime" Bars on Asylum and Withholding of Removal*, updated through Feb. 1, 2003.
- *Removal Defense Checklist for Criminal Charge Cases,* legal resource for immigrants and lawyers who represent immigrants in removal proceedings, updated through Feb. 1, 2003.

To access or download these resource materials, visit www.nysda.org and click on Immigrant Defense Project Resources. ⚖

Resources Sighted, Cited, or Sited

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submissions by practitioners. Content can be browsed or searched by keyword. The categories include: Blood and Bodily Fluids, Coroners, DNA, Dog Scent, Fingerprinting, Firearms, Hair and Fibers, Handwriting, Risk Assessment, Statistical Evidence, and Toxicology. The site is maintained by the National Legal Aid and Defender Association. http://www.nlada.org/Defender/ forensics/for_lib?

☮ *FourthAmendment.com* is a blog, and supplement to John Wesley Hall, Jr.'s, Search and Seizure (3d ed. 2000) published by Lexis Law Publishing. The site includes regular posts about current developments in search and seizure law nationwide. There are also updated links for individual book chapters. http://www.wallywaller.com/4th/

☮ *Federal Probation Journal Archives* is a collection of past issues of the Federal Probation Journal, which is devoted to criminal justice and correctional issues. The archives extend from 1998-2001 and appear on the US Courts Library web site. http://www. uscourts.gov/fpcontents.html

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The following is a synopsis of recent case law of interest to the public defense community. The index headings appearing before each case are from the Association's Subject Matter Index. These case briefings are not exhaustive, nor are they designed to replace a careful reading of the full opinion.

Citations to the cases digested here can be obtained from the Backup Center as soon as they are published.

United States Supreme Court

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

Double Jeopardy (Jury Trials) **DBJ; 125(10)**

Sattazahn v Pennsylvania, No. 01-7574, 1/14/03, 537 US __

During the penalty phase of the petitioner's capital trial, the prosecutor presented one aggravating factor. A life sentence was imposed by the judge after the jury deadlocked. The conviction was reversed due to errors in the jury charge. Meanwhile, the petitioner pled guilty to murder and other violent felonies in an unrelated case. On retrial the prosecution filed a notice to seek the death penalty, adding the pleas entered after the first trial as a second aggravating factor. Imposition of a death sentence after the second trial was upheld on appeal.

Holding: A death sentence upon retrial, after a previously hung sentencing jury resulted in a life sentence, did not violate double jeopardy. *Richardson v US,* 468 US 317, 324 (1984). No findings of fact were made by the sentencing jury or judge; therefore, jeopardy did not attach. *Stroud v US,* 251 US 15 (1919). The petitioner's life sentence was not an "acquittal" based on the prosecution's failure to prove aggravating factors. *Arizona v Rumsey*, 467 US 203 (1984); *Bullington v Missouri,* 451 US 430 (1981). When evidence supported any aggravating factor, no acquittal occurred and jeopardy did not attach. *Poland v Arizona*, 476 US 147 (1986). Due process did not afford more protection against retrial than double jeopardy. Judgment affirmed.

Concurrence: [O'Connor, J] A jury deadlock was not an acquittal on the merits under *Bullington* and *Rumsey*.

Dissent: [Ginsburg, J] The trial judge's entry of a life sentence at the first proceeding was compelled by statute and involved no choice by the petitioner. It created a legal entitlement protected by double jeopardy. *US v Scott,* 437 US 82 (1978).

Conspiracy (Withdrawal) **CNS; 80 (35)**

United States v Recio, No. 01-1184, 1/21/03, 537 US __

The petitioner was arrested driving a truck filled with drugs. The vehicle had been intercepted earlier by government agents and then transferred to the petitioner, who was convicted of conspiracy to possess and distribute illegal drugs. On appeal, the court held that the evidence was insufficient to show that the petitioner joined the conspiracy before the truck had been seized. *US v Cruz*, 127 F3d 791, 795 (9th Cir 1997). The prosecution appealed, challenging the rule that "a conspiracy ends as a matter of law when the government frustrates its objective."

Holding: A conspiracy is "an agreement to commit an unlawful act" (*Iannelli v US,* 420 US 770, 777 [1975]) that poses a "threat to the public" beyond the underlying crime. *Callanan v US*, 364 US 587, 593-594 (1961). Where police have frustrated a conspiracy's specific objective but conspirators, unaware, have not abandoned the conspiracy or withdrawn, conspiracy-related dangers persist. The rule in *Cruz* is erroneous; "the Government 's defeat of the conspiracy's objective will not necessarily and automatically terminate the conspiracy." Judgment reversed.

Concurrence and Dissent: [Stevens, J] Objection to the *Cruz* rule was not properly preserved. "The prosecutor, like the defendant, should be required to turn square corners."

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

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

Miller-el v Cockrell, No. 01-7662, 2/25/03, 537 US __

Before *Batson v Kentucky,* 476 US 79 (1986) was decided, the petitioner raised a challenge based on the prosecutor's use of peremptory strikes to exclude 10 of 11 African-Americans from his jury. State and federal courts denied his equal protection and, later, *Batson* arguments. The petitioner's last federal habeas motion was denied, and the court refused to grant a certificate of appealability. It held that the state court's decision was reasonable, and found no clear and convincing evidence to the contrary.

Holding: A certificate of appealability (28 USC 2253[c][2]) should have been issued since the petitioner made "'a substantial showing of the denial of a constitutional right'." *Slack v McDaniel,* 529 US 473, 481 (2000). An analysis of the merits was inappropriate. "In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors" and there was other evidence as well. The petitioner met the threshold requirement for a certificate of appealability by showing that his *Batson* claim was "debatable amongst jurists of reason." The clear and convincing standard applies only to a state court's findings of fact, not its decision. 28 USC 2254(d)(2) and (e)(1). Success on the merits was not required. Judgment reversed.

US Supreme Court *continued*

Concurrence: [Scalia, J] The AEDPA standard referred to by the majority had no role in the certificate of appealability inquiry.

Dissent: [Thomas, J] The certificate of appealability determination should have been treated same as a merits appeal. 28 USC 2254(e)(1). The petitioner failed meet the clear and convincing evidence standard.

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

Clay v United States, No. 01-1500, 3/4/03, 537 US __

The petitioner did not file a petition for a writ of *certiorari* after an appeals court affirmed his federal conviction. The time allotted for filing for *certiorari* was 90 days after entry of the appeals court's judgment and 69 days after its mandate, filed within 21 days of judgment absent a petition for rehearing. One year and 69 days after the mandate and one year after time for seeking *certiorari* expired, the petitioner sought *habeas corpus* relief. Because it was filed more than one year following the mandate, the court dismissed the writ. *Gendron v United States*, 154 F3d 672, 674 (7th Cir 1998). This was affirmed on appeal.

Holding: Congress spelled out finality rules for *habeas corpus* under 28 USC 2244(d)(1), which governs petitions by state prisoners, but not for section 2255, used by federal prisoners. In determining when a conviction is "final" for purposes of the one-year deadline for filing a motion for a writ of *habeas corpus* under 2255, the starting date, if no petition for a writ of *certiorari* was filed, is when the time for filing such a petition expired. *See eg Caspari v Bohlen,* 510 US 383, 390 (1994). Judgment reversed.

Due Process (Miscellaneous Procedures) (Substantive Due Process) **DUP; 135(10) (40)**

Sex Offenses (General) **SEX; 350(4)**

Connecticut Department of Public Safety v Doe, No. 01-1231, 3/5/03, 538 US __

Connecticut's Sex Offender Registration Act (SORA), or Megan's Law, required persons convicted of sexual offense crimes to register with the Department of Public Safety (DPS) and the registry information to be posted on the Internet. Conn Gen Stat 54-257and 54-258. The respondent, a convicted sex offender, brought a class action against DPS under 42 USC 1983, claiming SORA violated due process because the web site registry labeled him a "dangerous sexual offender," depriving him of a liberty interest without notice or a meaningful opportunity to be heard. A permanent injunction was issued and affirmed.

Holding: Due process did not entitle a convicted sex offender to a hearing to determine current dangerousness before inclusion in a state web registry, since criteria for inclusion was conviction, not dangerousness. Whether or not the respondent's liberty interest or reputation was diminished by inclusion was irrelevant, since it did not concern a material fact under the statute—conviction. *Michael H v Gerald D,* 491 US 110, 120 (1989). Whether SORA violated substantive due process was not reached. Judgment reversed.

Concurrence: [Scalia, J] The statute was sufficient to abrogate the respondent's liberty interest without additional procedural due process, absent a claim that it violated a fundamental interest under substantive due process.

Concurrence: [Souter, J] SORA might be challenged under equal protection as to its method for granting discretionary relief from registration.

Concurrence: [Stevens, J] The respondent's liberty interest was affected by SORA, although the trial underlying the conviction provided sufficient procedural safeguards.

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

Sentencing (Excessiveness) (Persistent Felony Offender) **SEN; 345(33) (58)**

Lockyer v Andrade, No. 01-1127, 3/5/03, 538 US __

Convicted of two counts of petty theft, with a special finding of two prior serious felonies, the respondent was sentenced to two consecutive terms of 25 years to life under California's three strikes law. Cal Penal Code Ann 666. Cruel and unusual punishment challenges were rejected in state court. Denial of federal *habeas corpus* was reversed on appeal and the state's application of the 8th Amendment found to be unreasonable under AEDPA. 28 USC 2254(d)(1).

Holding: AEDPA does not require any one methodology, such as *de novo* review of a state court decision as being contrary to, or an unreasonable application of, clearly established federal law. *Weeks v Angelone,* 528 US 225 (2000). The correctness of the state court's decision need not be addressed here, only whether the respondent's 8th Amendment claim was foreclosed by AEDPA. *Eg Rummel v Estelle,* 445 US 263 (1980). 8th Amendment decisions "have not been a model of clarity." *See Harmelin v Michigan*, 501 US 957, 965 (1991). Application of the gross disproportionality principle to sentences is "clearly established," but no clear guidance existed for applying it. California's decision was not contrary to, or an unreasonable application of, this principle. *Williams v Taylor*, 529 US at 406. Judgment reversed

Dissent: [Souter, J] *Solem v Helm*, 463 US 277 (1983) was similar enough to these facts to warrant a finding of

US Supreme Court *continued*

disproportionality. Deference to policy did not justify allowing the doubling of a 25-year minimum for repeating a trivial offense.

Sentencing (Excessiveness) SEN; 345(33) (58)
(Persistent Felony Offender)

Ewing v California, No. 01-6978, 3/5/03, 538 US __

The petitioner was convicted of felony grand theft for stealing three golf clubs. He was sentenced under California's three strikes rule based on four prior serious or violent felonies. Requests to treat the felony charge as a misdemeanor or dismiss allegations of prior felony convictions were denied, and he was sentenced to 25 years to life. Cal Penal Code Ann 667(e)(2)(A). On appeal, the petitioner's disproportionality claim was rejected based on *Rummel v Estelle,* 445 US 263 (1980) and the rationale behind the three strikes law, *ie* deterring and incapacitating repeat offenders.

Holding: California's three strikes law did not violate the 8th Amendment. Judgment affirmed.

Concurrence: [O'Connor, J] Successful challenges to "the proportionality of particular sentences should be exceedingly rare." *Hutto v Davis,* 454 US 370 (1982). The three strikes law was justified by the state's public safety interest in reducing recidivism and deterring crime. The gravity of the offense was not grossly disproportionate to the harshness of the penalty. That the offense was potentially a wobbler (either a misdemeanor or felony) was irrelevant.

Concurrence: [Scalia, J] The 8th Amendment excludes certain *modes* of punishment and is not a guarantee against disproportionate sentences.

Concurrence: [Thomas, J] The 8th Amendment contains no proportionality principle.

Dissent: [Stevens, J] Proportionality review was required by the 8th Amendment.

Dissent: [Breyer, J] This three strike sentence was rare and grossly disproportionate.

Retroactivity (General) RTR; 329(10)

Sex Offenses (Sentencing) SEX; 350(25)

Smith v Doe, No. 01-729, 3/5/03, 538 US __

Alaska's Sex Offender Registration Act (SORA), or Megan's Law, includes a retroactive registration requirement (Alaska Stat 12.63.010[a] and [b]), maintained by the Department of Public Safety. The respondents were convicted of sex offenses and released from prison before SORA became law. They filed an action under 42 USC 1983 claiming SORA is punitive and violates *ex post facto* principles and due process. The court granted their motion, which was affirmed on appeal.

Holding: Retroactive registration of sex offenders is not violative of the *ex post facto* rule since its purpose—to promote public safety—is a civil, nonpunitive one. *Kansas v Hendricks*, 521 US 346, 361 (1997). The clearest proof is required to assess SORA's punitive effect. *Hudson v United States*, 522 US 93, 100 (1997). Protecting the public from sex offenders through registration is a nonpunitive purpose, and its effect does not transform it into a criminal penalty. *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963). The negative impact came from the conviction, not the registration. Constitutionality of the mandatory reporting requirement was not reached. Judgment reversed.

Concurrence: [Thomas, J] *Ex post facto* analysis is limited to obligations imposed by statute, not effects of implementation. *Hudson v United States*, 522 US 93, 100 (1997).

Concurrence: [Souter, J] Presumption of constitutionality of state laws tipped the balance between civil and punitive character.

Dissent: [Stevens, J] The respondent's liberty interest was affected by SORA. *Wisconsin v Constantineau*, 400 US 433 (1971). It violated the *ex post facto* rule.

Dissent: [Ginsburg, J] SORA's intrusive obligations and disregard of future dangerousness exceeded the scope of intended purpose.

Habeas Corpus (Federal) HAB; 182.5(15)

Woodford v Garceau, No. 01-1862, 3/25/03, 538 US __

The respondent was convicted of murder and sentenced to death. After exhausting his state appeals, he filed a motion in federal court for appointed counsel on his *habeas corpus* motion and a stay of execution, both of which were granted before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), April 24, 1996. His *habeas* motion was filed after that date and was denied on its merits, a decision reversed for other reasons on appeal.

Holding: While AEDPA does not apply to cases pending in federal court on or before its effective date (*Lindh* v *Murphy,* 521 US 320 [1997]), it applied here. A case is not "pending" until an application for habeas corpus relief is filed in federal court. Judgment reversed.

Concurrence: [O'Connor, J] Before and after AEDPA, 28 USC 2254 only concerned applications for *habeas corpus*, not related proceedings.

Dissenting: [Souter, J] The respondent's motions for counsel and stay of execution presented the merits of his claims to the court before AEDPA's effective date.

US Supreme Court *continued*

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

Defense Systems (Financing) **DFS; 104(45)**

Brown v Legal Foundation of Washington, No. 01-1325, 3/26/03, 538 US __

The petitioners, non-lawyers licensed to act as escrowees in real estate transactions, challenged the respondent's Interest on Lawyers' Trust Accounts (IOLTA) program, claiming that it violated the 1st Amendment by compelling association with recipient organizations, and violated the taking clause of the 5th Amendment. At trial and on appeal, it was held that no loss occurred.

Holding: Pooled interest from IOLTA accounts created no value for depositors and did not require compensation under the 5th Amendment, which authorized government taking of private property when the taking was for "public use" and "just compensation" was paid to the owner. *Chicago, B. & Q. R. Co.* v *Chicago,* 166 US 226, 239 (1897). Interest taken for the IOLTA program was a public use. Just compensation under the 5th Amendment was measured by the property owner's loss, not the government's gain. *Boston Chamber of Commerce* v *Boston*, 217 US 189, 195 (1910). The petitioners were required to deposit funds in non-IOLTA accounts when they could generate net earnings for their clients. Mistakes about whether a non-IOLTA account should be used might give rise to private, but not state, actions. The petitioners incurred no losses from distribution of interest on IOLTA accounts through the respondents. Judgment affirmed.

Dissent: [Scalia, J] The petitioners were entitled to the fair market value of their interest generated by IOLTA accounts. There was no basis for applying net value as opposed to market value to measure just compensation.

Dissent: [Kennedy, J] Because of the majority's decision, "one constitutional violation (the taking of property) likely will lead to another (compelled speech)."

New York State Court of Appeals

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

People v Rodriguez, 99 NY2d 570, 755 NYS2d 705 (2003)

The defendant's motion to suppress a police identification was denied without a hearing. After pleading guilty, the defendant appealed. The Appellate Division found any error harmless.

Holding: The harmless error rule did not apply to the defendant who pled guilty after the court mistakenly denied a hearing on a motion to suppress identification evidence. *People v Sampson*, 73 NY2d 908. Whether the police officer's identification was confirmatory was unresolved mandating that the case be returned to the county court for a hearing. Judgment modified.

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

Sentencing (Life Imprisonment Without Parole) **SEN; 345(47.3)**

People v Hansen, 99 NY2d 339, 756 NYS2d 122 (2003)

Convicted of non-capital murder, the defendant challenged the sentencing statute (CPL 400.27) as violating due process because it did not allow sentencing hearings for presenting mitigating evidence in non-capital murder cases. The defendant was sentenced to life without parole. On appeal, he again raised federal and state due process claims and added an equal protection claim for disparate treatment of capital and non-capital murder defendants.

Holding: Heightened due process in sentencing was not required outside the context of capital cases. *Harmelin v Michigan*, 501 US 957 (1991). Due process in non-capital cases applied only if a sentence was based on "materially untrue" facts or misinformation. *People v Naranjo*, 89 NY2d 1047, 1049. New York's sentencing law provided sufficient safeguards to meet due process mandates of accurate and reliable information at sentencing, and an opportunity to contest factual assertions. CPL 390.20; 380.50. Ample opportunity for objections or arguments was given to the defendant at the sentencing hearing and through defense counsel's pre-sentencing memorandum. Judgment affirmed.

Counsel (Conflict of Interest) **COU; 95(10)**

People v Abar, No. 8, 2/18/03

The defendant had been charged with felonies at several different times, and entered a plea agreement to cover all charges with a sentence of probation. Later he was violated on probation and resentenced to prison. He filed a CPL 440.10 motion claiming ineffectiveness of counsel based on his public defender's conflict of interest. The motion was denied. The Appellate Division affirmed.

Holding: A public defender who formerly prosecuted defendant was not proven ineffective. Conflict-based ineffective assistance of counsel claims have two elements: (1) potential conflict of interest and (2) proof that conduct of the defense was affected by operation of the conflict. *People v Ortiz*, 76 NY2d 652, 657. An inherent conflict exists when a defense attorney joins the prosecutor's office creating an appearance of impropriety and a chance for violating privilege. *People v Shinkle*, 51 NY2d 417, 420. However, no evidence showed that the public defender acquired information as a prosecutor that was detrimental

NY Court of Appeals *continued*

to the defendant. The record supports the finding below, *ie* that the public defender's conduct of this case and the absence of complaints by the defendant showed that any potential conflict did not operate on the defense. Judgment affirmed.

Dissent: [Smith, J] Inherent actual conflict was created by a former prosecutor later representing the defendant in the same case, requiring automatic reversal. The rule in *Shinkle* applied. *See* ABA Standards Relating to the Defense Function Standard 4-3.5(h); 22 NYCRR 1200.45; Judiciary Law 493.

Dismissal (In the Interest of Justice [*Clayton* Hearing]) **DSM; 113(20)**

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

People v Hawkins, No. 17, 02/18/03

The defendant was convicted by a jury of second-degree assault. At sentencing, the defendant's motion for a trial order of dismissal (CPL 290.10) was granted. The court set aside the verdict and entered judgment for a lesser-included offense, attempted assault, in the interest of justice. The defendant's waiver of his right to appeal was a condition of the reduction.

Holding: The defendant's waiver of his right to appeal was invalid since the trial court lacked interest of justice jurisdiction to set aside the verdict. *People v Carter*, 63 NY2d 530, 536. The waiver form was also erroneous since it said that the defendant pled guilty, when he had been convicted by a jury. The trial court had found the evidence of physical injury sufficient to support the verdict. The Appellate Division held the evidence sustained only the lesser-included offense and modified the judgment accordingly. Since the Appellate Division was empowered to modify the judgment based on insufficient evidence, their action was appropriate. CPL 470.15(2)(a); *People v Dlugash*, 41 NY2d 725, 737-738. Judgment affirmed.

Burglary (Degrees and Offenses) (Elements) (Evidence) **BUR; 65(10) (15) (20)**

Lesser and Included Offenses (Definition) (Instruction) **LOF; 240(5) (10)**

People v Barney, No. 14, 2/20/03

The defendant was charged with second-degree burglary for entering a house with the intention of removing drugs. Requests for instruction on the lesser-included offenses of third degree burglary or criminal trespass, and a motion to dismiss the charge due to insufficient evidence were denied. On appeal, the conviction was affirmed.

Holding: A house whose sole resident recently died still retained indicia of occupancy sufficient for the second-degree burglary statute, which required proof that the defendant entered a dwelling with the intent to commit a crime where factors increased the likelihood of physical injury. Penal Law 140.25(1). There was sufficient evidence at trial to show that the house was a dwelling "usually occupied by a person lodging therein at night." Penal Law 140.00(3). The test for lesser-included offenses is whether it was impossible to commit the greater crime without necessarily committing the lesser and whether a reasonable view of the evidence supported a finding that the defendant committed only the lesser. *People v Van Norstrand*, 85 NY2d 131, 135. The dwelling character of the house prohibited finding defendant guilty of a lesser charge. *People v Sheirod*, 124 AD2d 14. Judgment affirmed.

Identification (Show-ups) **IDE; 19(40)**

People v Brisco, No. 21, 2/25/03

Within one hour of a residential burglary, police conducted a showup with the defendant. The complainant described the suspect initially by age, height, hair color, build and clothing—dark red or maroon shorts. At the showup with the complainant, police asked the defendant to hold a pair of maroon shorts found in his residence. The defendant's motion to suppress and appeal were denied.

Holding: Asking the defendant to hold at a showup an article of clothing described by the complainant conducted shortly after the crime as part of an ongoing investigation was not unduly suggestive. Showups can be found reasonable despite the absence of exigent circumstances provided they occur in close geographic and temporal proximity to the crime. *People v Ortiz*, 90 NY2d 533, 537. Suggestiveness was a mixed question of law and fact, unsupported by the record below. Judgment affirmed.

Dissent: [Smith, J] Requiring the defendant to hold the maroon shorts was unduly suggestive. *People v Riley*, 70 NY2d 523, 528. This was not an immediate showup and a lineup should have been held. *People v Johnson*, 81 NY2d 828, 831.

Evidence (Business Records) (Privileges) **EVI; 155(15) (115)**

Subpoenas and Subpoenas Duces Tecum (General) **SUB; 365(7)**

Matter of Subpoena Duces Tecum to Jane Doe, Esq., No. 7, 2/25/03

During a Medicaid fraud investigation, the grand jury issued subpoenas for records concerning the management of nursing home facilities. A motion to quash claimed that

NY Court of Appeals *continued*

the records were created for quality assurance purposes and privileged. NY Public Health Law 2801; 42 USC 1396r. The motion was denied, since the records requested were required by state regulation and not created exclusively for quality assurance. The decision was affirmed on appeal and disclosure ordered.

Holding: Nursing home records created for quality assurance purposes were privileged, under federal law, and protected from state grand jury subpoenas. Documents reviewed by quality assurance committees but generated for regulatory purposes were not privileged, *ie*, infection control and incident/accident reports. Compilations, studies, or comparisons of clinical data from multiple records created by or at the request of the quality assurance committee were protected by federal privilege. Records concerning monthly skin condition and pressure sore reports, monthly weight reports and lists of facility-acquired infections were exempt from disclosure. "[W]e recommend that a party seeking to protect documents from disclosure compile a privilege log in order to aid the court in its assessment of a privilege claim and enable it to undertake *in camera* review. The log should specify the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege." *United States v Construction Products Research, Inc.*, 73 F3d 464, 473 (2nd Cir 1996). Judgment modified.

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

People v Smocum, No. 22, 2/25/03

During the defendant's jury trial, the prosecutor used peremptory challenges against one Hispanic and two African-American women panelists. In response to a *Batson* objection (*Batson v Kentucky*, 476 US 79, 94-98 [1986]), the prosecutor claimed that two of the challenged panelists had unsatisfactory involvements with the police and one had a son who had died. The defendant's claim was denied and his conviction affirmed.

Holding: Under *Batson*, three steps must be followed. Applying them in the wrong order or combining steps improperly undermines proper evaluation of equal protection claims. *Durant v Strack*, 151 FSupp2d 226, 236 (EDNY 2001). The trial court's short-circuited inquiry glided over step one (establishing a *prima facie* case of discrimination in use of peremptory challenges) and compressed steps two (responding with race-neutral reasons) and three (court inquiry into the basis for reasons and existence of pretexts). However, the prosecutor's stated reasons for excusing the first two panelists were clearly nonpretextual; the question of a *prima facie* showing of discrimination was moot once step two was entered. The error regarding the third juror was unpreserved. *Jordan v LeFevre*, 206 F3d 196, 201 (2nd Cir 2000). "Despite the sometimes enormous pressures of trial, it is for courts to discharge their responsibilities under the law and for counsel to voice objection when they do not. In particular, we underscore the importance both of trial court attention to each of Batson's well-articulated, sequential steps, and of trial counsel attention to placing their objections on the record so they may be addressed by the court." Judgment affirmed.

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

People v Sanchez, No. 26, 3/27/03

Holding: During deliberations, a juror informed a court officer that "she did not understand what was going on," and that "she didn't understand the lawyers and she didn't understand the judge." Before the court resolved the juror's concerns, the jury reached a verdict of guilty. Later, the court interviewed the juror to determine if she was "grossly unqualified" by asking her questions about her age, address, citizenship, previous convictions, and ability to understand and communicate in English. CPL 270.35. The court found her qualified under the standard of Judiciary Law 510, and the Appellate Division affirmed. The court's inquiries were insufficient. *People v Buford*, 69 NY2d 290, 299. The court's inquiry was misdirected, failing to investigate the meaning behind the juror's statements, and left the problem unresolved. Judgment reversed.

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

People v Rodriguez, No. 31, 3/27/03

After the verdict in the defendant's jury trial, it was revealed that one of the jurors had concealed his friendship with an assistant district attorney (ADA) not assigned to the case. The defendant moved to set aside the verdict. CPL 330.30. At the motion hearing, the juror testified that his relationship with the ADA was remote and his concealment was prompted by a desire to serve on a short case. Denial of the motion was affirmed on appeal.

Holding: The defendant's right to participate in *voir dire* and to be judged by a fair and impartial jury was not prejudiced by one juror hiding his acquaintanceship with a prosecutor in the office handling the case. Juror concealment during *voir dire* was not grounds for automatic reversal. The defendant's motion was based on setting aside the verdict for juror misconduct (CPL 330.30), not lack of qualifications. CPL 270.35. The former statute required proof of prejudice to a substantial right. *People v Irizarry*, 83 NY2d 557, 561. No prejudice was found based on the trial court's inquiry.

NY Court of Appeals *continued*

The prosecutor's remarks concerning the defendant's character were unwarranted, but harmless error. *People v Crimmins*, 36 NY2d 230, 241-242. Judgment affirmed.

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

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

People v Brown, No. 27, 4/1/03

Holding: The defendant was convicted of offenses including first-degree and second-degree criminal sale of a firearm. The defendant moved to set aside under CPL 330.30 the firearm sales counts because there was insufficient evidence that the requisite number of guns (20 or more) were sold. The motion was properly granted and affirmed on appeal. Evidence showed that the defendant had not sold more than five guns in a single transaction, although the aggregate that he allegedly sold was more than 15, and the total sold by coconspirators in a dozen other transactions was 31. No basis existed in either firearms statute for aggregating the number of guns sold. Penal Law 265.13; 265.12.

The defendant's announced intention to file pretrial motions in a separate case, although never fulfilled, was sufficient to exclude the adjournment time from speedy trial analysis. CPL 30.30(4)(a); *People v Collins*, 82 NY2d 177. Judgment affirmed.

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobile and Other Vehicles]) **SEA; 335(10[a])**

People v Shabazz, No. 34, 4/1/03

Police received radio calls with a description of a van with an identified license plate number occupied by a man involved in shots being fired. They found the defendant's vehicle and confirmed the description and license number. A gun was discovered during a search of the van. Charged with weapons possession, the defendant unsuccessfully moved to suppress the gun. The defendant appealed, raising for the first time the argument that the radio transmissions were insufficient to support the traffic stop or arrest, since the reliability of the information was never established.

Holding: A police officer's testimony about the content of the radio transmission was sufficient to justify the stop. *People v Dodt*, 61 NY2d 408 (1984). Its reliability was not challenged at the suppression hearing, thus the burden did not shift to the prosecution. *People v Jenkins*, 47 NY2d 722 (1979). Judgment affirmed.

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

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

People v Keizer, Nos. 38; 39, 4/8/03

Defendant Keizer was charged by misdemeanor complaint with petit larceny and possession of stolen property. An attached affidavit indicated a store security guard witnessed the theft. The defendant waived prosecution by information and pled guilty to disorderly conduct. The conviction was affirmed on appeal. Defendant Pittman was charged with misdemeanor drug possession. He pled guilty after his motion to dismiss, which claimed it was not possible to distinguish between facts based on the officer's own knowledge and those made on information and belief, was denied. His conviction was reversed on appeal and the complaint dismissed as jurisdictionally defective based on hearsay.

Holding: Jurisdiction in *Keizer* was established by filing a misdemeanor complaint along with the defendant's waiver of prosecution by information. CPL 100.10 (4). Criminal court jurisdiction in misdemeanor cases is not abrogated by accepting a plea to an offense not listed in the complaint or a lesser-included charge. CPL 220.10; *People v Johnson*, 89 NY2d 905, 907. No constitutional violation occurred, and any statutory claim of error was forfeited by the guilty plea. Hearsay defects in *Pittman*'s accusatory instrument were non-jurisdictional and unpreserved at the trial level. *People v Casey*, 95 NY2d 354. Moreover, the hearsay challenges did not survive the guilty plea. *People v Hansen*, 95 NY2d 227. Judgment in *Keizer* affirmed; judgment in *Pittman* reversed.

First Department

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

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

Matter of Feerick v Safir, 297 AD2d 212, 745 NYS2d 538 (1st Dept 2002)

The petitioners are among four police officers prosecuted for overly zealous efforts to recover a police radio believed to have been stolen. The police department denied their request in 2000 for release of internal investigative files on their cases under the Freedom of Information Law (FOIL). Public Officers Law, art. 6. An article 78 proceeding brought by the petitioners was dismissed on the merits.

Holding: All of the documents sought should be disclosed, as none fit any FOIL exemption. The criminal investigation and judicial proceedings concerning these petitioners' conduct has been concluded, so disclosure will not compromise a continuing investigative or judicial process. Disclosure would not amount to an unwarranted

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invasion of personal privacy because the petitioners have waived their privacy by bringing this proceeding. Civil Rights Law 50-a, on which the department relied, permits disclosure of an officer's personnel records where the officer gives "express written consent." A statutory intent to prevent disclosure of confidential records to third parties cannot be used to prevent the subject of such records from reviewing them. *See Matter of Mantica v NYS Dept. of Health,* 94 NY2d 58. Any efforts to refer the petitioners back to the District Attorney's Office would undermine the public purpose of FOIL. Order and judgment reversed. (Supreme Ct, New York Co [Stallman, J])

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

Juveniles (Custody) **JUV; 230(10)**

Matter of Brittni K., 297 AD2d 236, 746 NYS2d 290 (1st Dept 2002)

The court followed a court-appointed attorney-referee's recommendation, made after a hearing, and denied the custody petition of a family friend, Nilda, who had cared for the child in question. The child was ordered returned to her mother.

Holding: The hearing court was best able to evaluate witnesses' credibility. *Matter of White*, 118 AD2d 336, 342. Its determination will be set aside only if lacking a sound and substantial evidentiary basis. *See Corsell v Corsell*, 101 AD2d 766, 767. The record clearly supports the finding that Nilda failed to meet her burden of proving that the child's best interests would be served by remaining in her care. Nilda "repeatedly and consistently interfered with and thwarted" the child's relationship with its mother, raising a strong probability that Nilda is unfit to act as a custodial parent. *Matter of Gago v Acevedo*, 214 AD2d 565, 566 *lv den* 86 NY2d 706.

The child's law guardian lacked standing to assert Nilda's right to counsel (*see* CPLR 5511; *Levin v Yeshiva Univ.*, 96 NY2d 484, 496) and did not object below, failing to preserve the issue for review. *See* CPLR 5501(a)(3). Nilda's briefed issues cannot be reached as she failed to file a notice of appeal. *See* CPLR 5501[a]; *Hecht v City of New York*, 60 NY2d 57, 61. In any event, appointment of counsel to her was discretionary. *See* Family Court Act 262[b]. She failed to timely present required financial proof to determine eligibility and the court had reason to believe she had not been forthcoming about her income. Order affirmed, matter remanded solely for order implementing a gradual and efficient transfer of custody and providing for visitation. (Family Ct, New York Co [Sosa-Lintner, J])

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

Matter of Ricardo S., 297 AD2d 255, 746 NYS2d 707 (1st Dept 2002)

The court denied the juvenile defendant's motions to suppress a pre-arrest oral statement and a post-arrest written statement and found that the defendant had committed an act that would constitute burglary.

Holding: The court erroneously concluded that the police officer's questioning of the defendant in his home was not a custodial interrogation requiring *Miranda* warnings because the defendant was not placed under arrest prior to questioning. It was a custodial interrogation because a reasonable 15-year-old, confronted by three police officers conducting the type of questioning that occurred here, even if in the defendant's own home with his mother present, would not have felt free to leave or that the questioning was not custodial.

However, there is no basis to overturn the court's credibility findings that the defendant's later written statement was made in the police station after appropriate *Miranda* warnings had been given, that it was not part of a continuous chain of events, and that these statements were admissible. *See People v Chapple*, 38 NY2d 112, 115. The error in admitting the oral statements was harmless. *See People v Sanders*, 56 NY2d 51, 66. Order affirmed. (Family Ct, Bronx Co [Lynch, J])

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

People v Smith, 297 AD2d 495, 746 NYS2d 723 (1st Dept 2002)

Holding: A potential juror who acknowledged friendship with a police officer "expressed apprehension" about the defense objective of proving the police lied. When defense counsel explained that he planned to cast doubt on the prosecution witnesses and asked if the juror had a problem with that, the juror replied, "'A little bit.'" The court acknowledged when the defense sought to have the juror excused for cause that the juror had said "'he could or would be'" but then asked if the defense was using a peremptory challenge and denied the challenge for cause, to which counsel took an exception. Under these unusual circumstances, the question was sufficiently preserved, contrary to the prosecution's assertion that counsel needed to specifically object to the denial, explain why the juror should be excused, or ask for an expurgatory oath. Under Criminal Procedure Law 270.20(1)(b), the juror should have been required to expressly state that his verdict would not be influenced by his prior state of mind. *People v Hausman*, 285 AD2d 352 *lv den* 97 NY2d 656, 355. A juror should not be allowed to serve in the absence of an

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unequivocal assurance of impartiality. *People v Arnold*, 96 NY2d 358, 363. Courts should err on the side of excusing a prospective juror when there is any doubt about the juror's impartiality. Judgment reversed, new trial ordered. (Supreme Ct, New York Co [Cropper, J])

Prisoners (Conditions of Confinement) PRS I; 300(5) (25)
(Rights Generally)

People v Purley, NYS Dept. of Correctional Services, Non-Party Appellant, 297 AD2d 499, 747 NYS2d 10 (1st Dept 2002)

After accepting a negotiated plea agreement including a sentence of concurrent three-to-six years terms, the defendant told the court that his doctor had advised him that the sentence could cause his death, given his affliction with AIDS. A hearing was held, and the court denied the defense motion to modify the sentence agreement. A further hearing was held. In a supplemental order, the court set out conditions of the defendant's imprisonment, including placement (at least until a DOCS physician in consultation with a HIV specialist, determined otherwise) in a level 1 facility with a doctor and nurse on call 24 hours a day, lodging in a facility with an on-site HIV clinic and assignment to a single primary care physician, reports by DOCS to the court, and no change in the defendant's medical regimen without adequate information and an opportunity for the defendant to consult (at his own expense) with his own doctor.

Holding: The supplemental order being civil in nature, it was appealable, especially as absent an appeal, DOCS would have no way to vindicate its position. *People v Marin*, 86 AD2d 40, 42-43 *affd* 65 NY2d 741. It is DOCS' responsibility to choose inmates' facilities and to deal with inmates' health care. *See* 9 NYCRR 7600 *et seq*; Correction Law 23 and 71. A court's commitment of a defendant to a specified institution is deemed a commitment simply to DOCS. Correction Law 71(b). The motion court's decision to micromanage the conditions of this defendant's incarceration was improper. A statutory mechanism exists for the release of terminally ill prisoners. *See* Executive Law 259-4. Supplemental order reversed and vacated. (Supreme Ct, New York Co [Kahn, J])

Instructions to Jury (General) ISJ; 205(35) (50)
(Theories of Prosecution and/or Defense)

Robbery (Instructions) ROB; 330(25)

People v Padua, 297 AD2d 536, 747 NYS2d 205 (1st Dept 2002)

After a robbery by two perpetrators, an imitation pistol (BB gun) was recovered, but a second gun alleged to have been involved was not. Four counts were submitted to the jury: first-degree robbery (display of apparent firearm, Penal Law 160.15[4]); second-degree robbery (aided by another, Penal Law 160.10[1]); second-degree robbery reduced from first-degree upon proof of affirmative defense that gun was not loaded (Penal Law 160.15[4] and 160.10[2][b]); and attempted assault.

Holding: The jury sent a note asking for "'any evidence about whether or not the gun was loaded.'" Defense counsel asked that the court instruct the jury that the BB gun was not a firearm, but the prosecutor said the jury could be considering the unrecovered weapon. The court advised the jury that the request had to be clarified before it could be answered. Counsel took no exception, but after the jury was re-instructed on the elements of first-degree robbery and the affirmative defense, counsel renewed the request for instruction that the gun in evidence was not a "firearm." Where the jury did not identify which gun was the subject of their inquiry, it was within the court's discretion to ask for clarification. *See People v Malloy*, 55 NY2d 296, 302 *cert den* 459 US 847. Further, there was no evidence offered with respect to either gun to demonstrate that it was unloaded or inoperable. *People v Brown*, 108 AD2d 922, 23 *lv den* 64 NY2d 1131. Judgment affirmed. (Supreme Ct, Bronx Co [Hunter, J])

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

Search and Seizure SEA; 335(55)
("Poisoned Fruit" Doctrine)

People v Codina, 297 AD2d 539, 747 NYS2d 209 (1st Dept 2002)

The defendant faced multiple charges relating to operating a law firm to handle immigration matters without being admitted to the New York Bar and taking money without providing services to a client.

Holding: After several clients reported the defendant to the police, the Departmental Disciplinary Committee, and the state Attorney General (AG), the AG executed a search warrant and seized the defendant's office files on Mar. 20, 1998. On Feb. 4, 1999, the AG obtained a referral from the Superintendent of the State Police. The AG then presented evidence to a grand jury. Lacking a statutory referral at the time of the search, the AG could proceed only civilly, not criminally, against the defendant at that point. *People v Romero,* 91 NY2d 750. The seizure of the defendant's office records was thus *ultra vires*. The records should have been suppressed. *See Matter of B.T. Foods., Inc. v Barr*, 44 NY2d 226. The AG was authorized to obtain the indictments because by then there had been a statutory referral. The grand jury witnesses—former clients—whose names were ascertained from reviewing the seized

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files testified voluntarily, so their testimony was admissible. *People v Mendez*, 28 NY2d 94 *cert den* 404 US 911. The defendant's arguments that her sentence was excessive are persuasive, but need not be reached. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Visitacion-Lewis, J])

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

People v Casarino, 297 AD2d 543, 747 NYS2d 95 (1st Dept 2002)

Holding: The unpreserved claim of legal insufficiency regarding four counts of coercion is reviewed as a matter of discretion in the interest of justice. *See* CPL 470.15(3)(c). The evidence that the defendant repeatedly cursed gas station attendants, vowed no one else would be served, and then poured gasoline down a coin slot in the attendants' booth is more than sufficient to support an inference that the defendant intended to coerce the attendants. However, the attendants refused to comply with the defendant's demands and carried on business as usual with no visible trace of fear, a statutory requirement for coercion. *See* Penal Law 135.65(1). The evidence satisfies the elements of attempted first-degree coercion (*see* Penal Law 135.65[1] and 110.00), which is a lesser included offense of first-degree coercion. Judgment modified to reduce the four counts and remitted for resentencing. (Supreme Ct, New York Co [Bradley, J])

Juveniles (Delinquency—Procedural Law) (Detention) **JUV; 230(20) (35)**

Re Kenny U., 297 AD2d 573, 747 NYS2d 166 (1st Dept 2002)

Holding: The appellant's alleged waiver of his right to a timely fact-finding hearing (Family Court Act 340.1) was made on the assumption that the appellant's detention conditions would remain unchanged. As the presentment agency concedes, the waiver was therefore not knowing and voluntary. "As soon as the court indicated its intention to change the conditions of detention to require placement in a secure facility, the law guardian indicated that appellant would not, in that case, waive his rights." The appellant is entitled to have the petition dismissed. *See Matter of Frank C.*, 70 NY2d 408. (Family Ct, Bronx Co [Martinez-Perez, J])

Second Department

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

Matter of Kindra B., 296 AD2d 456, 745 NYS2d 74 (2nd Dept 2002)

When the petitioner-mother failed to appear at a fact-finding hearing, her attorney was granted permission to withdraw. The court made a finding of permanent neglect and immediately held a dispositional hearing at which it terminated parental rights. The petitioner arrived at the court two hours after the hearing was scheduled to begin and filed a *pro se* application with the clerk to "restore" the matter and to vacate the disposition, explaining that she was late because the bus she took from Georgia had problems in Virginia. The court denied her application on the grounds that the evidence against her was overwhelming, despite the petitioner's claim to have completed all programs required, and that she had not provided a reasonable excuse for being late.

Holding: The petitioner did not genuinely default. She had previously appeared in court on this matter and her counsel appeared at the hearing. It was improper for the court to permit her attorney to withdraw without giving her notice. *See Matter of Tierra C.*, 227 AD2d 994; CPLR 321(b)(2). In any event, the court erred in denying the petitioner's request to restore. The petitioner's explanation should not have been summarily rejected. Where the only witness was a caseworker who had been assigned to the case two weeks earlier, and given the importance of the rights at issue, the petitioner's assertion that she had completed all of the programs required of her warranted restoring the matter to the calendar. *See Matter of Vanessa M.*, 263 AD2d 542. Order reversed. (Family Ct, Richmond Co [Porzio, J])

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

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

People v Horton, 296 AD2d 466, 744 NYS2d 7 (2nd Dept 2002)

Holding: The defendant's contention that prosecutorial misconduct throughout the trial requires reversal is rejected. Any prosecutorial misconduct that may have occurred during the trial did not substantially prejudice the defendant's trial. *See People v Galloway*, 54 NY2d 396. The court failed to have the defendant produced for resentencing on his conviction of attempted first-degree rape after it determined that the original sentence was unlawful. As the prosecution correctly concedes, this violated the defendant's statutory right to be present when sentence is pronounced. *See* CPL 380.40; *People v Crossland*, 251 AD2d 509. Judgment affirmed, sentence vacated, matter remitted for resentencing. (Supreme Ct, Queens Co [Rosenzweig, J])

Discovery (General) **DSC; 110(12)**

Speedy Trial (Appeal Delay) (Cause for Delay) **SPX; 355(5)(12)**

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People v Garcia, 296 AD2d 509, 745 NYS2d 474 (2nd Dept 2002)

Holding: Police went to the defendant's apartment on Feb. 25, 1998 to execute a search warrant. He was arrested that day, and was indicted on June 30. On July 22, the court ordered open-file disclosure. On Dec. 10, the prosecution had not provided full discovery; the defense requested a copy of the search warrant and all supporting documents. The court ordered production of these by Jan. 25, 1999. A redacted copy of the search warrant was provided on Feb. 12, with no explanation for the delay. The court granted the defendant's motion to dismiss the indictment under CPL 30.30.

The prosecution's appellate arguments were not preserved for review (*see People v Foy*, 249 AD2d 217) and they will not be considered as an exercise of discretion in the interest of justice jurisdiction under these circumstances. *See People v Marshall*, 228 AD2d 15. Order affirmed. (Supreme Ct, Kings Co [Griffin, J])

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

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

Witnesses (Cross Examination) **WIT; 390(11)**

People v Taylor, 296 AD2d 512, 745 NYS2d 477 (2nd Dept 2002)

Holding: The court erred in allowing the prosecutor to repeatedly cross-examine the defendant about information contained in the notice of alibi, since the notice contained no statements made by the defendant and was merely a document prepared by counsel pursuant to statute. *See* CPL 250.20; *People v Nelu*, 157 AD2d 864. During cross-examination, the prosecution consistently disregarded sustained objections and continued its improper line of questioning. *See People v Stewart*, 92 AD2d 226. The challenged remarks made by the prosecution at summation were reversible error, though only some were properly preserved, because they exceeded the "'broad bounds of rhetorical comment permissible' (*People v Galloway*, 54 NY2d 396, 399)" in that they distorted the facts and were either inflammatory or speculative, or concerned matters not in evidence. *See People v Ashwal*, 39 NY2d 105. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Ruchelsman, J])

Evidence (Circumstantial Evidence) (Hearsay) **EVI; 155(25) (75)**

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

People v Boston, 296 AD2d 576, 746 NYS2d 28 (2nd Dept 2002)

The defendant was found guilty of arson and other charges for setting his girlfriend's kitchen on fire.

Holding: The prosecution presented testimony from four witnesses. Two fire marshals testified as expert witnesses that the fire was not accidental and did not start at the stove where the defendant claimed to have left oil cooking. The complainant's aunt also testified, over a hearsay objection, that the complainant, in a telephone call made upon discovery of the fire, told her the defendant started it. This was error, as it was undisputed that the complainant, who also testified, did not observe the defendant set the fire; her statement to her aunt that the defendant had set the fire did not qualify as an excited utterance. *See People v Caviness*, 38 NY2d 227, 232.

The prosecution's theory of the case was that the defendant's statement that he may have unintentionally caused the fire by leaving oil burning on the stove was untrue. They could not then rely on that same statement as direct evidence of guilt. *Cf People v Burke*, 62 NY2d 860. The remainder of the prosecution's case was entirely circumstantial, therefore the court erred in denying the defendant's request for a circumstantial evidence charge. Inadvertent submission of the defendant's criminal record was alleviated by a curative jury instruction by the court. *See People v Young*, 48 NY2d 995, 996. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [D'Emic, J])

Identification (In-court) (Sufficiency of Evidence) **IDE; 190(24)(45)**

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

People v Hargroves, 296 AD2d 581, 745 NYS2d 579 (2nd Dept 2002)

Holding: The complainant described his assailants as a "group of male blacks," one of whom was wearing an orange coat. This description did not give the police reasonable suspicion to stop and detain a group of young black males walking towards the crime scene (who did not flee when approached by the police), even if the jacket worn by one of them could be considered orange. The court should have granted the motion to suppress the identification testimony. *See People v Gethers*, 86 NY2d 159, 162. Under the present circumstances, including the complainant's failure to identify either the defendant or any of the codefendants, the indictment must be dismissed. *See People v Rossi*, 80 NY2d 952, 954. Judgment reversed, suppression granted, indictment dismissed. (Supreme Ct, Queens Co [Rotker, J])

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Juries and Jury Trials (General) (Qualifications) (Voir Dire) **JRY; 225(37) (50) (60)**

Matter of Yara v Levin, 296 AD2d 576, 745 NYS2d 727 (2nd Dept 2002)

Holding: The petitioner was a defendant in a first-degree murder criminal action. He moved under Judiciary Law 509 for the court to direct the New York State Office of Court Administration and the Commissioner of Jurors of Kings County to disclose to the petitioner's counsel all juror qualification questionnaires. He also sought "a record of persons who were found not qualified or disqualified or who were exempted or excused, and the reasons why, or, in the alternative," for these materials to be provided, sealed, to the court for appellate review. These requests are denied. *See Matter of Hale*, 239 AD2d 500; *see gen Matter of Newsday, Inc. v Sise*, 120 AD2d 8 *affd* 71 NY2d 146 *cert den* 486 US 1056. Petition denied, proceeding dismissed.

News Media (General) **NEW; 269 (10)**

Trial (Prejudicial Publicity) **TRI; 375 (40)**

Matter of Barron v Colabella, 296 AD2d 585, 745 NYS2d 729 (2nd Dept 2002)

In a Feb. 14, 2002 order, the court declared unconstitutional Civil Rights Law 52, which precludes broadcasting of court proceedings. An application to photograph, televise, and broadcast the criminal proceedings concerning the prosecution of the present petitioner, a Justice of the Supreme Court charged with one count of bribe receiving, was granted. In this action, the petitioner sought either a writ of prohibition barring the court from enforcing the order, or a writ of mandamus compelling the court to comply with Civil Rights Law 52. Alternatively, the petitioner applied under CPLR 103(c) to convert the proceeding to an action for a judgment declaring Civil Rights Law 52 constitutional. The petitioner further moved to stay enforcement of the order granting permission to televise, photograph, and broadcast the proceedings pending the determination of his challenge.

Holding: The proceeding is time-barred by the four-month statute of limitations set forth in CPLR 217. *See Matter of Holtzman v Marrus*, 74 NY2d 865. Based on the record, the proceeding will not be converted to an action for a judgment declaring Civil Rights Law 52 constitutional. Proceeding dismissed. Motion for stay denied as academic.

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

People v Mendez, 297 AD2d 291, 746 NYS2d 171 (2nd Dept 2002)

Holding: A determination of competency to stand trial is given great deference. *See People v Martin*, 291 AD2d 459 *lv den* 98 NY2d 653. The hearing court's determination that the defendant was competent, based on the uncontroverted testimony of three experts, satisfied the burden of demonstrating fitness by a preponderance of the evidence. *See People v Cox*, 196 AD2d 596. Notably, after the court's determination defense counsel never indicated that the defendant could not understand the nature of the proceedings or assist in her defense. *See People v Tortorici*, 92 NY2d 757, 767 *cert den* 528 US 834. Judgment affirmed. (County Ct, Westchester Co [Mulroy, J])

Dissent: (Goldstein, J) The test is whether the defendant has a present ability to consult with counsel with a reasonable degree of rational as well as functional understanding. *See Dusky v United States*, 362 US 402. This is a judicial, not medical, determination. One expert found the defendant had "'a minimal degree of understanding'" of the roles of those in the judicial proceedings. One found the defendant had the "intellectual skills" to know the charges, who her attorney was, and the objective to be found not guilty, making her competent even though she showed lapses of memory not only of past events but of events unfolding at the moment; he acknowledged she might "miss a whole chunk" of trial. One, who had examined the defendant only briefly, was '"not necessarily' interested" in her pre-existing psychiatric disorder. It is undisputed that the defendant suffered from multiple personalities, and testimony indicated that she would effectively black out when switching personalities. This would prevent her from having a rational understanding of the proceedings and make her unable to capably assist in her defense.

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

People v Robinson, 297 AD2d 296, 746 NYS2d 31 (2nd Dept 2002)

The defendant was convicted of possessing weapons and drugs based on the testimony of three accomplices. They said that the defendant was the leader of a drug organization, that he would supply them drugs to sell and collect the proceeds, and that he stored guns in apartment 2G and drugs in apartment 6H of the building he operated out of. One of the accomplices testified that the defendant assaulted him because the defendant suspected that the accomplice had stolen drugs and money.

Holding: It was proper to convict the defendant of possession of drugs. The accomplice testimony regarding that charge was properly corroborated as required by CPL 60.22(1), which says that "A defendant may not be convicted of any offense upon the testimony of an accomplice

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unsupported by corroborative evidence tending to connect the defendant to the crime charged." *See People v Besser*, 96 NY2d 136, 143-144. The portion of the accomplice's testimony concerning the defendant's assault on him is deemed "non-accomplice" testimony and tends to connect the defendant to the drug charge. However, there is no non-accomplice testimony linking the defendant to apartment 2G. Therefore, the accomplice testimony concerning the weapons charge is uncorroborated. Judgment modified, conviction for possession of a weapon is vacated and those counts dismissed. (Supreme Ct, Queens Co [Buchter, J])

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

People v Lawrence, 297 AD2d 290, 745 NYS2d 918 (2nd Dept 2002)

The defendant was convicted of criminal contempt, criminal mischief, and assault. He was sentenced to an indeterminate term of $1^1/_3$ to 4 years for contempt and to definite terms of one year for the other convictions, all to run consecutively.

Holding: The two one-year terms should run concurrently with the indeterminate sentence. Service of the indeterminate sentence satisfies the definite sentences since the criminal mischief and assault offenses were committed prior to imposition of the sentence for contempt. *See* Penal Law 70.35; *People v Leabo*, 84 NY2d 952.

Evidence of prior violent incidents involving the complainant and the defendant were properly admitted as evidence of motive and intent, and as relevant background material to enable the jury to understand the defendant's relationship with the complainant and explain the issuance of an order of protection. *See People v Alvino*, 71 NY2d 233. The court's limiting instruction caused the probative value of this evidence to outweigh its prejudicial effect. *See People v Foy*, 176 AD2d 893. Judgment modified and as modified, affirmed. (Supreme Ct, Kings Co [Rivera, J])

Insanity (Civil Commitment) (General) ISY; 200(3) (27)

Mental Hygiene Legal Services ex rel Christine D. v Bennett, 297 AD2d 308, 746 NYS2d 308 (2nd Dept 2002)

A court authorized the Hudson River Psychiatric Center, a non-secure center, to administer medication to the plaintiff over her objection. She was transferred to Mid-Hudson Forensic Psychiatric Center, a secure center and again refused medication. The plaintiff filed this declaratory judgment action claiming that forced medication at Mid-Hudson violated her statutory, common-law, and constitutional rights. The order granted to Hudson was found to extend to Mid-Hudson due to its status as a secure facility, functioning as a "temporary auxiliary to, or extension of" Hudson, and the complaint was dismissed. Before the plaintiff's appeal could be heard, she was transferred back to Hudson.

Holding: The mootness doctrine does not preclude review because substantial and novel legal issues are presented that are likely to be repeated and will typically evade review. *See Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715. Where the plaintiff was transferred to Mid-Hudson pursuant to part 57 of the Commissioner's regulations (*see* 14 NYCRR 527.8[c][4]), Mid-Hudson was not required to re-evaluate the existing court authorization, which had not expired. An unchallenged judicial determination pursuant to *Rivers v Katz* (67 NY2d 485) existed which found that the plaintiff lacked the capacity to decide for herself whether to take the medication. Judgment modified, declaration that the order does not violate the plaintiff's statutory, common-law, or constitutional rights to be attached to the order authorizing the involuntary medication of the plaintiff. (Supreme Ct, Orange Co [Slobod, J])

Discovery (*Brady* Material and Exculpatory Information) (Prior Statements of Witness) DSC; 110(7) (26)

People v Rosas, 297 AD2d 390, 746 NYS2d 610 (2nd Dept 2002)

Holding: The court erred in denying the defendant's post-verdict motion to set aside his conviction based on violations of *People v Rosario* (9 NY2d 286 *cert den* 368 US 866) and *Brady v Maryland* (373 US 83). Pretrial statements made by the decedent's son in a memorandum to the district attorney fall within the *Rosario* requirement that the prosecution turn over any pretrial statements by a prosecution witness concerning the subject matter of the witness's testimony. "The statements may directly relate to the declarant's identification of the defendant, and the prosecutor's failure to disclose the statements reasonably could have affected the verdict (*see* CPL 240.75; *People v Sorbello*, 285 AD2d 88, *lv denied* 97 NY2d 658)." Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Eng, J])

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

Misconduct (Prosecution) MIS; 250(15)

People v Bhupsingh, 297 AD2d 386, 746 NYS2d 490 (2nd Dept 2002)

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The prosecutor objected to defense counsel's peremptory challenges of male prospective jurors as gender based. Counsel's stated reason for the challenge to juror number seven was that the juror had many police friends with whom he often socialized and discussed their aspirations for advancement in their careers in law enforcement.

Holding: The court erred by seating the juror on the basis that the proffered reason was "not sufficient to be gender-neutral." The explanation was not pretextual on its face, and counsel's reasons were related to the case and based on facts elicited during *voir dire*. *See People v Wilson*, 224 AD2d 725, 726. It was disingenuous of the prosecutor to oppose a defense objection to a prosecutorial peremptory challenge where the challenged juror had a bad experience with police by noting that police testimony would be important, then claim that defense reliance on a bias favoring police was pretextual.

Other prosecutorial misconduct was also noted. One example was cross-examination of the defendant about collateral, prejudicial matters, such as his family members' reasons for attending trial and the content of conversations the defendant may have had with them after his arrest. *See People v Sandy*, 115 AD2d 27, 32. Others included sarcastic remarks to the defendant about his testimony, suggestions that the defendant's wife did not believe his denial of guilt, continuous leading questions of prosecution witnesses, improper use of evidence of prior consistent statements by the complainant, and appeals to the sympathy of the jury. *See People v Andre*, 185 AD2d 276, 278. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosengarten, J])

Defenses (Justification) **DEF; 105(37)**

Instructions to Jury (General) (Theories of Prosecution and/or Defense) **ISJ; 205(35) (50)**

People v Bradley, 297 AD2d 640, 747 NYS2d 48 (2nd Dept 2002)

The defendant was convicted of assault.

Holding: The complainant's injuries included a fracture to his left orbital bone, which surrounds the eye. Claiming that any physical force used against the complainant was in defense against the complainant's unjustified threatened use of a handsaw, the defendant asserted a justification defense and requested a jury charge concerning the use of ordinary physical force. *See* 1 CJI [NY] PL 35.15(1), at 858-863. The court granted the charge but, due to the severity of the complainant's injury, the court also charged the jury that if it found the complainant had suffered serious physical injury, it was required to consider whether deadly physical force was justified. *See* 1 CJI [NY] PL 35.15(2)(a), at 867-873. This was error. The focus should have been on the nature of the risk created, 'not [on] the consequence of [the] conduct'." *See People v Magliato*, 68 NY2d 24, 29. There was no evidence that the defendant used deadly physical force; imposing an duty to retreat on the defendant through issuing the deadly physical force charge was unwarranted. The evidence against the defendant was not overwhelming. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rosengarten, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Scope]) **SEA; 335(10[m])**

People v Jennings, 297 AD2d 644, 747 NYS2d 235 (2nd Dept 2002)

Holding: The court properly granted the defendant's motion to suppress physical evidence and his statements as being obtained from an unlawful search. Strip searches of persons arrested for misdemeanors or other minor offenses violate the 4th Amendment absent reasonable suspicion, based on the charge, the particular characteristics of the arrestee, or the circumstances of the arrest, that an arrestee is hiding weapons or contraband. *See Walsh v Franco*, 849 F2d 66 (2nd Cir 1988). At no time did the police claim that the strip search here was anything other than part of the investigation of a bag of marijuana recovered from a vehicle during a routine traffic stop. The defendant, who was a passenger, along with the other occupants of the vehicle were patted down, handcuffed, and taken to the sheriff's department, where the strip search occurred. There was no indication that the officers suspected the defendant was concealing weapons or contraband. Order affirmed. (County Ct, Rockland Co [Resnik, J])

Double Jeopardy (General) (Punishment) **DBJ; 125(7) (30)**

People v Campanella, 297 AD2d 642, 746 NYS2d 905 (2nd Dept 2002)

Holding: The prosecution correctly concedes that the defendant established a legitimate expectation in the finality of his original maximum sentence under the circumstances of this case, so that an increase in that maximum term upon resentencing violated the prohibition against double jeopardy. *See Stewart v Scully*, 925 F2d 58, 62-65. The illegality in the original sentence should have been corrected by reducing the minimum term to one-third of the maximum. Order reversed, resentence vacated, matter remitted. (Supreme Ct, Kings Co [Firetog, J])

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

Sentencing (Mandatory Surcharge) (Restitution) **SEN; 345(48) (71)**

People v Rawdon, 296 AD2d 599, 744 NYS2d 573 (3rd Dept 2002)

Holding: The defendant pled guilty and was sentenced to a determinate prison term of six years, one year longer that the maximum recommended by the prosecution as part of the plea bargain; restitution and surcharges were also imposed. The record is clear that the defendant was advised of the court's sentencing prerogatives and that the court made no sentencing promise as part of the plea. Failure of the court to advise the defendant about the postrelease supervision component of the sentence does not alone provide a basis for modifying the sentence. *People v Housman*, 291 AD2d 665, 667 *lv den* 98 NW2d 638. This defendant does not seek to withdraw his plea, but only to have the period of postrelease supervision vacated or reduced. This would be illegal under Penal Law 70.45. The court did err in imposing a collection surcharge of 10% of the ordered restitution, as no affidavit was filed indicating that actual cost of collection would exceed 5%; the surcharge amount must be reduced accordingly. *See People v Arquette*, 281 AD2d 652. Judgment modified, and as modified, affirmed. (County Ct, Franklin Co [Main, Jr., J])

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

People v Jaworski, 296 AD2d 597, 744 NYS2d 575 (3rd Dept 2002)

Holding: The defendant's factual recitation regarding the events underlying the charges did not cast significant doubt on his guilt, and his claim that the court should have inquired whether he was waiving the defense of intoxication is in any event not preserved for review. He should have been advised that his determinate prison sentence of five years would be followed by five years of postrelease supervision. "That omission requires that defendant be permitted to withdraw his plea." *People v Goss*, 286 AD2d 180, 184. While this issue is unpreserved, as a matter of discretion in the interest of justice the sentence is vacated to afford the defendant the opportunity to withdraw his plea. *See People v Jachimowicz*, 292 AD2d 688. Judgment modified and as modified, affirmed. (County Ct, Ulster Co [Bruhn, J])

Evidence (General) **EVI; 155(60)**

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

People v Mosley, 296 AD2d 595, 744 NYS2d 577 (3rd Dept 2002)

Holding: The defense failed to raise below a claim that the prosecution improperly bolstered key identification evidence in its case in chief. Identification of the defendant was the central issue at trial, and the issue is reached—directly rather than within a constitutional ineffective assistance of counsel argument—in the interest of justice and judicial economy. There are no assertions that the defense opened the door to testimony about a pretrial out-of-court photographic identification of the defendant. Except in rare instances, such evidence is prohibited. *See eg People v Lindsay*, 42 NY2d 9, 12. The prosecution's claim that such evidence is permitted as "confirmatory" under *People v Wharton* (74 NY2d 921) is rejected. No precedent or cogent argument leads to the conclusion that there should be a buy-and-bust exception to the longstanding prohibition against pretrial photographic identification evidence. The cumulative effect of allowing the two police officers who provided the only identification evidence at trial to improperly bolster their testimony cannot be found harmless, especially where the defendant, who was not arrested near the time of the crime, provided alibi evidence. *See People v Polenca*, 204 AD2d 911. The significant potential for prejudice also justified review despite the absence of objection. *Cf People v Faison*, 126 AD2d 739, 739-740. Judgment reversed, remitted for new trial. (County Ct, Columbia Co [Czajka, J])

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

Sentencing (Appellate Review) (Excessiveness) **SEN; 345(8) (33)**

People v Young, 296 AD2d 588, 746 NYS2d 195 (3rd Dept 2002)

Holding: The defendant's convictions followed a jury trial, not a plea. This precluded a claim that a superceding indictment should have been sought after DNA testing disproved the theory presented to the grand jury that the defendant left a trail of blood from the scene. *See People v Bryant*, 234 AD2d 605 *lv den* 89 NY2d 1032. The defendant failed to timely object to the court's failure to present the attempted murder and reckless endangerment charges in the alternative. His claim that he was denied the right to confront witnesses by admission of his accomplice's statements fails. The accomplice was clearly unavailable to testify and had made the self-inculpatory statements in a non-coercive atmosphere with no apparent motive to falsify, providing sufficient indicia of reliability. *See People v Sanders*, 56 NY2d 51, 64. The defendant raised only constitutional, not common-law hearsay, claims about the statements, making *People v Brensic* (70 NY2d 9, 14) inapplicable. There is no *per se* rule requiring redaction of a coperpetrator's name in every statement. *People v James*, 93 NY2d 620, 637-638.

The 33-year-old defendant's attempt to kill pursuing police officers after robbing two citizens and his signifi-

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cant criminal history do not justify a minimum aggregate sentence of 57½ years, the equivalent of life imprisonment without parole. The two terms of 25 years to life for attempted first-degree murder should run concurrently, making the aggregate minimum sentence 32½ years. *People v Delgado*, 80 NY2d 780. Judgment modified, and as modified, affirmed. (County Ct, Albany Co [Breslin, J])

Concurrence in Part, Dissent in Part: [Cardona, PJ]) The sentence should be affirmed.

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

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

People v Harler, 296 AD2d 712, 744 NYS2d 916 (3rd Dept 2002)

Holding: The defendant was convicted of second-degree assault after a nonjury trial. The prosecution recommended a determinate sentence of 3½ years but the court sentenced the defendant (as a second felony offender) to a determinate 3 years. The defendant claims the court's failure to advise him of a mandatory five-year period of postrelease supervision invalidates the waivers leading to the nonjury trial. Failure to so advise a defendant who pleads guilty does require that the defendant be given an opportunity to withdraw the plea. *See People v Jawarski*, 296 AD2d 597. Here, the record shows that a negotiated agreement was reached under which the defendant would waive indictment, be prosecuted under a superior court information, and be tried without a jury on stipulated facts with the expectation that he would be convicted and sentenced to no more that a four-year determinate prison sentence. (A separate, pending rape charge was also dismissed as part of the agreement.) The use of bench trials on stipulated facts has been upheld. *See People v Boateng*, 246 AD2d 749, 750 *lv den* 91 NY2d 970. The arrangement here was clearly the equivalent of a guilty plea. As in other cases, the unpreserved error is reviewed in the interest of justice and corrective action taken. *See* CPL 470.15(3)(c); *People v Jachimowicz*, 292 AD2d 688. Judgment reversed, matter remitted. (County Ct, Chemung Co [Buckley, J])

Aliens (Deportation) (General) **ALE; 21(10) (30)**

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

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

People v McDonald, 296 AD2d 13, 745 NYS2d 276 (3rd Dept 2002)

The defendant, a citizen of Jamaica, was charged in 1999 with marijuana sale and possession. After a motion to suppress was denied, he pled guilty and was sentenced according to the agreement. The next day he was served with a notice of deportation.

Holding: The court's failure to advise the defendant of the possibility of deportation, a collateral rather than direct consequence of the plea, did not affect the plea's voluntariness. The statute requiring the court to advise of the possibility of deportation expressly provides that failure to do so shall not affect the validity of the conviction. CPL 220.50(7). This does not apply to the defendant's claim, candidly admitted by trial counsel, that counsel misadvised the defendant that he would not be deported because of his long residence (over 20 years) in the US and the fact that his three children, all US citizens, live here. This distinctive effective assistance of counsel issue was expressly left open in *People v Ford* (86 NY2d 397, 405). No published New York decision addressing a comparable claim has been found; the defendant cites one unpublished case, *People v Ahmed* (Sup Ct, Queens Co [6/1/01]), that required a hearing on misadvice concerning immigration consequences of a plea. Because counsel's misadvice was not placed on the record and the issue was not raised during the plea or sentencing, the defendant has failed to make a sufficient showing of prejudice to warrant vacatur or a hearing. *See People v Ramos*, 63 NY2d 640, 643. Counsel's affidavit in support of the CPL 440.10 motion averred that the defendant "'relied on'" the misadvice and had "'maintained his innocence,'" but did not allege that had correct advice been given, there is a reasonable probability that the defendant would have gone to trial. The defendant submitted no affidavit containing these basic allegations that would entitle him to a hearing. *See Hill v Lockhart*, 731 F2d 568 *affd* 474 US 52. There is no indication on the record of how the defendant might have been able to avoid conviction. Judgment and order affirmed. (County Ct, Tompkins Co [Barrett, J])

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

Prisoners (General) **PRS I; 300(17)**

People v McCrae, 297 AD2d 878, 747 NYS2d 399 (3rd Dept 2002)

Holding: The defendant was found with marijuana in a state prison and was charged with, *inter alia*, first-degree promoting prison contraband. The statute provides in pertinent part that this offense is committed when a prisoner knowingly and unlawfully possesses "'any dangerous contraband." Penal Law 205.25 (2). The defendant argues that marijuana is not "dangerous contraband" within Penal Law 205.00(4), which includes any item capable of endangering the safety or security of a facility or a person therein. Use of illegal drugs can result in "'disruptive and dangerous behavior'" among prisoners. *People v Watson*, 162 AD2d 1015 *app dismd* 77 NY2d 857. The defendant's

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reliance on *People v Soto* (77 Misc2d 427) is misplaced. Judgment affirmed. (County Ct, Clinton Co [Ryan, J])

Speedy Trial (Burden of Proof) (Cause for Delay) (Due Process) **SPX; 355(10) (12) (25)**

People v Rivera, 298 AD2d 612, 747 NYS2d 854 (3rd Dept 2002)

Holding: About 14 months passed from the time of the defendant's offense of first-degree promoting prison contraband until his arraignment after indictment. The court having summarily rejected a due process claim, the matter was remitted upon appeal to give the prosecution an opportunity to oppose the defendant's claim and to hold a hearing if needed. County Court found "there was protracted delay and that the prosecution did not meet its burden of establishing good cause for that delay." Applying the principles of *People v Taranovich* (37 NY2d 442, 444-445), the length of the delay is determined to be about 14 months. The Department of Correctional Services (DOCS) did not report the case for about six months, but "any delay occasioned by one coordinate arm of law enforcement is chargeable to both." While good and sufficient reasons were shown for the eight-month delay from the time DOCS referred the case until the arraignment, "the record is totally devoid of any explanation for the delay of approximately six months" in reporting the offense. This did not constitute a denial of due process under the circumstances of this case. *See eg People v Cooper*, 258 AD2d 815 *lv den* 93 NY2d 1013. The charge was based on routine illegal possession of drugs, the defendant was incarcerated on other charges, and there is no showing that the delay impaired the defendant's defense. Judgment affirmed. (County Ct, Franklin Co [Main, Jr., J])

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

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

People v Skinner, 298 AD2d 625, 747 NYS2d 857 (3rd Dept 2002)

Holding: The introduction of an autopsy photograph showing the deceased infant's exposed skull was not error where the photograph revealed three distinct areas of bruising, tending to disprove the defendant's claim that he fell while carrying the child. The prosecutor's unobjected-to, improper remarks during summation warrant reversal after review in the interest of justice. At least a dozen direct references to the defendant being a liar, other references to a "'false' and/or 'tailored story,'" and denigration of the defense expert as a "puppeteer with defendant as his puppet" constituted flagrant, pervasive misconduct compelling the conclusion that the defendant was denied a fair trial. *See People v Walters*, 251 AD2d 433, 434. Admission of a single prior incident of the defendant allegedly improperly disciplining his five-year-old stepdaughter was highly prejudicial, and not so probative as to allow its admission under any *Molineux* exception. *See People v Williams*, 212 AD2d 957, 958 *lv den* 85 NY2d 982. The prosecutor improperly argued that the prior incident showed the defendant's violent propensities. Judgment reversed, remitted for new trial. (County Ct, Schenectady Co [Austin, J])

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

People v Abdullah, 298 AD2d 623, 748 NYS2d 419 (3rd Dept 2002)

The defendant pled guilty to attempted second-degree murder, three counts of first-degree robbery, two counts of third-degree possession of a weapon, and first-degree use of a firearm. He received concurrent sentences of 10 years for the robbery and murder convictions and three years for the weapons possession, and a consecutive term of five years for the use of a firearm.

Holding: The prosecution concedes that the consecutive sentence was improper. The statutory provision allowing an additional, consecutive term for use of a firearm to be added to an indeterminate sentence for a class B violent felony (Penal Law 265.09[2]) does not apply here. The defendant was sentenced as a second violent felony offender to a determinate sentence. *See* Penal Law 70.04. All the crimes arose from the same transaction, so the sentences must be concurrent. Penal Law 70.25(2). Judgment modified, matter remitted for resentencing. (County Ct, Broome Co [Mathews, J])

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

Instructions to Jury (Cautionary Instructions) **ISJ; 205(25)**

People v Chaney, 298 AD2d 617, 748 NYS2d 182 (3rd Dept 2002)

Police observed the defendant make a controlled drug sale to a confidential informant, for which he was not charged. He was later stopped while driving a car, found to have no valid driver's license, and arrested for aggravated unlicensed operation of a vehicle. At arrest, he had a key to a dwelling where he and his companions allegedly lived. A search of those premises pursuant to a warrant revealed crack cocaine and money.

Holding: Of the many arguments raised on appeal, one has merit. The court ruled after a *Ventimiglia* hearing that the prosecution could introduce at trial evidence of the defendant's uncharged sale. The court's analysis stopped at the first part of the required analysis set out in *People v Alvino*, 71 NY2d 233, 242. The court determined

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that the uncharged sale was, as a matter of law, not automatically barred under the general rule proscribing bad-act evidence. The record reveals no discretionary balancing of the prejudicial effect of and need for the evidence. Given the other evidence available—the testimony of surveillance officers and of one of the defendant's companions, the quantity and packaging of the drugs in the closet (16 baggies with 10 pieces of crack in each) and the money found there—there was no need to admit the uncharged sale. Doing so was highly prejudicial to the defendant's right to a fair trial. The limiting instructions given to the jury did not overcome the natural tendency to find guilt based on an apparent propensity to commit such crimes. *See People v Allweiss*, 48 NY2d 40, 46. Judgment reversed, remitted for new trial. (Supreme Ct, Albany Co [Lamont, J])

Evidence (Prejudicial) **EVI; 155(106)**

People v Dobere, Jr., 298 AD2d 770, 749 NYS2d 114 (3rd Dept 2002)

During surveillance of an alleged open-air marijuana enterprise, police observed activity apparently relating to drug sales. The defendant was seen in the immediate vicinity talking with various people and sitting close to one juvenile who was packaging a green leafy substance from a car trunk. The defendant then got into the driver's seat of the car. Others, including the individual that police had decided to arrest after another individual with whom he engaged in an apparent transaction was searched off-site and found to have marijuana, also got in the car. The defendant was convicted of second-degree possession of marijuana based on what was found in the car's trunk.

Holding: The defendant raised several issues, only one of which has merit. A police detective testified over objection about street level packaging and distribution of marijuana. The defendant was charged not with sale or possession with intent to sell, but only with possession. There is no showing that the detective's testimony was needed to fill a void in the evidence, or to render more understandable some otherwise incomprehensible testimony. *People v Alfonso*, 194 AD2d 358, 359. The testimony served no purpose other than to shift the jury's attention to the drug trade in general. *See People v Soto*, 172 AD2d 355. While the court eventually curtailed the testimony, it did not strike what had been admitted or provide curative instructions. Judgment reversed, remitted for a new trial. (County Ct, Albany Co [Ryan, J])

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

People v Elliott, 299 AD2d 731, 751 NYS2d 331 (3rd Dept 2002)

During jury selection at the defendant's assault trial, defense counsel waived the defendant's appearance for purposes of sidebar legal conferences. The defendant was also excluded from questioning of potential jurors on the issue of bias.

Holding: The defendant's right to be present at material stages of the proceedings (US Const, 6th, 14th Amends; NY Const, art I, 6; CPL 260.20) was triggered where his presence would have had a reasonably substantial relation to his defense. *People v Morales*, 80 NY2d 450, 454. Since jury selection was not a core proceeding, the right to appear at a sidebar conference was statutorily based. CPL 260.20; *People v Roman*, 88 NY2d 18, 25-26. Defense counsel's waiver of his client's presence at legal conferences did not cover interviews of prospective jurors for bias, since the court did not articulate the substance of the *Antommarchi* (*People v Antommarchi*, 80 NY2d 247) right. *People v Keen*, 94 NY2d 533, 538-539. Without an effective waiver, the defendant's exclusion required reversal where one venire person was excused based on defense counsel's challenge. *See People v Maher*, 89 NY2d 318, 325. The defendant was denied "a full and fair opportunity to give meaningful input" on that decision. The record was unclear whether defendant was absent when this specific challenge was made, revealing only the comment that he was going to be brought in; therefore a reconstruction hearing is necessary. *See People v Lucious*, 269 AD2d 766, 768-769. Judgment modified. (County Ct, Sullivan Co [La Buda, J])

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

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

Speedy Trial (Cause for Delay) (General) (Statutory Limits) **SPX; 355(12) (30) (45)**

People v Watson, No. 13516, 2002 NY App Div LEXIS 11433, 3rd Dept, 11/27/02

Holding: The defendant was tried for murder and assault. All charges except that of murder must be reversed on statutory speedy trial grounds. CPL 30.30. The prosecution failed to show that the three-year delay in indicting the defendant resulted from his absence. *See People v Sturgis*, 38 NY2d 625, 628. Given the seriousness of the murder charge, the defendant's efforts to avoid apprehension by fleeing the jurisdiction, and the lack of any showing of prejudice from the delay, there was no constitutional speedy trial violation. *See People v Taranovich*, 37 NY2d 442, 445.

Witnesses at trial testified that unidentified individuals told them that the defendant was the assailant. The statements made by unidentified individuals were not admissible under the present sense impression exception

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to the hearsay rule when it could not be established that they witnessed the event. *People v Vasquez*, 88 NY2d 561, 575. During the defendant's testimony, the prosecutor cross-examined him about pre-trial silence, specifically his failure to disclose to police that he had a gun. The questions were improper. *People v De George*, 73 NY2d 614, 618-619. In light of the overwhelming evidence of guilt, these errors were harmless. *People v Crimmins*, 36 NY2d 230, 237-238. Judgment modified and as modified, affirmed. (County Ct, Schenectady Co [Catena, J])

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

People v Beverly, 299 AD2d 744, 751 NYS2d 104 (3rd Dept 2002)

Holding: After being convicted of robbery and other charges, the defendant filed a CPL 440 motion claiming that his trial attorney was ineffective. The motion was denied. The defendant said that his statement to the police was coerced and that there had been a witness to the physical coercion and screaming by police. At trial, defense counsel did not cross-examine the interrogating police officer about the coercion or call the witness. Defense counsel was aware of the defendant's claim of involuntariness and the witness's statement, and attributed his failure to question the officer to pressure from co-counsel. Succumbing to the pressure of co-counsel not to vigorously question police credibility and the admission of statements made by his client was ineffectiveness of counsel. The defendant was entitled to conflict free representation. *People v Orvitz*, 76 NY2d 652, 656. Objective evaluation shows that defense counsel's divided loyalties operated on the representation of the defendant. In view of the acquittal of the co-defendants, which indicated the jury did not credit the complainant's identification of some of the assailants, instances of prosecution witnesses lying, and the lack of forensic or physical evidence connecting the defendant to the crime, counsel needed to fully challenge the defendant's statement. Judgment reversed, new trial ordered. (County Ct, Albany Co [Breslin, J])

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

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

Matter of Darrell CC, 299 AD2d 757, 751 NYS2d 113 (3rd Dept 2002)

The respondent had been adjudicated a juvenile delinquent and placed on probation. He was found in violation of probation and resentenced.

Holding: A petition alleging a violation of probation must contain nonhearsay allegations or supporting documents that establish every violation charged. *See* Family Ct Act 360.2 [2]. This probation violation petition, based on information and belief without revealing the source of the knowledge or including supporting depositions, was insufficient. *See Matter of Steven DD.*, 243 AD2d 890, 890. This error was a nonwaiveable jurisdictional defect, *Matter of Neftali D.*, 85 NY2d 631, 637, and could be raised for the first time on appeal. *Matter of Charles BB.*, 277 AD2d 756, 757. Judgment reversed. (Family Ct, Franklin Co [McGill, J])

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

People v Gilliam, 300 AD2d 701, 752 NYS2d 722 (3rd Dept 2002)

The defendant was tried on charges of murder and robbery and was convicted of manslaughter and robbery.

Holding: The court properly refused to charge petit larceny as a lesser included offense of first-degree robbery. A lesser included offense should be charged when it was impossible to commit the greater offense without committing the lesser offense (CPL 1.20 [37]; *People v Mitchell*, 288 AD2d 622, 624 *lvs den* 97 NY2d 758, 98 NY2d 699) and a reasonable view of the evidence would support a finding that the defendant committed the lesser but not the greater. *People v Wheeler*, 109 AD2d 169, 170 *affd* 67 NY2d 960. Robbery could not be committed without also committing petit larceny (*People v Atkins*, 91 AD2d 507) and the non-violent lesser included offense of petit larceny to a charge of robbery could be charged where a defendant had sustained the burden of proof on the issue of self-defense. However, no view of the evidence supported a finding that the defendant committed only the lesser offense. The defendant testified that he was attacked by the decedent, who was larger, and used a knife in self-defense; he acknowledged taking money. Prosecution evidence showed that the defendant stole money from the decedent after stabbing him, inflicting wounds that included "defensive wounds" and causing death. As the self-defense claim failed, so did justification for a lesser-included charge. Judgment affirmed. (County Ct, Chemung Co [Danaher, Jr., J])

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

Matter of Guido v Goord, 300 AD2d 703, 749 NYS2d 915 (3rd Dept 2002)

The petitioner had been incarcerated in a Florida jail on local charges and rape charges from a New York warrant. One set of Florida charges resulted in acquittal, the other in dismissal. He spent 411 days in Florida jails before being extradited to New York. After being convicted on the rape charges, he brought an Article 78 proceeding challenging the decision of the Commissioner of

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Correctional Services to deny him credit for the time spent in Florida before extradition.

Holding: The petitioner would have been entitled to credit for jail time served in another state if the charges pending in New York had been the only basis for the detention. Since he was held on Florida and New York charges, he cannot receive credit for the time served towards his New York sentence. *Matter of Birden v Department of Correctional Servs*., 134 AD2d 843, 844. The contention that financial inability to post bail deprived the petitioner of his constitutional rights was not preserved for review and the record contains no evidence of indigence. Judgment affirmed. (County Ct, Albany Co (McNamara, J)]

Prisoners (General) (Good Time) **PRS I; 300(17) (20)**

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

Matter of Bolster v Goord, 300 AD2d 711, 752 NYS2d 403 (3rd Dept 2002)

The petitioner pled guilty to burglary in satisfaction of indictments also charging sex crimes and child endangerment. He was sentenced to $2\frac{1}{3}$ to 7 years in prison, where he refused to participate in a treatment program for sex offenders on the ground that he had not been convicted of a crime involving sexual misconduct. The Time Allowance Committee withheld two years and four months of good time for failing to join the program. After the decision was affirmed administratively, the petitioner filed an Article 78.

Holding: Withholding good time for not participating in a sexual treatment program while incarcerated on the crime of burglary was permissible where there was a rational basis. *See Matter of Lamberty v Schriver*, 277 AD2d 527, 528. Good behavior allowances are a privilege. 7 NYCRR 260.2. The granting or withholding of allowance time is discretionary. *Matter of Amato v Ward*, 41 NY2d 469, 473. The presentence report indicated that the defendant had performed sexual acts with two children under the age of 14. His denials were included in the report, but the report was not challenged at sentencing. The burglary had a sexual misconduct element to it; when burglarizing the residence of the children whom he was accused of molesting, the defendant left a pornographic magazine in their bed. *See Matter of Ferry v Goord*, 268 AD2d 720, 721 *lv den* 94 NY2d 763. Judgment affirmed. (Supreme Ct, Albany Co [Malone, Jr., J])

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

People v Williams, 300 AD2d 825, 752 NYS2d 434 (3rd Dept 2002)

The defendant pled guilty to second-degree sale of drugs. Pursuant to a plea agreement, another pending indictment was dismissed and the defendant was sentenced to a prison term of six years to life.

Holding: The presentence report contained no information indicating that the defendant had any prior felony conviction. At the plea, defense counsel had indicated that the plea agreement represented the minimum sentence available to a second felony offender. The judge similarly stated that the defendant would receive a sentence "representing 'the minimum for a two felony offender…'" Nothing at sentencing indicated that the defendant was being sentenced as a second felony offender; the sentence he received was within the permissible limits for a first-time felony offender. *See* Penal Law 70.00(2)(a); (3)(a)(ii). As it was not *per se* illegal, the defendant was required to object to preserve review, which he did not do. *See People v Samms*, 95 NY2d 52, 56-57. The universal misunderstanding apparent on the record justifies an exercise of jurisdiction as a matter of discretion in the interest of justice. The record does not reveal whether the court would have imposed a lesser sentence had it been apprised of the defendant's actual status. Judgment modified, sentence vacated, matter remitted. (County Ct, Ulster Co [Bruhn, J])

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

Sex Offenses (General) (Juveniles) (Lewd Conduct) **SEX; 350(4) (12) (15)**

People v Pinkoski, 300 AD2d 834, 752 NYS2d 421 (3rd Dept 2002)

The court dismissed a 19-count indictment, based on photographs of the defendant's daughter, accusing the defendant of various sex offenses.

Holding: Dismissal of counts relating to photographs of the complainant's buttocks and bare chest because they did not constitute a "lewd exhibition of the genitals" under sexual conduct as defined in Penal Law 263.00(3) was not error. The legislature chose to include "buttocks" in only two of the four sections of the Penal Law that define the term "sexual conduct."

Dismissal of the counts involving a photograph of the complainant's genitalia, based on insufficient grand jury instructions, was error. The word "lewd" is not beyond the understanding of the average juror. The complainant's pose is far from a family photo and is not an artistic rendering. There was a basis for the grand jury to find the elements of the offense. Given the defendant's inconsistent, disingenuous explanations for the spreading of the complainant's buttocks, the grand jury could properly have inferred the sexual gratification element. The defendant's admissions concerning her conduct with the other children in the room supports the counts of endangering the welfare of a child. Order modified by reversing as to specified counts, reinstating those counts. (County Ct, Cortland Co [Avery Jr., J]) ⚖

NYSDA Membership Application

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