New York State Defenders Association

Public Defense Backup Center
REPORT

VOLUME XIV NUMBER 2 February 1999

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Backup Center Office Moves

As of March 1, 1999, NYSDA's Public Defense Backup Center will be housed in new space. The move, from offices the Backup Center has occupied for 10 years to new quarters that will more economically provide sufficient room for current and future needs, will allow NYSDA to better serve its members and other public defense providers. The new offices, at Washington Avenue and Lark Street, are three blocks from the Capitol and Empire State Plaza. The address is:

New York State Defenders Association
194 Washington Avenue
Suite 500
Albany, NY 12210-2314

At press time, NYSDA had been assured that telephone and fax numbers would remain the same. If that changes, a message will be available at the current number: (518) 465-3524.

Executive Budget Eliminates Backup Center, Other Defense Funding

The proposed budget released by Governor Pataki for the next fiscal year includes no funding for NYSDA's Public Defense Backup Center. Also cut were the Indigent Parolee Representation Program, Neighborhood Defender Service, and Prisoners' Legal Services. (None of the $12 million cut from civil legal services last year was restored in this budget.)

The Aid to Defense Program, which provides state aid to some counties for certain types of felony cases, was included at the same level as last year.

The same programs that were cut this year were zero funded by the governor in 1998. Funding was restored by the legislature, but a line-item veto cut state funding for PLS entirely, and NDS received a mere $50,000. It is hoped that NYSDA's funding, and that of other defense programs, will be restored in the final budget this year.

Even if funding is ultimately restored, this annual elimination of funding in the executive budget has an adverse impact on the defense community's ability to adequately represent clients, damaging the planning, continuity, and staff morale necessary for efficient, constitutional operations.

The proposed executive budget increases Aid to Prosecution funds by $150,000 from FY 1998/99 and maintains proposed funds for district attorney training, including the New York State District Attorneys Association and the New York Prosecutors Training Institute, at the same level. It increases funding for DAs' salaries by $623,900. (Meanwhile, in federal developments, the Department of Justice is requesting a $21 billion budget "to continue fighting crime, combating cyber-terrorism, curbing drug abuse and funding prison construction to incarcerate felons." Some of that funding may find its way into New York, as $1.28 billion would be earmarked for community policing, new technologies, community prosecutors and district attorneys.)

Death penalty defense funds are increased overall in the governor's proposed budget, but the Capital Defender Office was cut $88,900 from FY 1998/99. An increase of 18.5% is included for the payment of defendants' attorneys' compensation, fees and expenses for expert, investigative and other reasonably necessary services for defendants pursuant to

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§35-b of the Judiciary Law. (The fee schedule for capital defense work was revised substantially downward by the Court of Appeals last December [*see* the last issue of the *REPORT*], so the increase apparently provides funds for more cases, not more funds per case.)

Funding in the current executive budget and actual state funding provided in the last fiscal year for public defense and relevant criminal justice programs are set out below:

Program	Exec. Budget for FY99/00	State Funding for FY98/99
NYSDA Backup Center	Eliminated	$1,400,000
Indigent Parolee Representation Program	Eliminated	$1,600,000
Prisoners' Legal Services	Eliminated	$0
Neighborhood Defender Service	Eliminated	$ 50,000
Aid to Defense	$13,837,300	$13,837,300
Capital Defender Office	$ 6,158,700	$ 6,327,600
Capital Defense under 35-b	$ 8,597,800	$ 7,255,000
Aid to Prosecution	$21,163,000	$21,013,000
DA Salaries	$ 2,624,100	$ 2,000,200
DA Training	$ 3,500,000	$ 3,500,000

Miranda *Under Attack*

Included in the case digests this issue is the 4th Department decision in *People v Seymour*, holding that statements made by the defendant to other inmates need not be suppressed for lack of warnings that the defendant need not talk to police (or their agents) and that statements he made might be used against him. Even if both inmate witnesses were police agents, the court said, incarcerated persons are not entitled to *Miranda* warnings because no Fifth Amendment interests are implicated. (See Digest, p. 20.) The well-known "*Miranda* rights," which have been in existence over 30 years, have been eroded and eluded in a number of ways, and have recently been frontally attacked as well.

■ *Congress Can Cancel* Miranda*, Circuit Court Concludes*

One editorial has called the ruling by a 4th Circuit panel in *US v Dickerson* "eccentric," and called on the US Supreme Court to "close the legal can of worms this unwise decision has opened." Law professors Yale Kamisar of the University of Michigan and Stephen Saltzburg of George Washington University think the High Court will not use the *Dickerson* case to overturn *Miranda v Arizona*, 384 US 436 (1966). The defense attorney in the case, James W. Hundley of Fairfax, Virginia, will be asking for the 4th Circuit to rehear the *Dickerson* case *en banc*. But for the moment, the case is binding law in the Circuit's five states (Virginia, Maryland, North and South Carolina, and West Virginia), and it says that a long-unenforced federal statute (18 USCA 3501) negates *Miranda* as to federal agents. Federal law enforcement officers, under this ruling, need not warn suspects before interrogation of their rights to remain silent and to have the advice of counsel before deciding whether to speak. (*Post-Gazette* [Pittsburgh PA] 2/13/99; *The Bergen Record* [Hackensack NJ] 2/12/99; *The Washington Post* 2/10/99, all on-line).

Charles Dickerson's confession to bank robbery and other offenses was suppressed by a federal district court because, while it was voluntary, it was obtained in violation of *Miranda*. Two groups, the Washington Legal Foundation and the Safe Streets Coalition, appeared as *amici curiae* in the 4th Circuit. In an opinion by Circuit Judge Karen J. Williams, the Court of Appeals chastised the Justice Department for refusing to invoke §3501 (noting that Justice Scalia has similarly complained) and held that because the requirements of *Miranda* are not constitutionally based, its holding therefore can be—and was—legislatively overruled. *US v Dickerson*, No. 97-4750 (4th Cir., 2/8/99). A copy of the opinion is available at the following web site: (http://www.law.emory.edu/4circuit/feb99/974750.p.html) or from the Backup Center.

■ *NY Judge Holds Probationer Not Entitled To Warnings*

A Sullivan County Supreme Court Justice ruled last summer that the statement of a defendant to his probation officer was admissible at probation revocation proceedings despite the absence of *Miranda* warnings. While the 5th Amendment right against self-incrimination and the 6th Amendment right to counsel are fundamental, probationers have less of an expectation of such rights, Judge Frank J. LaBuda found. While the case differed from *People v Ronald*

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W. (24 NY2d 732) in that Ronald W. had voluntarily gone to the probation office with a friend while this defendant had been taken into custody, the distinction did not matter. *People v Perry, NY Law Journal,* 8/25/98.

■ *Deliberate Violation of* Miranda *May Not Taint Later Statement*

The U.S. District Court for the District of Columbia has found that a confession obtained by police who deliberately interrogated a suspect without giving *Miranda* warnings did not taint a second confession given following a proper rights advisory. The *Miranda* violation was just one factor to consider in determining if the second statement was given voluntarily, the court said. *Davis v US,* No. 96-CF-275 (DC Cir., 12/31/98), 64 CrL 307. Nor is this the only instance of deliberate *Miranda* violations to be considered in recent months.

In Colorado, a defendant who had been advised of his rights and had waived them was then given a "witness statement form" that said "I also understand that I may be called upon to testify in court as to this case and statement." A trial judge suppressed the resulting statement because the witness form contradicted the *Miranda* warnings given earlier. The state's supreme court reversed, finding that the misadvice on the witness form concerned only the defendant's right to assert his privilege against self incrimination *at trial*, not during custodial interrogation. *People v Owens,* No. 98SA225 (1/11/99), 64 CrL 316.

■ *Impeachment Boundaries of unMirandized Statements Tested*

Another issue concerning deliberate police circumventing of *Miranda* is whether a defendant may be impeached (*see Harris v New York*, 401 US 222 [1971] and *People v Hernandez*, __ AD2d __, 673 NYS2D 16 [3/11/98]) with a statement suppressed as to the prosecution's case-in-chief on that basis.

A police detective in California continued to talk with a suspect, after that defendant invoked the right to counsel pursuant to *Miranda* warnings, for the purpose of obtaining impeachment evidence. The California Supreme Court said last May that while *Harris* was not intended to encourage police misconduct, it did apply to intentional violations of a suspect's *Miranda* rights. *People v Peevy*, 17 Cal. 4th 1184 (1998), 63 CrL 192. Posting *Peevy* on its web site, the Alameda County (CA) District Attorney's office noted that some courts might find that such an intentional police act rendered the resulting statement involuntary and therefore constitutionally inadmissible. It also noted that defense attorneys would undoubtedly challenge any widespread or systemic practice of ignoring *Miranda* invocations. Finally, the office noted that the issue of whether police personnel deliberately ignoring *Miranda* would be open to civil suits remains open. *See California Attorneys for Criminal Justice v Butts*, 922 FSupp 327 (CD Cal. 1996).

The Florida Supreme Court said a few months later that post-arrest statements made before *Miranda* warnings were given could not be used for impeachment under that state's constitution. *State v Hoggins,* No. 90,121 (Fla. Sup. Ct 9/17/98), 64 CrL 6. Florida therefore provides more protection for persons in custody than the U.S. Supreme Court does. *Fletcher v Weir,* 455 US 603 (1982).

■ *Anticipatory Assertion of Rights Invalid*

In Indiana, the state supreme court has held that a defendant's repeated requests for counsel during the execution of a search warrant for his hair, blood, and saliva samples did not invalidate his statement made four days later after being *Mirandized*. Only when there is both custody and interrogation does the invocation of *Miranda* rights preclude police from initiating later contact, the court said. *Sauerheber v State*, No. 89S00-9701-CR-18 (Ind. Sup. Ct. 9/1/98), 63 CrL 633.

■ *Interrogation Can Ensnare Even Innocents*

"[A]fter three decades of rulings that have undercut *Miranda*'s reach, and the increasingly savvy tactics of investigators, the warnings have become an easily slipped latch to the interrogation room, with the vast majority of suspects waiving their rights," the *New York Times* reported a year ago. The article by Jan Hoffman set out publicly what defendants and defense attorneys already knew—police may lie and deceive those they interrogate so effectively that some suspects (especially those suffering from retardation, mental illness, or other problems making them susceptible to suggestion) falsely confess. (*New York Times* 3/30/98).

A few experts have published work on this phenomenon. For example, see Richard J. Ofshe & Richard A. Leo, "The Consequences of False Confessions: Deprivation of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 *Journal of Criminal Law and Criminology* 429 (1998).

But getting expert information on this issue to a jury may be difficult. The 3rd Department in December upheld a judge's preclusion of a psychologist's testimony about the defendant's "interrogative suggestibility." The court was unpersuaded by the admissibility of such evidence in federal courts (*see eg US v Shay*, 57 F3d 126, 130-134) because the *Daubert* standard of admissibility for expert evidence used in federal court is more liberal than the *Frye* test still used in New York. *People v Marcus Green*, No. 10331 (3d Dept. 12/24/98). This decision will be digested in a future issue of the *Backup Center REPORT*.

Judge Admonished for Campaign Ads

For graphic and sensational advertising during his campaign, Monroe County Supreme Court Justice William Polito has been admonished by the Commission on Judicial Conduct. According to the commission's Determination, improper television ads included ones that contained statements regarding "Violent crimes in our streets," "the menace of drugs," and "sexual predators terrorize our lives," a portrayal of a masked man with a gun attacking a woman by her

car, and an exhortation to "pull the lever for Bill Polito and crack down on crime" while a jail door slammed shut. Another ad proclaimed that "Bill Polito won't experiment with alternative sentences or send convicted child molesters home for the weekend . . ." Print ads promised that Polito would "not experiment with 'alternative sentencing.' " Finding that the judge's campaign portrayed him as biased against criminal defendants and having committed himself to imposing jail sentences in every case while rejecting other lawful dispositions, the Commission determined on Dec. 23, 1998 that admonition was appropriate.

Death Penalty Notes

■ *Mark Harris to Head Albany CDO After Treece Takes Job with Comptroller*

Randolph Treece has resigned as First Deputy Capital Defender to serve as general counsel for State Comptroller H. Carl McCall. Treece had been at the Capital Defender Office (CDO) for nearly three and a half years, and made the change for the opportunity to work on "new and diverse issues that will broaden [his] legal background and experiences," according to press reports. (*Times Union* 2/2/99)

Mark Harris, a deputy capital defender since September, 1995, has been named to replace Treece as the head of the Albany region's CDO. Capital Defender Kevin Doyle lauded Harris's qualifications, noting that Harris had come to the CDO with superb trial skills and had integrated capital insights and sensibilities into those skills. "Luckily for poor persons charged with capital crimes, Mark was confident enough to command a courtroom, but humble enough to adopt the new perspectives made necessary by the death penalty's unique stakes and dynamics," Doyle said.

■ *Upstate/Downstate Disparity Reported in NY*

Upstate homicide defendants have been 10 times more likely to face the death penalty than defendants in New York City and its suburbs since the reinstatement of capital punishment, according to a recent press report. As a result, because most upstate counties are predominantly white, whites account for 35 percent of those capitally accused. (Twenty-one percent of all murder defendants in New York state are white.) Geographic disparities in application of the death penalty are not limited to New York; academic experts have revealed other disparities in selected states.

Repeated decisions by prosecutors in the New York metropolitan area not to pursue the death penalty have been criticized by capital punishment proponents. The most publicized instance of dissatisfaction was Governor Pataki's action in replacing Bronx District Attorney with then-Attorney General Dennis Vacco in a murder prosecution. *Matter of Johnson v Pataki*, 91 NY2d 214. The recent press article said that the governor's complaint (he said he would not allow local prosecutors' discretion to create "death-penalty free zones") might actually be used in efforts to overturn New York's death penalty, by defense lawyers contemplating challenges saying the law is being arbitrarily applied. (*New York Times*, 1/21/99)

■ *Capital Procedures Still Under Development*

The figures above were compiled from the 34 cases in which death penalty charges have been lodged since the current statute was passed. Thirteen capital defendants are awaiting trial, two in Albany County. Both those cases date from 1996, which was the subject of one recent news report on perceived delays in the death penalty process. A number of factors contributing to the time lapse were mentioned, not all censorius; there was reference to the assumption that "death is different," requiring more and longer pretrial motions. (*Times Union* 2/7/99)

Attacking supposed capital delay from another angle, a downstate report compared the approximately two-month jury selection procedures in the seven capital cases tried to date under New York's current statute with much shorter capital *voir dires* in some other jurisdictions. While concerns about fairness and making verdicts appeal-proof were covered, much of the article focused on comments such as that of a Pennsylvania prosecutor who said that two-month jury selection was "insanity" and that his office couldn't function if such long processes were employed. (*Newsday* 2/17/99)

Both articles recognized that because New York's death penalty statute is relatively new, there is a learning process for judicial handling of such cases.

The number of cases pending statewide was the reason given by the Court of Appeals on Oct. 7, 1998 for creating an interim roster of counsel to handle capital appeals, as the CDO did not anticipate establishment of a recruitment and screening process for attorneys seeking appointment in capital appeals before the end of 1998. As of early February, the interim roster was still being maintained, awaiting finalization by the CDO of permanent procedures for appointment of capital appellate counsel. Standards for Appellate and State Post-conviction Counsel in Capital Cases were adopted by the Court of Appeals in May, 1998.

In the wake of the Court of Appeals' invalidation of the guilty-plea portions of the death penalty statute [*Matter of Hynes v Tomei et al*, noted in the last issue of the *REPORT*, digest to appear in the next issue], one defendant represented by the CDO sought to plead guilty before the prosecution elected to pursue the death penalty. A Dutchess County judge rejected the defense move, saying it would be "presumptuous and illegal for this Court to allow defendant to enter a plea of guilty to the Superseding indictment before the statutory time in which the District Attorney had to file a notice of intent to seek the death sanction expired." *People v Francois*, Superceding Ind. No. 122/98 (County Ct, Dutchess Co, 2/11/99). A copy of the decision is available from the Backup Center.

While legal processes for capital cases are still in flux, the Department of Correctional Services established rules for death row in June, 1998, a month before anyone had been

sentenced to death. Among the provisions: "No packages may be received by an inmate in the Unit for Condemned Persons except those containing legal materials (excluding envelopes), books and periodicals. No food or food packages will be permitted from any source." Death row inmates are to be fed in their cells. Food items are not among those which death row inmates may purchase from the commissary.

Before an inmate is transferred to the Capital Punishment Unit where the death sentence is to be carried out, all personal property with the exception of personal legal papers, 10 photographs, and two cartons of cigarettes are to be disposed of. There is no recognition of the possibility that a stay might be obtained after transfer but before execution. (DOCS Directive 0054, 6/26/98)

■ *Small Sample Size Dooms Statistical Showing of Selective Prosecution*

A white defendant who sought to show that the federal Department of Justice had selected him for capital prosecution based on race has lost in the Middle District of Tennessee. He claimed that he was targeted in reaction to criticism that too high a percentage of minorities had been previously prosecuted under the federal death penalty statute. The court rejected the defendant's contention that two African-Americans who were prosecuted non-capitally had committed crimes very similar to his. The court also rejected his allegation that 60% of whites federally accused of killing witnesses faced the death penalty while only 18% of blacks did. The sample size was too small to be statistically reliable, the court found, and in any event the data were insufficient under *McClesky v Kemp*, 481 US 279 (1987) to show, without more, the requisite discriminatory intent. *US v Holloway*, No. 3:96-00004 (M Dist Tenn, 12/3/98); 64 CrL 231.

Racial Bias in Traffic Stops Considered in Sentencing

A district judge in Boston has departed downward from the federal sentencing guidelines because the defendant's criminal record, which consisted primarily of motor vehicle violations and minor drug possession crimes, was likely to reflect systemic racial bias and overstate the defendant's culpability and likelihood of recidivism. The defendant, Alexander Leviner, had received seven criminal history points for motor vehicle offenses. Leviner's record of traffic stops evolved into "countable " offenses because he received more than 30 days imprisonment for them. Citing scholarly studies and journalistic articles showing that African American motorists are stopped and prosecuted for traffic offenses more than other citizens, Judge Nancy Gertner's order of Dec. 22, 1998 found it "not unreasonable to believe that African Americans would also be imprisoned at a higher rate for these offenses, as well." Most of the offenses consisted of driving without a license, and none involved driving erratically or violating a traffic law, raising questions about what drew officers' attention to Leviner in the first place, Gertner noted. (*US v Leviner*, Criminal No. 97-10260-NG, 12/22/99 [Dist Mass]). A copy of the order is available from the Backup Center. [The 29-page opinion addresses other issues—please specify if you want the full opinion or the sentencing issue only.]

Press accounts said that this was the first known instance of a federal judge in a criminal case acknowledging and relying on a common experience known as being stopped for "DWB—Driving While Black." University of Toledo law professor David Harris told the *Boston Globe* that courts are beginning to recognize that the practice of stopping motorists on the basis of race exists and "has a corrosive effect on the criminal justice system." (*Boston Globe*, 12/16/98). Harris is the author of "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," 87 The Journal of Criminal Law and Criminology 544 (1997). While it seems clear that police decisions to target persons for investigation on the basis of race are improper (*US v Avery*, 128 F.3d 974 [6th Cir. 1997]), criminal courts have largely declined to find discrimination in the face of statistical evidence since the US Supreme Court ruling in *McClesky v Kemp (*481 US 279 [1987]). Prosecutors in the *Leviner* case have said they will appeal.

African Americans have raised racial discrimination claims of DWB in a number of civil suits across the country. (*Eg USA Today*, 12/17/98). The pervasiveness of DWB is also reflected in a variety of web sites on the Internet. Reports and comments about the *Leviner* case indicated the controversial nature of the ruling (*eg In the Line of Duty*, "From the Blotter," http://www.lineofduty.com/blotter/messages/4308.html ; *New York Post*, "An Appalling Ruling in Boston," http://nypostonline.com/editorial/7348.htm. Other sites suggest that litigation and legislation are required to deal with the problem. For example, a California chapter of the ACLU is seeking first-person accounts of DWB stops (http://www.aclusandiego.org/dwb.htm), while Representative John Conyers (D-Michigan) introduced a bill last year which passed the House but stalled in the Senate (http://www.house.gov/conyers/).

International Baseball and A Good Cause

When the World Champion New York Yankees face the Toronto Blue Jays on Saturday, Apr. 24, beginning at 1:35 p.m., 400 seats in Sections 17, 19, and 21 in Yankee Stadium will be filled with supporters of such public interest groups as NYSDA, Prisoners' Legal Services and others. Ronald J. Tabak, Pro Bono Coordinator for the New York firm of Skadden Arps, Slate, Meagher & Flom LLP, is once again organizing a baseball fundraiser. Pay $24.50 per seat and over half your money will support your favorite cause while you watch baseball. To participate, send one check for $11.50 per seat made out to Ronald Tabak, and one check for at least $13 per seat made out to NYSDA, PLS or other tax-deductible group, to Ron at 919 Third Avenue, 31st Floor, New York NY 10022-3897. For more information, call Ron at (212)735-2226 or e-mail him at rtabak@skadden.com. ⚖

Conferences & Seminars

Sponsor: The Pearl, Lawrence I. and Lloyd M. Gerber Memorial Lecture Fund
Theme: Gideon: A Generation Later—A Defendant's Right to Counsel—Real or Illusory?
Dates: March 12-13, 1999
Place: Baltimore, MD
Contact: Loris Moore, Adm. Assistant, UMSL, 500 West Baltimore Street, Baltimore MD 21201-1786. (410)706-4211

Sponsor: New York State Defenders Association
Theme: 13th Annual New York Metropolitan Trainer
Dates: March 13, 1999
Place: NYU Law School
Contact: NYSDA: tel: (518)465-3524; fax: (518)465-3249; e-mail: info@nysda.org; web site: http://www.nysda.org

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Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance XI
Dates: March 13-16, 1999
Place: Atlanta, GA
Contact: NLADA: (202)452-0620 (Aiyana Bullock [logistics] ext 40; LaJuana Davis [substantive questions] ext. 14); e-mail: training@nlada.org; web site: http://www.nlada.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Public Defender Seminar—The Best Defense: Winning Strategies & Techniques
Dates: March 18-21, 1999
Place: St. Louis, MO
Contact: NACDL: Kate Carroll (202)872-8600 ext. 221

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: CLE Seminar
Date: March 19, 1999
Places: Albany, NY
Contact: Patricia Marcus: (tel:) (212) 532-4434; (fax:) (212)532-4668; e-mail: nysacdl@aol.com; web site: http://www.nysacdl.org

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Sponsor: Pace Univ. School of Law & Albert Einstein Col. of Medicine
Theme: Playing the Psychiatric Odds: Can We Protect the Public by Predicting Dangerousness?
Dates: April 8, 1999
Place: White Plains, NY
Contact: Kathleen Lambert, Pace University School of Law, 78 North Broadway, White Plains NY 10603. (914)422-4223; e-mail: klambert@genesis.law.pace.edu

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Sponsor: American Bar Association's Center on Children and the Law
Theme: 1999 National Conference on Children and the Law: Addressing Tough and New Issues in Children's Legal Advocacy
Dates: April 8-10, 1999
Place: Washington, DC
Contact: Conference Coordinator, ABA Center on Children and the Law, 740 15th Street NW, Washington DC 20005. (202)662-1740; e-mail: ctrchildlaw@abanet.org; web site: http://www.abanet.org/child/conference99.html

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Sponsor: National Institute for Trial Advocacy
Theme: Advanced Advocates Programs
Dates: April 9-11, 1999
Place: Hempstead, NY
Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; fax on demand: (219)236-6665; e-mail: nita.1@nd.edu; web site: http://www.nita.org

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Sponsor: Forensic & Clinical Psychology Associates, P.A.a, University of Florida College of Law, & Devereux Florida Treatment Network
Theme: 9th Annual National Symposium: Mental Health & the Law—Clinical Assessment and the Law: Directions for the 21st Century
Dates: April 9-11, 1999
Place: Miami Lakes, FL
Contact: Dr. I. Bruce Frumkin, FCPA: tel: (305)666-0068; fax: (305)666-8283; e-mail: Bfrumkin@aol.com

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Sponsor: Indiana Public Defender Council
Theme: Appellate Advocacy
Dates: April 9-11, 1999
Place: Indianapolis, IN
Contact: IPDC: 309 W. Washington Street, Suite 401, Indianapolis IN 46204-2725. tel: (317)232-2490; fax: (317)232-5524

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer
Date: April 10, 1999
Places: Syracuse, NY
Contact: Patricia Marcus: (tel) (212) 532-4434; (fax) (212)532-4668; e-mail nysacdl@aol.com; web site: http://www.nysacdl.org

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Sponsor: Association of the Bar of the City of New York
Theme: The ABCs of Federal Criminal Litigation
Dates: April 13, 20, and 27, 1999
Place: New York City
Contact: CitiBar Center for CLE, ABCNY, 42 West 44th Street, New York NY 10036. tel: (212)382-6663 (Betsy Martinez for registration); (212)382-6612 (Nadine Dallitis for general CLE info); fax: (212)869-4451; web site: http://www.abcny.org

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Sponsor: National Association of Sentencing Advocates
Theme: 7th Annual Conference
Dates: April 15-17, 1999
Place: Miami, FL
Contact: NASA: Gayle Hebron, tel: (202)628-0871; fax: (202)628-1091; e-mail: nasa@sentencingproject.org

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Sponsor: National Institute of Justice, American Bar Association, American Academy of Forensic Sciences, National Center for State Courts
Theme: National Conference on Science and the Law
Dates: April 15-16, 1999
Place: San Diego, CA
Contact: Pat Maher, CSR, Inc., Suite 200, 1400 Eye Street NW, Washington DC 20005. tel: (202)842-7600; fax: (202)842-0418; e-mail: nijopns@csrincorp.com

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Conferences & Seminars

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Sponsor: National Legal Aid and Defender Association
Theme: Defender Leadership and Management Training
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Sponsor: New York State Bar Association
Theme: Special Problems of Criminal Practice in New York City
Date: May 7, 1999
Place: New York City
Contact: NYSBA: tel: (800)582-2452 or in Albany area (518)463-3724; fax: (518)487-5618; fax-on-demand: (800)828-5472; web site: http://www.nysba.org

Sponsor: National Legal Aid and Defender Association
Theme: Defender Advocacy Institute
Dates: May 21-25, 1999
Place: Dayton, OH
Contact: NLADA: (202)452-0620 (Aiyana Bullock [logistics] ext 40; LaJuana Davis [substantive questions] ext. 14); e-mail: training@nlada.org; web site: http://www.nlada.org

Sponsor: New York State Defenders Association Defender Institute
Theme: Basic Trial Skills Program
Dates: June 6-12, 1999
Place: Troy, NY
Contact: NYSDA: tel: (518)465-3524; fax: (518)465-3249; e-mail: info@nysda.org; web site: http://www.nysda.org

Sponsor: New York State Defenders Association
Theme: 32nd Annual Meeting & Conference
Dates: July 29-August 1, 1999
Place: The Queensbury Hotel, Glens Falls, NY
Contact: NYSDA: tel: (518)465-3524; fax: (518)465-3249; e-mail: info@nysda.org; web site: http://www.nysda.org ⚖

Job Opportunities

The National Legal Aid and Defender Association seeks a **Senior Manager** for its National Defender Clearinghouse, to provide support for the organizational development and management capacity of member indigent defense programs and interface with other organizations providing programs or services relevant to indigent defense program management. Requirements: 7 years experience as an attorney in an indigent defense program office, including at least 4 years legal practice experience and 3 years managerial experience in an indigent defense program or association; experience with information clearinghouse database, design and implementation of organizational development and management systems and training programs for indigent defense; strong supervisory and management skills; ability to coordinate multiple tasks; initiative; good judgment; work well with all levels of personnel; knowledge of all types of indigent defense systems and structures, and management and litigation systems within each structure; strong analytical and writing abilities; broad perspective of systemic problems and opportunities for reform or improvement; creative vision; deep commitment to the improvement of indigent defense. Salary $65,000+ DOE. AA/EOE. Minorities, women, the elderly and disabled encouraged to apply. Send resume, cover letter, references, writing sample and any salary requirements to: NDC Search, 1625 K Street NW, Suite 800, Washington DC 20006.

The Rural Law Center of New York, Inc. seeks an **Executive Director**, who will be responsible for carrying out the mission, goals, and objectives of this small, not-for-profit corporation funded by the NYS IOLA fund, as well as administration, supervision, legislative and administrative advocacy and litigation. The position requires working closely with a statewide Board of Directors, diverse advocacy groups, legal service providers, and bar associations to advance the interests and needs of New York's rural poor. Prior administration, poverty litigation, and fund-raising experience preferred. Location flexible, some time must be spent in Albany. Salary to $60,000 DOE. Benefits. EOE/AA. Minorities, women, and people with disabilities strongly urged to apply. Send resume and writing sample to: Kathleen M. Spann, Esq, Chairperson, 11 Park Street Ext., Green NY 13778.

The Sentencing Project seeks a capable criminal justice professional to be **Special Assistant for Programs**, to work under the direct supervision of the Executive Director and Assistant Director. Duties will include assisting with the management and administration of, and doing substantive work on, one or more discrete projects such as: developing a model program design and curriculum planning and training to improve defender dispositional advocacy for juveniles "automatically transferred" into criminal courts; and preparing a practical handbook for criminal justice practitioners on reducing racial disparity in the criminal justice system. The Special Assistant for Programs will manage two major federal grants, assist in developing financial support for research, advocacy and technical assistance (TA) to defenders and others on sentencing issues, provide TA to defender offices on issues related to representation of juveniles in adult courts and coordinate the work of other TA providers, conduct site visits and informally evaluate defender programs, act as contact and liaison with criminal justice professional associations, conduct research and writing, and coordinate research and writing assignments for consultants. Required: demonstrated writing skills and familiarity with research in criminal justice issues; defender or other advocacy experience in criminal or juvenile courts; experience and working relationship with juvenile and/or minority defendants; management and administrative skills. The position is open to a lawyer or person with social services background having the other requisite qualifications. Salary $28,000-$35,000 DOE. Send resume, cover letter indicating interest and experience, and 2 references to: The Sentencing Project, 918 F St NW, Ste 501, Washington DC 20004. Deadline for applications is March 5—call after that to ascertain if applications will still be accepted. (202) 628-0871. Fax: (202)628-1091; e-mail: staff@sentencingproject.org; web site: http://www.sentencingproject.org

Western New York Law Center seeks **Experienced Litigator** to conduct complex litigation in and around western New York. The Center is funded in part to provide civil legal services to low income clients in areas that Legal Services Corporations grantees may not handle due to Congressional restrictions. Required: 5 years experience, demonstrated success as a litigator, success representing clients in impact litigation or other systems change litigation or advocacy, and ability to work with community groups concerned with issues affecting low income people. Areas/issues include: public and subsidized housing; public benefits (welfare reform); fair housing; disability rights; civil rights. Salary DOE; excellent benefits. EEO. People of color, gays and lesbians, and people with disabilities encouraged to apply. Planned deadline for applications is February 26, 1999. Send resume, cover letter, and 3 references (including names, addresses and phone numbers) to: Western New York Law Center, attn: Lorene Morrison, 295 Main Street, Suite 454, Buffalo NY 14203. ⚖

Resources Sighted, Cited, or Sited

This section of the REPORT contains resources of potential interest to defense teams. Whether sighted in other publications by staff or others, cited by members or others in pleadings, or sited on the Internet, these resources are noted for readers' information; Backup Center staff have not investigated every one, and no representation as to their quality or continuing availability is made by listing them here.

- ✔ "More Than Meets the Eye: Rethinking Assessment, Competency and Sentencing for a Harsher Era of Juvenile Justice," Marty Beyer, Thomas Grisso, Malcolm Young, article, *The Advocate* [publication of the KY Dept. of Public Advocacy] 1/99.
- ✔ *New York Legal Research Guide, 2nd ed.*, Ellen M. Gibson, book, $68, 1998. [Reviewed in *NYS State Bar Journal* 1/99, noting that special features include NY Indian Law sources and a 200-pg. NYC guide]. Published by William S. Hein & Co., Buffalo.
- ✔ "New York Felony Sentencing: Shift in Emphasis to Increase Penalties for Violent Offenders," Bonnie Cohen-Gallet, article, *NYS State Bar Journal*, 1/99.
- ✔ "Failure to Provide Supporting Deposition," Raymond J. Elliott III, article, in column "Justice Court Topics" in "Town Topics" [publication of the Association of Towns of the State of New York], 1-2/99. [Deals with "simplified traffic informations."] Copy available from the Backup Center.
- ✔ "Harassment—Lack of Intent," Raymond J. Elliott III, article, in column "Justice Court Topics" in "Town Topics" [publication of the Association of Towns of the State of New York], 11-12/99. [Describes dismissal of a harassment charge where an office manager grabbed the complainant by the wrist during an argument and led her to an adjoining room.] Copy available from the Backup Center.
- ✔ "Recanted Testimony—New Trial," redacted decision of Town Justice Victor J. Alfieri, Jr., of the Town of Clarkstown, in column "Justice Court Topics" by Raymond J. Elliott III, in "Town Topics" [publication of the Association of Towns of the State of New York], 11-12/99. [Discusses the 1916 case of *People v Shilitano*, 218 NY 161 and vacates conviction, ordering a new trial in sexual abuse and endangerment case.] Copy of redacted decision available from the Backup Center.
- ✔ *1998 AIDS in Prison Bibliography*, National Prison Project, 68 pg., $10 (prepaid). Write: Jackie Walker, AIDS Information Coordinator, ACLU National Prison Project, 1875 Connecticut Avenue NW, Suite 410, Washington DC 20009.
- ✔ *Prison Writing in 20th Century America*, H. Bruce Franklin, ed., book, $13.95 (+$3 ship). Write: Prison Legal News, 2400 NW 80th St #148, Seattle WA 98117. ⚖

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Mandatory INS Detention Follows Most Deportable Offense Convictions

When noncitizens convicted of most deportable offenses are released from criminal custody, it is mandatory for the Immigration and Naturalization Service (INS) to detain them, under a rule effective October 9, 1998. There is no longer any statutory right to release on bond pending completion of removal proceedings. This means that a deportable (or inadmissible) noncitizen should expect to be picked up by the INS when he or she completes federal or state prison time, or is otherwise released from criminal custody. The noncitizen will be held in an INS detention facility until removal (unless relief from removal is obtained). The INS also appears to be applying the new mandatory detention policy to some deportable or inadmissible noncitizens released from criminal custody prior to October 9.

This mandatory detention policy was mandated by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), but full implementation was delayed for two years because the Attorney General certified that the INS did not have sufficient bed space to detain all those covered by the new legislation. The legislation did not allow the Attorney General to delay implementation beyond two years.

Under the terms of the legislation now in effect, an individual may be released pending completion of removal proceedings only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." (8 U.S.C. 1226(c)).

Noncitizen defendants and their attorneys should be aware that, for a noncitizen who is already deportable or inadmissible based on a prior offense or illegal immigration

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* *Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support to attorneys, and is a former supervising attorney of the Immigration Law Unit of the Legal Aid Society of New York City.* **If you have questions about immigration issues in a criminal case, call Manny at (212) 367-9104 (note: this is a new number). Hours are: Tuesdays and Thursdays, 9:30 a.m. to 4:30 p.m.** *Manny wrote the Project's manual,* Representing Noncitizen Criminal Defendants in New York State, *which is available from the Backup Center for $25. He is planning a number of presentations on criminal law/immigration issues around the state this spring.*

status, getting out of criminal custody on bail may merely result in being transferred to an INS detention facility. To make matters worse, such a defendant will not get credit towards any subsequent prison sentence for the time he or she has spent in INS custody.

Some noncitizens subjected to the new mandatory detention policy have filed federal habeas corpus petitions in New York and elsewhere to challenge the policy on various statutory and constitutional grounds. There has been some success so far in other jurisdictions. *See eg Martinez v Greene*, 1998 WL 879834 (D.Colo., December 14, 1998). A copy of the opinion is available from the Backup Center.

INS Deportations of Noncitizens in 1998 at All-Time High

The INS announced last month that it removed 171,154 "criminal and other illegal aliens" in Fiscal Year 1998, breaking the prior year record of 114,386 removals. This marks the fifth year of record-setting removal figures.

"Criminal alien" removals reached 56,011, representing an average of over a thousand such noncitizens removed each week. According to INS statistics, most of these removals were accounted for by drug convictions (47 percent), criminal violations of immigration law (15 percent), and convictions for burglary (5 percent), assault (5 percent) and sex crimes (4 percent).

2nd Circuit Finds AEDPA Immigration Relief Restriction Not Retroactive

There was a bit of good news for criminally convicted lawful permanent resident (LPR) noncitizens who were already in deportation proceedings on April 24, 1996, the date of enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The United States Court of Appeals for the 2nd Circuit has held that AEDPA's restrictions on relief from deportation for such LPRs could not be applied retroactively to their cases.

At issue in the court's decision was the government's retroactive application of AEDPA Section 440(d), which barred LPRs from eligibility for a waiver of deportation if they were convicted of any of several enumerated criminal offenses no matter how minor the offense or what equities were present. The 2nd Circuit held, as a matter of statutory interpretation, that Congress did not intend for this relief restriction to be applied in pending cases. *Henderson v INS*, 153 F3d 106 (2d Cir. 1998). The Circuit did not reach the issue of whether Section 440(d) applies in cases that were not pending on April 24, 1996, but which involved pre-Act convictions.

The government has petitioned the U.S. Supreme Court for a writ of *certiorari*. The Court is expected to conference in February on whether it will grant the writ. In the meantime, the 2nd Circuit has stayed issuance of its mandate in *Henderson*.

LPR noncitizens currently in criminal proceedings and their attorneys should be aware that the 2nd Circuit's decision in *Henderson* is directly applicable only to LPRs placed in removal proceedings before April 1, 1997 and thus subject to AEDPA. LPRs placed in removal proceedings on or after April 1, 1997 are subject to the subsequently enacted, and at least equally harsh, immigration law amendments included in IRIRA. The temporal applicability of IIRIRA's amendments remains an open issue.

Early Parole for Deportation Suspended, Now Being Reactivated

Although New York and federal law continued to allow for the early release from prison of certain nonviolent noncitizen offenders subject to immediate INS custody and prompt deportation, the state's early release program was suspended for much of last year. According to the New York Division of Parole, however, the program is now in the process of being reactivated.

New York law provides that the State Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant parole to certain noncitizens with final orders of deportation. Such early parole is statutorily barred for an inmate convicted of either a violent felony offense or a Penal Law A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. *See* Executive Law 259-i(d).

Due to controversy last year over the early release and deportation of certain A-1 drug felons, legislation was proposed to eliminate eligibility of A-1 drug felons, and to make release of A-II drug felons subject either to prosecutor or court approval. Although the legislation was not enacted, the State suspended the early release program.

According to Parole, they are now processing some of the backlog of cases that had previously been approved, after which they will begin considering new cases. It appears that Parole, as a matter of administrative policy, will be increasing efforts to obtain prosecutor and court recommendations before granting early parole for deportation.

NY Passing a Bad Check Not a Crime Involving Moral Turpitude

In a case before an Immigration Judge in New York last month, the INS switched positions and accepted an argument that the New York offense of Issuing a Bad Check (Penal Law 190.05) is not a crime involving moral turpitude (CIMT) for immigration purposes. The Immigration Judge then terminated removal proceedings.

The current version of the New York offense of Issuing a Bad Check requires a showing that the issuance was "knowing" but, unlike its precursor statute, does not contain an "intent to defraud" element. Therefore, under precedent of the Board of Immigration Appeals, it should not be considered a CIMT for deportability or inadmissibility purposes.* See *Matter of Balao*, Int. Dec. #3166 (BIA 1992). ⚖

***Note:** *Owners of the NYSDA Criminal Defense Immigration Project manual,* Representing Noncitizen Criminal Defendants in New York State, *should amend the entry for Issuing a Bad Check on Page A-15 of Appendix A to reflect that this offense probably would* not *be considered a CIMT.*

Case Digest

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 available.

New York Court of Appeals

Evidence (Hearsay) (Sufficiency) EVI; 155(75) (130)

People v Fratello, No. 164, 12/1/98

The complainant recanted his identifications of the defendant prior to trial and testified for the defense. On cross-examination, he denied telling anyone that the defendant had shot him. The prosecution offered evidence to rebut his denial. The Appellate Division upheld the defendant's conviction.

Holding: The defendant challenged the admission, under the "excited utterance" rule, of two statements in which the complainant named the defendant as his attacker, but the rule was appropriately applied. The first statement was made to a layperson who came to help the complainant less than a minute after the car crash that followed the shooting. Bleeding profusely and hysterically asking if he was going to die, the complainant stated the defendant's name repeatedly, referred to him as a former friend, and described his car, meeting the requirements that the remarks be made under stress and without time to reflect on self-interest. The ten-minute lapse before the second statement was made in response to questioning by a police officer did not detract from the spontaneity under the circumstances. *People v Cotto*, 92 NY2d 68, 79. The record supports the lower courts' finding that the complainant had a reasonable opportunity to observe and identify his attacker, placing it beyond review. The trial court properly rejected expert testimony on night visibility, a subject of common experience. *See People v Mooney*, 76 NY2d 827, 828.

Contradictory testimony by a sole witness does not warrant reversal where the jury had an objective, rational basis to resolve the contradictions. *See DiCarlo v US*, 6 F2d 364 (2d Cir). Order affirmed.

Dissent: [Smith, J] The evidence was insufficient to sustain a conviction. A repudiated identifying statement by someone shown to have a motive to lie should require corroboration.

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

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

Trial (Mistrial) TRI; 375(30)

People v Yong Yun Lee, No. 166, 12/1/98

During trial, the defendant's wife told a complaining witness, "Be careful what you say. It's not going to be good for you." Defense counsel's motion for a mistrial was denied after the judge interviewed the jury. Each juror was questioned, and one was excused after stating he might blame the defendant for the remark. Although another juror said the remark was "a reflection on the person on trial," no further questions were asked of that juror. Defense counsel requested, and received, a jury instruction to ignore the remarks. The Appellate Division upheld the robbery, burglary and related convictions and consecutive sentences that followed.

Holding: The failure to remove the second juror did not fall into the limited category of "mode of proceeding" errors that do not require preservation, as it was not so adverse to fundamental trial proceedings as to taint the entire trial. *People v Gray*, 86 NY2d 10, 21-22. The defendant unsuccessfully argued that all his sentences should be concurrent rather than consecutive, because the use of a firearm was an element of each conviction. Concurrent sentences are required for multiple offenses committed through a single act, or when an act which in itself constitutes one offense and is also a material element of the other. *See* Penal Law 70.25 (2). Here, the burglary offense was complete when the defendant entered with the intent to commit a crime. The two robbery offenses were separate acts, so it was not error to impose consecutive sentences. *People v Brown*, 80 NY2d 361. Order affirmed.

Civil Practice (General) CVP; 67.3(10)

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

Cohens v Hess, No. 169, 12/1/98

After a 1992 collision, the defendant pled guilty to failure to obey a traffic-control device. In 1995, the plaintiff sued the defendant for injuries sustained in the accident. About six months later, the defendant successfully moved to vacate his conviction and withdraw his guilty plea. He then pled guilty to a non-moving violation. In the civil trial, the defendant testified he had stopped at the stop sign before the collision. The court refused to allow the plaintiff's counsel to impeach the defendant with the since-vacated plea. The Appellate Division affirmed the resulting judgment against the defendant, which included a finding of contributory negligence on the part of the plaintiff, who appealed.

Holding: In a criminal case, a withdrawn guilty plea may not be used against a defendant (*People v Spitaleri*, 9 NY2d 168); admitting a vacated plea would effectively compel the defendant to testify, violating fundamental fairness. This concern does not arise in a civil trial. A guilty plea to a traffic violation may be admitted in a civil action. *Ando v Woodbury*, 8 NY2d 165. Because the defendant has the opportunity to explain the plea, the jury may decide how much weight to give it. The defendant was allowed to withdraw his plea because it was made without the advice of counsel. However, counsel was not constitutionally or statutorily mandated in the case; and withdrawal (likely prompted by

the civil suit) was a matter of discretion. In these circumstances, the plaintiff's intended use of the withdrawn plea was proper, provided the defendant has the opportunity to offer his reasons for the plea to the jury. Order reversed.

Appeals and Writs (Judgments and Orders Appealable) (Scope and Extent of Review) **APP; 25(45) (90)**

Arrest (General) (Police Officers) (Warrants) **ARR; 35(12) (30) (55)**

People v LaFontaine, No. 149, 12/3/98

The defendant was arrested in New York City by New Jersey police officers holding both New Jersey and federal warrants. After entering his apartment, where they observed and seized drugs and other evidence, the police turned the defendant and the seized property over to New York City police. The defendant's motion to suppress the evidence on the basis of an unlawful arrest was denied on the ground that, although the New Jersey warrant could not be executed under the circumstances, the federal warrant was lawful. The appellate court rejected this reasoning, but upheld the suppression as pursuant to an authorized citizen's arrest under CPL 570.34, a theory which had been rejected by the lower court.

Holding: Only questions of law that were raised or considered in the intermediate appeal, or involve errors resulting in the original criminal court decision, may be considered upon an appeal from an affirmance of a lower court's judgment in a criminal case. *See* CPL 470.35[1]. Review here is confined to the federal warrant issue. The New Jersey officers were not authorized to execute a federal warrant in New York; legal arrests by out-of-state officers in New York are generally limited to cases involving hot pursuit. *See* CPL 140.55. The prosecution "might be able to seek re-examination of the alternative suppression justifications that have been part of this case since its onset, either before the nisi prius court on the remittal or, depending on the nature and configuration of eventual new rulings there, on an ensuing appeal (*see, People v Goodfriend*," 64 NY2d 695, 698). Order reversed and case remitted.

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

Mental Hygiene Legal Service on behalf of Aliza K v Ford, No. 150, 12/3/98

Aggravated harassment charges were dismissed because the petitioner was unfit to stand trial. She was diagnosed with a delusional disorder and transferred to an Office of Mental Health psychiatric facility, then into a locked ward for violent patients. When the facility requested her transfer to a secure mental facility, she objected. The Appellate Division held that this was a non-emergency transfer requiring a judicial hearing.

Holding: Although the petitioner's release has been ordered, the issue is not dismissed as moot since it is likely to recur. Because there may be a greater stigma in being a patient at the secure facility, the petitioner has a liberty interest triggering due process rights. *See Kesselbrenner v Anonymous*, 33 NY2d 161, 167. What process is due is determined by weighing three factors. *Matthews v Eldridge*, 424 US 319 (1976). As no evidence refutes the finding that the secure facility actually affords greater freedom of movement than the confinement of the locked ward, the petitioner's liberty interest is slight. The risk of erroneous deprivation of liberty is minimized by current safeguards. There is no showing that a judicial hearing would significantly reduce the possibility of an erroneous transfer. Security and medical concerns are linked in the treatment of violent mentally ill patients, and the decision to transfer the petitioner was a medical one. The government has a strong interest in avoiding the burden of holding a judicial hearing for every objected-to transfer, which would divert scarce resources from care and treatment. *Savastano v Nurnberg*, 77 NY2d 300, 310. The petitioner's equal protection argument fails because there is a rational basis for providing hearings under CPL 330.20 for persons found not responsible for criminal conduct by reason of mental disease or defect and not under 14 NYCRR 57. Order reversed.

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

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

People v Williams, Nos. 152 and 153, 12/3/98

Both of these cases raised issues regarding the authority of the trial court to accept or reject a defendant's knowing, voluntary and intelligent waiver of rights to be present at sidebar conferences with prospective jurors during jury selection as provided by *People v Antomarchi* (80 NY2d 247 *rearg den* 80 NY2d 759).

Holding: At issue was the discretionary authority of the courts to control and manage their courtrooms and proceedings, particularly voir dire examination of prospective jurors. As to defendant Williams, the refusal of the trial court to allow the defendant to rescind his validly-executed waiver after the voir dire had begun did not as a matter of law amount to an abuse of discretion. *See People v Vargas*, 88 NY2d 363, 377. As to defendant Janvier, however, the trial court's refusal to permit the defendant to validly waive his presence, forcing him to participate in the sidebar conferences over the objection that the jury would see the defendant accompanied by court security personnel and infer that he was incarcerated, did constitute an abuse of discretion. Order in No. 152 affirmed; order in No. 153 reversed.

NY Court of Appeals *continued*

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

Attempt (Lesser and Included Offenses) **ATT; 50(10)**

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

People v Mike, No. 171, 12/3/98

The defendant was convicted after a bench trial of third-degree criminal sale of a controlled substance. The Appellate Division reduced the conviction to attempted criminal sale. The evidence showed that after the defendant offered to purchase drugs for undercover police officers, they drove him to a location where the officers refused either to give the money to the defendant or accompany him inside to complete the transaction. When the transaction then fell through, the officers arrested the defendant for offering to sell drugs.

Holding: The evidence failed to sustain either a conviction for a criminal sale (because there was insufficient proof of a *bona fide* offer to sell and ability and intent to complete the transaction [*see People v Flores*, 84 NY2d 957]), or an attempted sale (because there was no proof that the defendant came dangerously close to completing a sale [*see People v Warren*, 66 NY2d 831, 832]). Order reversed and indictment dismissed.

Dissent: [Bellacosa, J] This case is distinguishable from *People v Warren*, *supra*, in its facts and procedural review framework. The record justified the Appellate Division's action.

First Department

Continuances (Good Cause) **CTN; 90(15)**

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

People v Marcus, No. 1969, 1st Dept, 11/05/98

Holding: The court's refusal to adjourn trial so defense counsel could obtain a more complete set of daily copy for the hearing minutes did not violate the defendant's fundamental rights. *See Matter of Eric W.*, 68 NY2d 633, 636. The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The statutory element of display of a firearm was established by credible evidence. A jury could have reasonably concluded from the totality of the circumstances that the nontestifying victim perceived he was being threatened with a firearm. *See People v Cole*, 216 AD2d 128, 129 *lv den* 86 NY2d 872.

Finally, because the missing witness was not within the prosecution's control, no missing witness charge to the jury was required. Judgment affirmed. (Supreme Ct, New York Co [Schlesinger,J])

Appeals and Writs (General) (Prosecution, Appeals by) **APP; 25(35) (70)**

Motions (General) **MOT; 255(17)**

People v Hernandez, Nos. 2147 and 2147A, 1st Dept, 11/05/98

Holding: The prosecution sought to overturn a 1996 order vacating the defendant's judgment of conviction. Although the notice of appeal was timely served, several adjournments of the prospective retrial were subsequently sought and granted while the prosecution decided whether to actually appeal. No appeal was perfected, and no extra time in which to perfect was sought. Finally, the prosecution unambiguously declared on the record its intent not to appeal. The totality of these circumstances supports the conclusion that the prosecution abandoned the original appeal. The prosecution did not move for reargument of the 1996 order until the Court of Appeals handed down a 1997 decision arguably favorable to their position. An untimely reargument motion cannot be used to take advantage of a change in the law. *Matter of Huie*, 20 NY2d 568, 572. Abandonment of the original appeal had the same effect as never filing a notice of appeal, and the court should have denied reargument rather than granting it and then adhering to the original order. However, the defense did not appeal. Appeal from first order dismissed, second order affirmed insofar as it adhered to the first. (Supreme Ct, Bronx Co [Alvarado, J])

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

People v Johnson, No. 1357, 1st Dept, 11/10/98

Holding: A juror expressing a strong bias in favor of police testimony over lay testimony was allowed to serve over defense objections. An alternative basis for excusing the juror, although used to conclude the defense argument, did not constitute abandonment on the earlier preserved ground and did not dilute the significance of the bias. The bias was conclusively established and the defense's challenge for cause should have been granted for the reasons stated in a companion case. *People v Sharper*, No. 1589, released simultaneously. Judgment reversed, matter remanded for new trial. (Supreme Ct, New York Co [Sudolnik, J])

Dissents: [Ellerin, J] The trial judge, having the benefit of firsthand observation, had a better opportunity to decide the juror's ability to render an impartial verdict. [Mazzarelli, J] Defense counsel effectively abandoned the bias issue to focus on another ground. The objection was therefore insufficient to alert the court to the bias argument. *See People v Anderson*, 242 AD2d 489 *lv den* 91 NY2d 888. The trial judge was correct in determining that the juror's concerns with his internship would not prevent him from entering an impartial verdict.

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

People v Sharper, No. 1589, 1st Dept, 11/10/98

A juror was challenged by the defense because of a stated bias in favor of police testimony and concern about missing employment training. The trial court denied the challenge but spoke only to the second point, ignoring the bias issue. The defense used a peremptory challenge to remove the juror.

Holding: When, as here, a defendant uses all his peremptory challenges before the completion of jury selection, an erroneous denial of a challenge for cause constitutes reversible error. CPL 270.20(2). Where a juror demonstrates a likelihood of being unable to render an impartial verdict, challenge for cause should be granted. A juror whose impartiality is questioned must be excused unless the juror unequivocally promises to set bias aside. *People v Blyden*, 55 NY2d 73, 78. The juror here not only failed to follow his initial hesitation with an unambiguous statement that he would be fair, but made a further statement indicating bias. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Sudolnik, J])

Dissent: [Nardelli, J] Defense counsel made only a perfunctory mention of the bias issue, which was thus unpreserved. The juror was never asked if he could set his bias aside. The prosecution's challenge for cause to a potential juror who had expressed a definite bias against police testimony was also denied by the court, which exercised its sound discretion in denying both challenges.

Parole (Revocation Hearings [Warrant]) **PRL; 276 (45[g])**

People ex rel Nunez v NYS Division of Parole, No. 2651, 1st Dept, 11/12/98

Holding: The petitioner unsuccessfully sought a writ of habeas corpus. The court's determination that the inclusion of an expired warrant number on the Notice of Violation of Parole was merely a correctable clerical error is supported by the record. *See People ex rel Dell v Walker*, 186 AD2d 1043 *lv den* 81 NY2d 702. The petitioner's own submissions show timely notice of the correct warrant number, the charges alleged, and the scheduled final parole revocation hearing. Since the conviction of a new crime in Massachusetts occurred while the petitioner was still under New York's parole supervision, the petitioner was not entitled to a preliminary parole revocation hearing. *People ex rel Courtney v NYS Div. of Parole*, 208 AD2d 352 *lv den* 84 NY2d 811. Order affirmed. (Supreme Ct, Bronx Co [Hunter, J])

Search and Seizure (Automobiles [Investigative Searches]) (Motions to Suppress) **SEA;335 (15[k])(45)**

In re Muhammad F., No. 725, 1st Dept, 11/17/98

The juvenile appellant was arrested following a routine safety check stop of the taxi in which he was a passenger. The police, in an unmarked car, had decided to stop every third occupied cab. After the stop, police noticed the appellant kick something under the seat and discovered a paper bag of crack. The appellant unsuccessfully sought to suppress this evidence because the taxi was stopped without suspicion of wrongdoing.

Holding: Fixed checkpoint stops have been held constitutional. However, vehicle stops by roving patrols with less than reasonable suspicion have been disapproved. *US v Brignoni-Ponce*, 422 US 873, 883-884 (1975). Uniform and nondiscriminatory means of determining which cars will be stopped must be used, such as written standards promulgated by higher officials. *People v Scott*, 63 NY2d 518, 523. Here, the police relied upon no written directive and did not document the method they used. The patrol car was unmarked and did not stop cars at a fixed location. A roving stop is more intrusive and generates more concern than does a checkpoint stop, and the practice of stopping only occupied taxis suggests the officers' purpose was more closely related to observing the passengers than to educating the cab drivers. Order reversed. (Family Ct, New York Co [Marks, J])

Dissent: [Sullivan, J] The police had a systematic procedure in place for stopping vehicles nonarbitrarily. As long as the criteria for stopping cars are fixed, it should be immaterial whether they are verbal or written.

Search and Seizure (Automobiles [Investigative Searches]) (Motions to Suppress) **SEA;335 (15[k])(45)**

People v Boswell, No. 1569, 1st Dept, 11/17/98

Holding: Police who were stopping every third taxi as part of a supervised taxi driver safety program arrested the defendant, a passenger, after officers observed him kicking a bag (containing drugs) under the seat. His motion to suppress the evidence was granted because no written, systematic procedure was shown to limit the officers' discretion to stop taxis. The prosecution moved for reargument under the intervening holding in *People v Serrano* (233 AD2d 170 *lv den* 89 NY2d 929) that the failure to reduce procedures to writing would not alone invalidate a checkpoint stop. After reargument, the court adhered to its decision to suppress, distinguishing *Serrano* by its visible checkpoint and lack of vehicle pursuit. The court erred. The required presence of a supervisor, the fixed location of the police vehicle, and the systematic stopping of every third taxi combined to properly limit these officers' discretion. The case of *Matter of Muhammad F.* (No. 725, decided simultaneously) is distinguishable be-

First Department *continued*

cause those officers' discretion was not sufficiently limited. Order reversed and case remanded. (Supreme Ct, Bronx Co [Cohen, J])

Dissent: [Tom, J] The police actions here resemble a mobile patrol more than a stationary checkpoint. The police car was not visible and was required to pursue the taxis that passed. The lack of a written policy left excessive discretion to the officers on patrol. There was no reporting of the stops, which were made disproportionately at night. Less intrusive and more effective means exist for disseminating information, making the purported educational basis for the taxi stop program suspect.

Search and Seizure (Automobiles [Probable Cause Searches]) (Warrantless Searches) **SEA; 335(15[p]) (80)**

People v Sosa, No. 2775, 1st Dept, 11/19/98

The defendant was convicted of manslaughter and assault. He challenged the admissibility of two guns recovered after the car he had been driving at the time of his arrest was later searched.

Holding: The identification of the defendant as a participant in a drive-by shooting established probable cause for the arrest. Because the detective had information indicating the same car was used in two separate shooting incidents, he was justified in searching the car without a warrant. *People v Blasich*, 73 NY2d 673, 678-679. The two-day delay between the arrest and the search was reasonable, given that the detective was working on another homicide investigation at the time. *See People v Batista*, 209 AD2d 326 *lv den* 84 NY2d 1028. Testimony about the guns was properly admitted; any uncertainties in their identification went to the weight of the evidence and not the admissibility. Although ballistics evidence could not positively connect the guns with the crime, they were highly probative of the defendant's guilt. The color of one gun matched the description of one used in the shooting.

There was no showing that the defendant was prejudiced by late delivery of *Rosario* materials. The court properly exercised its discretion in giving an adverse inference charge as to missing discovery material, rather than dismissing the indictment. Judgment affirmed. (Supreme Ct, Bronx Co [Stadtmauer, J])

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

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

People v Reyes, No. 2186, 1st Dept, 11/24/98

The defendant was a passenger in a car in which police found cocaine and a loaded gun. At a 1988 *Mapp/Huntley* hearing, the court found Officer Parson, the prosecution's sole witness, credible. The defendant's motion to suppress, based on an unlawful stop and coercion, was denied. Parson's trial testimony stating the gun was in plain view was not corroborated by his partner. Parson was convicted in 1996 of tampering with public records and several other offenses. In 1997, the defendant successfully moved to vacate his conviction on the basis of the newly discovered evidence concerning Parson.

Holding: Parson's 1996 conviction did not warrant vacatur of the defendant's conviction. Newly discovered evidence must be, *inter alia*, material and not mere impeachment evidence. Parson's acts were not material to the defendant's case. They occurred three years later and would not have aided the defendant, whose defense was that the drugs and gun found in the car were not his. *See People v Martin*, 240 AD2d 5 *lv den* 92 NY2d 856. Parson's conviction constituted only general impeachment evidence (*see People v Vasquez*, 214 AD2d 93) and had no bearing on the guilt or innocence of the defendant. Order reversed, motion denied, judgment reinstated. (Supreme Ct, New York Co [Bradley, J])

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

People v Garcia, No. 2557, 1st Dept, 11/24/98

The defendant was charged in 1993 with second-degree possession of cocaine under Penal Law 220.18 (1), which requires that the person charged knowingly and unlawfully possessed two or more ounces of a narcotic. Under the law then in existence, the defendant was entitled to a jury charge stating that the prosecution must prove beyond a reasonable doubt the defendant's knowledge that the drugs weighed two or more ounces. However, the trial court instructed the jury over objection that, while all other elements required proof beyond a reasonable doubt, the prosecution's burden respecting the defendant's knowledge of the weight "is a lesser burden; that is, they have to put forward some credible evidence of it." Later realizing that the instruction had to be corrected, the court refused to accept the jury's verdict, gave new instructions and sent the jury for further deliberations. The second instruction stated that the prosecution had the burden as to every element including weight, so that, "if you find beyond a reasonable doubt that . . . the defendant possessed in excess of two ounces of cocaine, then you must find him guilty of that crime. . ." The instruction did not address the defendant's knowledge of the weight.

Holding: The initial charge was clearly erroneous under the law at that time, and if such an error is not properly corrected it mandates reversal. Here, the supplemental instructions were confusing and failed to set forth the appropriate rule of law. The court did not clearly state that the first instruction was wrong. The jury was not provided with the proper standard. A harmless error analysis does not apply to errors in reasonable doubt instructions. *Sullivan v Louisiana*, 508 US 275, 281 (1993). Judgment reversed. (Supreme Ct, New York Co [Rothwax, J])

Second Department

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

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

People v Ricketts, No. 96-09245, 2nd Dept, 11/2/98

The defendant was sentenced to six to 12 years imprisonment for each of two convictions of second-degree robbery and burglary, two to four years for first-degree unlawful imprisonment, and one year for second-degree unlawful imprisonment. All sentences were to run concurrently.

Holding: The tape recording of the call to 911 was properly admitted under the present sense impression exception to the hearsay rule. The statements described substantially contemporaneous noises that the caller heard shortly before and during her emergency call. *See People v Brown*, 80 NY2d 729, 732, 734. The defendant's contention that the tape recording was insufficiently corroborated was never raised before the trial court, so is unpreserved for review (*see* CPL 470.05[2]), and there was evidence sufficient to assure the tape's reliability.

Because the defendant had no prior felony convictions, his minimum sentence for first-degree unlawful imprisonment should have been one third of the maximum, not one half of the maximum. *See* Penal Law 70.00(3)(b); *People v Glass*, 242 AD2d 305. Judgment modified, and as modified, affirmed. (County Ct, Nassau Co [Kowtna, J])

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

People v Smith, No. 97-05530, 2nd Dept, 11/2/98

Holding: The defendant knowingly and voluntarily admitted to a violation of his probation. *See People v Harris*, 61 NY2d 9. Based upon his admission, the court properly adjudicated the defendant to be in violation of probation. *See* CPL 410.70; *People v Hunter*, 194 AD2d 628. An admission to a probation violation does not require a waiver of the full panoply of constitutional rights waived by a guilty plea. *See People v Keemer*, 186 AD2d 586. Amended judgment affirmed. (County Ct, Orange Co [Patsalos, J])

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

Homicide (Mental Condition) (Murder [Intent]) **HMC; 185(35) (40[p])**

People v Smith, No. 95-10149, 2nd Dept, 11/9/98

The defendant pointed a sawed-off shotgun at the decedent after an argument and pulled the trigger, killing the decedent. The defense was lack of knowledge that the gun was loaded and that the intent had been only to scare the decedent.

Holding: The evidence was legally sufficient to establish beyond a reasonable doubt the defendant's guilt of second-degree murder based on depraved indifference to human life. Penal Law 125.25(2). The only mental state required for depraved indifference murder is recklessness; the defendant's mental state was not pertinent to whether the objective circumstances bearing on the nature of his conduct were such that they created a very substantial risk of death. *People v Roe*, 74 NY2d 20, 24. "The assessment of the objective circumstances evincing the actor's depraved indifference to human life—i.e., those which elevate the risk to the gravity required for a murder conviction—is a qualitative judgment to be made by the trier of the facts." *People v Register*, 60 NY2d 270, 274-275 *cert den* 466 US 953. For a person with the defendant's knowledge of guns to point a shotgun at someone and pull the trigger without ascertaining whether the gun was loaded presented a grave risk of death. Judgment affirmed. (County Ct, Westchester Co [Angiolillo, J])

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

People v Hamilton, No. 96-09529, 2nd Dept, 11/9/98

Holding: The defendant's right not to be twice placed in jeopardy was not violated where a mistrial was granted due to defense counsel's immediate need for a heart transplant. *See People v Ferguson*, 67 NY2d 383. The court made a proper inquiry regarding counsel's medical condition upon the defendant's objection to the mistrial motion. The court obtained sufficient information regarding the severity and uncertainty of the defense counsel's condition, and after considering the alternatives, found that there was a manifest necessity for a mistrial. *See Matter of Davis v Brown*, 87 NY2d 626, 630. Judgment affirmed. (Supreme Ct, Queens Co [Robinson, J])

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

Identification (Suggestive Procedures) **IDE; 190(50)**

People v Kemp, No. 97-00374, 2nd Dept, 11/9/98

Holding: Although the court included a general waiver of the right to appeal among a litany of constitutional rights waived by a plea of guilty, the court failed to engage the defendant in an adequate colloquy to ensure that his waiver of the right to appeal was knowing and voluntary. *See People v Callahan*, 80 NY2d 273.

The defendant's contention that he was entitled to an independent source hearing was without merit where the suppression court properly determined that the complainant's identification of the defendant was merely confirmatory. *See People v Rodriguez*, 79 NY2d 445. The defendant's statements to the police and other evidence established that the complainant and the defendant were sufficiently known to each other so that suggestiveness of the police identification procedure was not a concern. *See People v Allen*, 231 AD2d 900. Judgment affirmed. (Supreme Ct, Kings Co [D'Emic, J])

Second Department *continued*

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

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

People v Mandinga, No. 97-03273, 2nd Dept, 11/9/98

Holding: After the court found that the prosecutor had established a *prima facie* case of racial discrimination in defense peremptory challenges, defense counsel explained that one prospective juror had been a victim of car theft, and counsel was concerned about that juror's emotional response to the crimes at issue. Defense counsel was also not satisfied with the juror's response to her inquiry regarding the presumption of innocence. Defense counsel explained that another prospective juror's home had previously been burglarized. These explanations were facially neutral and sufficient to rebut the prosecution's *prima facie* showing of discrimination. *See People v Payne*, 88 NY2d 172. The court erred by rejecting defense counsel's explanations as pretextual on the basis that the defense had not challenged a juror whose son had been mugged 11 years earlier at the age of seven. The prosecution failed to satisfy their burden of proving racial discrimination where they did not offer additional evidence of such discrimination. *See People v Rudd*, 225 AD2d 710. Judgment reversed and new trial ordered. (Supreme Ct, Queens Co [Rosenzweig, J])

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

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

People v Perez, No. 97-03582, 2nd Dept, 11/9/98

Holding: The court did not err in refusing to sanction the prosecution for the destruction of a surveillance videotape prior to trial, where there was no showing of bad faith and the evidentiary value of the videotape was questionable. The defense explored the destruction of the videotape both in cross-examination and in summation. Given the minimal prejudice to the defendant, it was a proper exercise of discretion for the court to decline to sanction the prosecution. *See People v Daly*, 186 AD2d 217.

The court properly curtailed cross-examination of a prosecution witness regarding prior bad acts of which the witness had been accused where such witness alerted the court to his intention to invoke his privilege against self-incrimination. *See People v Thomas*, 51 NY2d 466, 472-473. Judgment affirmed. (Supreme Ct, Kings Co [Douglass, J])

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

People v Budd, 97-06204, 2nd Dept, 11/9/98

Holding: The court should have granted the defendant's challenge for cause with respect to a prospective juror whose statement (that a person accused of a crime needed to say they weren't there or couldn't have done it) rendered unclear whether the juror would have been able to render an impartial verdict if the defendant did not testify at trial. *See* CPL 270.20(1)(b). The court failed to conduct a follow-up inquiry to establish that the juror would follow its instructions, including that the defendant has the right to remain silent and that the prosecution always carries the burden of proof. *See People v Hernandez*, 222 AD2d 696. The defendant was prejudiced because his allotment of peremptory challenges was used before jury selection was completed. *See People v Bentz*, 232 AD2d 498. Judgment reversed. (County Ct, Westchester Co [Ryan, J])

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

People v Chetrick, et al., Nos. 97-06548, 97-06549, 97-06550, 97-09603, 97-09606, 97-09608, 2nd Dept, 11/9/98

Holding: The court granted the defendants' joint motion to dismiss each of the respective indictments on the ground that the prosecution was not ready for trial within six months of the commencement of the actions. The counts in both of the felony complaints and in the second indictment were based on conduct "comprised of several groups of acts 'so closely related and connected in point of time and circumstance of commission as to constitute a single criminal indictment.' " CPL 40.10(2)(a); *see also People v Sheriff of Schenectady County*, 220 AD2d 190. For purposes of applying the six-month speedy trial limitation prescribed by CPL 30.30(1)(a), the second indictment related back to the date the felony complaints were filed.

The court did not err in denying the prosecution's motion to renew and reargue, where the prosecution did not offer a valid excuse for failing to submit available facts in response to the defendants' original motion to dismiss the indictment. *See Foley v Roach*, 68 AD2d 558. A remedy is not available where "'a party has proceeded on one legal theory on the assumption that what has been submitted is sufficient, and thereafter sought to move again on a different legal argument merely because he was unsuccessful upon the original application.' " *Id* at 568. Orders affirmed. (County Ct, Suffolk Co [Vaughn, J])

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

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

People v Gundersen, No. 95-10964, 2nd Dept, 11/16/98

Holding: The court erred in finding that the defendant's videotaped statement was sufficiently attenuated from the taint of his prior illegal arrest. *See People v Harris*, 77 NY2d 434. It was incorrect for the court to rely upon facts developed in separate hearings involving codefendants. *See People*

v Victor, 74 NY2d 874, 876. The lapse of several hours from the time of the illegal police conduct was inconclusive. That *Miranda* warnings were issued prior to the taking of the statement is also inconclusive. *See Wong Sun v United States*, 371 US 471 (1963). There were no significant intervening events which could be viewed as sufficiently attenuating the videotaped statement from the prior taint of impropriety. *See People v Conyers*, 68 NY2d 982.

The redacted statement of a non-testifying co-defendant was improperly admitted into evidence where such statement unfairly prejudiced the defendant. *Cf People v Mahboubian*, 74 NY2d 174. The redacted statement contained an inculpatory reference to "everybody" present striking the disarmed complainant, directly conflicting with the defendant's position at trial that he had only disarmed the complainant and did not strike him thereafter. Judgment reversed. (Supreme Ct, Kings Co [Feldman, J])

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

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

People v Cardwell, No. 97-08847, 2nd Dept, 11/16/98

Holding: Defense counsel attempted to make a *Batson* challenge to the prosecution's motives in using a peremptory challenge to excuse a black venireperson. The court failed to allow defense counsel the opportunity to set forth the "facts and other relevant circumstances" which counsel felt made out a *prima facie* case of improper exclusion by the prosecutor. *See People v Jenkins*, 84 NY2d 1001, 1002. Counsel was entitled to an opportunity to make out a *prima facie Batson* showing. *See People v Garcia*, 217 AD2d 119). Appeal held in abeyance, matter remitted to hear and report on the defendant's *Batson* challenge, and to hear and report on the prosecutor's exercise of peremptory challenges, if necessary. (Supreme Ct, Queens Co [Browne, J])

Identification (In-court) (Show-ups) **IDE; 190(24) (40)**

People v Garcia, Nos. 97-02304, 97-02305, 97-02306, 97-02307, 97-02308, 98-09633, 2nd Dept, 11/23/98

Holding: The prosecution failed to establish by clear and convincing evidence that any in-court identifications of the defendants by the complaining witnesses would be derived from a source independent of the illegal police detention of the defendants. *See People v Gethers*, 86 NY2d 159. The initial descriptions given were general and vague—the complainants had been assaulted by a group of approximately 15 men, whom they said were young, Hispanic, and about 5′7″ tall. The defendants were not identified until a show-up about six weeks later. The court did not err in allowing the defendants to waive their right to be present during the independent source hearing, and properly granted the defendants' motions to preclude in-court identification testimony by the complainants. Judgment affirmed. (Supreme Ct, Queens Co [Eng, J])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) (Motions to Suppress [CPL Article 710]) **SEA; 335(15[k]) (45)**

People v Leary, No. 97-08861, 2nd Dept, 11/23/98

Holding: A police officer who legally stopped a cab with a passenger exceeded the permissible bounds of a level one request for information (*see People v Hollman*, 79 NY2d 181) when the officer opened the rear door, leaned into the cab, and moved the passenger's bag. Although the officer was permitted to speak to the defendant passenger in order to ascertain the defendant's destination and assist the driver, the minimal intrusion permitted by a level one inquiry was exceeded by the officer's subsequent conduct. *See People v Vidal*, 71 AD2d 962. The branches of the defendant's *omnibus* motion, to suppress the fruits of the unlawful conduct, must be granted. Judgment reversed. (Supreme Ct, Queens Co [Butcher, J])

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

Weapons (Deadly Weapons) (Evidence) **WEA; 385(10) (20)**

People v Ferguson, No. 96-04433, 2nd Dept, 11/30/98

Holding: Because the prosecution failed to present proof that the defendant possessed a "deadly weapon" as defined by Penal Law 10.00(12), the defendant's first-degree robbery conviction under Penal Law 160.15(2) was reduced to third-degree robbery. *See People v Amato*, 99 AD2d 495. For the same reason, the defendant's conviction for second-degree criminal possession of a weapon was dismissed. *See* Penal Law 265.03; *People v McInnis*, 179 AD2d 781.

The defendant's motion to set aside the verdict pursuant to CPL 330.30(2) based on juror misconduct was properly denied where the defendant failed to submit sworn allegations of the existence of "all facts essential to support" the motion. CPL 330.40(2)(a) and (e)(ii); *see People v Hill*, 225 AD2d 902. Judgment modified, and as modified, affirmed. (Supreme Ct, Queens Co [Robinson, J])

Second Department *continued*

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

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

Witnesses (General) **WIT; 390(22)**

People v Kendall, No. 97-00725, 2nd Dept, 11/30/98

Holding: Although it was improper for the prosecution's rebuttal witness to repeat the testimony that he had given on the prosecution's direct case (*see People v Brown*, 126 AD2d 657), the error was harmless under the circumstances. *See People v Alston*, 158 AD2d 607. Judgment affirmed. (Supreme Ct, Queens Co [Katz, J])

Third Department

Evidence (Hearsay) (Other Crimes)(Prejudicial) **EVI; 155(75) (95) (106)**

People v Chestnut, No. 10114, 3rd Dept, 10/15/98

Holding: The defendant, who ran away when his parole officer questioned him and tried to search the defendant's pocket, was arrested; after drugs were found in a nearby garbage can, he was indicted and convicted. Testimony given by the parole officer describing bystanders yelling that the defendant had discarded something in the garbage was admissible not to prove the truth of the matter asserted but to provide evidence of the officer's state of mind and steps taken to recover evidence. *See People v Roraback*, 242 AD2d 400, 403 *lv den* 91 NY2d 878. It was necessary to inform the jury of the defendant's parole status in order to complete the narrative of events; that status, and its conditions such as the parole officer's authorization to interview and search him at any time; were inextricably intertwined with the facts of the offense. *See People v Starr*, 213 AD2d 758, 759 *lv den* 85 NY2d 980. Any prejudice to defendant as a result of disclosure was mitigated by the court's limiting instruction. The evidence, viewed in the light most favorable to the prosecutor (*see People v Contes*, 60 NY2d 620), was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Judgment affirmed. (Supreme Ct, Rensselaer Co [Peters, J])

Larceny (Elements) (Evidence) **LAR; 236(17) (25)**

People v Vandenburg, Nos. 77236 and 10357, 3rd Dept, 10/15/98

Holding: The prosecution failed to establish that the value of property taken by the defendant exceeded $3000. *See* CPL 155.35. Statutory law requires a showing of "the market value of the property at the time and place of the crime . . ." Penal Law 155.20 [1]. A witness must provide a basis of knowledge for a statement of an item's value. *See People v Lopez*, 79 NY2d 402, 404. Conclusory statements and rough estimates are not sufficient, nor is evidence of the original purchase price, without more. An item's price must be reduced by any depreciation or change which affected its value. *People v Medjdoubi*, 173 Misc2d 259, 261. The complainant provided the price and age of items stolen, but not enough evidence so the jury could reasonably infer their value rather than "merely speculate." *People v Jackson*, 194 AD2d 691, 692. The conviction is reduced under CPL 470.15(2)(a) from grand larceny to petit larceny.

Evidence of uncharged crimes was properly admitted. An aborted burglary preceding the offense at issue provided a timeline of events and an explanation of the defendant's subsequent apprehension. Evidence regarding drug use explained his motive for committing the crimes. *See People v Alvino*, 71 NY2d 233, 242. The defendant failed to challenge the underlying felony conviction at sentencing, thereby waiving any challenge to being sentenced as a second felony offender. Judgment modified, matter remitted for resentencing, and as modified, affirmed. (County Ct, Albany Co [Breslin, J])

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

People v Fields, No. 10057, 3rd Dept, 11/29/98

Holding: The court erred in closing the courtroom to the public during an undercover officer's testimony at the *Wade* hearing. The constitutional and statutory right to a public trial extends to suppression hearings. *See Waller v Georgia*, 467 US 39, 46 (1984). This right is not absolute and closure could be justified in some instances. The prosecutor here merely said the officer was still working undercover, and requested courtroom closure. The prosecutor did not make the required factual showing that the officer was still making undercover buys and that his public testimony would jeopardize his safety or compromise the integrity of an ongoing investigation. *See People v Jefferson*, __ AD2d __, 670 NYS2d 239, 241-242. Appeal held in abeyance and the matter remitted to the county court for a new suppression hearing. (County Ct, Sullivan Co [LaBuda, J])

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

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

People v Wilson, No. 10017, 3rd Dept, 11/5/98

Holding: The defendant was not entitled to a pretrial hearing regarding the admissibility of the testimony of the three young complainants where there was no claim that use of the testimony was precluded by an exclusionary rule or that it constituted novel scientific evidence. *See People v Wernick*, 89 NY2d 111, 115. The defendant's argument that the testimony may have been tainted by suggestive questioning goes to the witnesses' credibility and reliability.

These are issues reserved for the jury. *See People v Hudy*, 73 NY2d 40, 58.

The defendant claimed that the verdict was not supported by legally sufficient evidence because the seven-year-old complainant, A, was not given a formal traditional oath and therefore provided unsworn testimony. The form of an oath is flexible, and is sufficient where it is "calculated to awaken the conscience and impress the mind of the person taking it in accordance with his or her religious or ethical beliefs." *See Collins v AA Trucking Corp.*, 209 AD2d 363. Given the defendant's statement, complainant A's testimony, and complainant C's unsworn testimony, which was sufficiently corroborated, a rational trier of fact could conclude that the elements had been proven beyond a reasonable doubt. *See People v Chico*, 90 NY2d 585, 588-589. Judgment affirmed. (County Ct, Schuyler Co [Callanan, J])

Dismissal (General) **DSM; 113(17)**

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

People v Hollis, No. 10082, 3rd Dept, 11/5/98

Holding: Defense counsel did not cross-examine the complainant, a court security officer, about his status. Counsel chose to wait until the prosecution had rested, then moved to dismiss the indictment for failure to establish the requisite element that the person assaulted was a peace officer. Penal Law 120.05(3). The prosecutor requested and was granted the opportunity to reopen the case and adduce additional evidence as to that element. The court had discretion to reopen the case prior to submission of the case to the jury. *See People v Olsen*, 34 NY2d 349, 353. Significantly, the defendant complained not about the timing of receipt of the new evidence but that its overwhelming probative value essentially compelled a finding of the contested element.

Taken as a whole, the court's instructions to the jury that it could find guilt only if the complainant was a court security officer, and acting in that capacity at the time of the incident, were appropriate. The court did not remove the element of "peace officer" from the crime, but tailored its instructions to the trial evidence. The defendant did not receive ineffective assistance of counsel because defense counsel did not attack the alleged deficiencies in the evidence. The decision to request dismissal was a tactical one. The evidence presented by the prosecutor as to whether or not the security officer was a peace officer was overwhelming. Judgment affirmed. (County Ct, Schenectady Co [Eidens, J])

Accomplices (Corroboration) (Witnesses) **ACC; 10(20) (35)**

Impeachment (General) **IMP; 192(15)**

People v Bass, Nos. 73460 and 73883, 3rd Dept, 11/12/98

The defendant's CPL 440.10 motion to vacate the judgment after his conviction of second-degree robbery was denied.

Holding: The testimony of the alleged accomplice who inculpated the defendant was sufficiently corroborated. Corroborative evidence from an independent source need not establish commission of the crime but only connect the defendant with the crime in a way that can reasonably satisfy the jury of the accomplice's truthfulness. *People v Daniels*, 37 NY2d 624, 630. The defendant's live-in girlfriend testified that the defendant, the accomplice, and another left the night of the robbery and returned about one hour later. The complainant was not able to identify his assailants, but his testimony as to time and place of the robbery matched the accomplice's. An acquaintance testified that the defendant admitted his involvement to the crime.

The prosecution's impeachment of another alleged accomplice who implicated the defendant before trial but then testified that he (this accomplice) had acted alone was permissible under CPL 60.35(1), and the jury was properly instructed as to this evidence in compliance with CPL 60.35(2). Claims that the defendant was denied effective assistance of counsel and the right to appear before the grand jury are without merit, where the public defender was appointed on March 4, the defendant received the CPL 190.50 notice on March 18 and communicated no desire to testify, and no motion to dismiss based on a 190.50 violation was made within 5 days of the arraignment on the indictment (which was returned on May 12). Judgment and order affirmed. (Supreme Ct, Schenectady Co [Sheridan, J])

Insanity (Defense of) (Evidence) **ISY; 200(10) (25)**

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

People v Cilberg, No. 76552, 3rd Dept, 11/12/98

Holding: The jury rejected the defense of lack of criminal responsibility by reason of mental disease or defect. The verdict was not against the weight of the evidence just because the prosecution presented no expert testimony rebutting the defense's psychiatric testimony and relied on testimony characterizing his behavior by the police officers who initially arrested him. While, on appeal, evidence may be examined in a neutral light, and inferences drawn contrary to the jury's (*see People v Acosta*, 80 NY2D 665, 672), great deference must be accorded to the jury's opportunity to see the witnesses. *See People v Bleakley*, 69 NY2d 490, 495. The jury was not obligated to accept the opinion of a defense expert, provided that a reasonable alternative conclusion was supported by other evidence. *See People v Myers*, 220 AD2d 272 *lv den* 87 NY2d 923. Since the officers testified that on the day of the crime the defendant seemed rational, the

Third Department *continued*

jury could permissibly conclude that the defendant "had a full understanding and appreciation of the nature and consequences of his act." *See People v Smith*, 217 AD2d 221, 236 *lv den* 87 NY2d 977.

The admission of an uncharged crime of perjury committed by the defendant was not error, as it was more probative than prejudicial (*see People v Chase*, 85 NY2d 493, 502) and was relevant to intent and to rebut the claim of insanity. *See People v Santarelli*, 49 NY2d 241, 248. After the defense rested, one juror claimed to hear another say, "let's find this guy guilty and let's go home," but an *in camera* exam of each juror did not substantiate that the comment prejudiced the defendant. Judgment affirmed. (County Ct, Sullivan Co [Meddaugh, J])

Probation and Conditional Discharge (Conditions and Terms) (Modification) — **PRO; 305(5) (25)**

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

People v Myatt, Nos. 78274 and 10158, 3rd Dept, 11/12/98

Holding: The record shows that the defendant made an informed decision when he pled guilty and waived his right to appeal. The defendant was not deprived of effective assistance of counsel, as his attorney did argue in favor of youthful offender status and against a condition of probation barring the defendant from a 10-mile radius of the complainant's home, and the defendant did obtain a favorable plea. The challenge to the 10-mile zone because it was not statutorily authorized and prevented the minor defendant from living in his parents' home lacked merit. A 1996 amendment to Penal Law 65.10, providing courts with greater flexibility to impose conditions aimed at public safety (L 1996, ch 653, [1]), effectively overruled the "fundamentally rehabilitative purpose" holding of *People v McNair*, 87 NY2d 772. The defendant's parents live near the young complainant, with whom the defendant had had other sexual contact, and the defendant had expressed no remorse, creating concerns for the complainant's safety. The defendant may apply to have the condition eliminated during his probationary period.

The defendant's behavior, lack of empathy, and lack of engagement during mental health counseling sessions, and the presentence report recommendation support the court's finding that the defendant be required to register under the Sex Offender Registration Act, and the denial of youthful offender status. Judgment and order affirmed. (County Ct, Franklin Co [Main Jr., J])

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

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

State v Alexander, Nos. 78973A and 78973B, 3rd Dept, 1/12/98

An undercover police investigator purchased cocaine, at the defendant's suggestion, from codefendant DeSarno rather than someone else, leading to the arrest and conviction of both the defendant and DeSarno, who were represented by one attorney.

Holding: The court did not err in denying without a hearing the defendant's motion to vacate the judgment based on a claim of ineffective assistance of counsel due to trial counsel's action in stipulating to receipt of a lab report identifying the substance sold to the investigator as cocaine. The complained of "inconsistencies" in the lab paperwork were easily reconciled, and raised no genuine issue of accuracy of the analysis or integrity of the chain of custody. The stipulation was consistent with the defendant's theory that he did not participate in the sale of the substance. A court may summarily deny a motion to vacate if the moving papers do not contain competent evidence supporting a genuine ground for vacatur. *See* CPL 440.30[4][a], [b].

Nor was there ineffective assistance of counsel due to the joint representation of codefendant DeSarno and the defendant, who made an informed choice to proceed with counsel despite a potential conflict of interest. Unlike DeSarno, the defendant came forth with no new evidence. *Cf People v DeSarno*, 239 AD2d 74, 77. The prosecutor's statements that the defense was contrived cannot be found to have had "a decided tendency to prejudice the jury." *See People v Ashwal*, 39 NY2d 105, 110. Judgment and order affirmed. (County Ct, Tompkins Co [Sherman, J])

Fourth Department

Counsel (Attachment) (Competence/Effective Assistance/Adequacy) — **COU; 95(9) (15)**

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

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

People v Seymour, No. 989, 4th Dept, 11/13/98

Holding: The defendant challenged the admission of statements he made to two inmates, arguing that he was deprived of his rights to counsel and protection against self-incrimination. Although one inmate witness was a police agent, no right to counsel had attached since the defendant had not been charged with the crimes and had not requested or obtained an attorney in the matter. As the second inmate was not a police agent, those conversations did

not violate the right to counsel. The inmate took the information to the police on his own. Even if both inmate witnesses were police agents, incarcerated persons are not entitled to *Miranda* warnings before questioning by undercover agents. *People v Alls*, 83 NY2d 94, 98.

The prosecution erred in disclosing grand jury testimony of one witness to another, absent a court order or any of the limited exceptions in CPL 190.25 (4)(a). While the conduct of the prosecutor in violating the secrecy of the grand jury proceedings without a court order is not condoned, it does not warrant reversal. The testimony of the witnesses at trial was the same as that before the grand jury, the evidence against the defendant was overwhelming, and the misconduct did not prevent a fair trial. Judgment affirmed. (County Ct, Steuben Co [Scudder, J])

Dismissal (General) **DSM; 113(17)**

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

People v Santmyer, No. 1011, 4th Dept, 11/13/98

Holding: The defendant, a police officer, was charged with perjury. The court erred in dismissing the indictment on the grounds that the grand jury proceedings were defective, creating a risk of prejudice to the defendant. The only defense contention was that the court had not granted leave for the matter to be withdrawn from the first grand jury and resubmitted to a second grand jury. However, the first grand jury was never asked to consider criminal charges, so charges could not be withdrawn from it. *See People v Wilkins*, 68 NY2d 269, 274. The court did not consider this contention, but relied on other grounds not raised by the defendant. The prosecution had no opportunity to address these alleged defects, so the dismissal must be reversed. *See* CPL 210.45 (2) (6). In any event, there is no showing of prejudice to the defendant. That the defendant's testimony was inconsistent with that of other witnesses should have been obvious, so there was no potential for prejudice from the prosecutor's testimony. The decision not to instruct the grand jurors as to which of the defendant's statements were allegedly perjurious was within the prosecutor's discretion.

Dismissing the indictment because of preindictment delay was also error. That claim was not advanced by the defendant, so the prosecution was again deprived of its opportunity to be heard. Order reversed. (County Ct, Onondaga Co [Mulroy, J])

Accusatory Instruments (Variance of Proof) **ACI; 11(20)**

People v George, No. 1120, 4th Dept, 11/13/98

Holding: The defendant was indicted for one act of rape, but the complainant testified that the defendant committed two acts of rape on that date. The defendant's right to have charges preferred by the grand jury rather than by the prosecutor at trial was violated, because the jury may have convicted the defendant of the rape for which he was not indicted. *See People v Grega*, 72 NY2d 489. Meaningful appellate review of the evidence is not possible without implicating the prohibition against double jeopardy. *People v Ball*, 231 AD2d 853, 854. The rape conviction must be reversed.

The defendant's contention that improper admission of the complainant's hearsay statements to the doctor requires reversal was not preserved for review. The defendant objected only in general terms, and if considered, the admission would be harmless error. Judgment modified. (Supreme Ct, Monroe Co [Affronti, J])

Dissent: [Piggott, Jr., J] On direct and cross-examination, the complainant testified as to a single count of rape. The redirect testimony, construed by the defense as referring to an earlier act of rape, was clarified by the complainant later in her redirect testimony, so no ambiguity remained. Defense counsel and the prosecutor referred to a single count in their summations. There was no danger that the defendant was convicted for offenses for which he was not indicted.

Confessions (Corroboration) **CNF; 70(22)**

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

People v Lewandowski, No. 1253, 4th Dept, 11/13/98

The defendant was convicted of forgery after using the credit card of her former employer. In a signed statement, she admitted that she had used the card despite knowing she was no longer an authorized user, and had signed the name of her brother, an officer in the corporation, on the receipts without his permission.

Holding: The defendant contends that CPL 60.50, prohibiting a conviction based solely on a confession or admission without additional proof, was violated. Although her brother testified that the defendant was no longer employed by the corporation when the card was used to make the purchases, his testimony did not explicitly state that the defendant was not authorized to use the card. The statutory requirement is intended merely to prevent a conviction where, despite a confession, no crime has actually been committed. *See People v Chico*, 90 NY2d 585, 590. Circumstantial evidence may provide the necessary added proof, with the confession explaining the circumstances. Here, the inference that the defendant used the credit card without authority is supported by the evidence. Judgment affirmed. (Supreme Ct, Monroe Co [Cornelius, J])

Dissent: [Pine, JP] Without the defendant's confession, there was no showing that the signatures were unauthorized. There was insufficient proof that crimes were committed.

Fourth Department *continued*

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

Evidence (Exclusionary Rule) **EVI; 155(53)**

People v Young, No. 1269, 4th Dept, 11/13/98

Holding: The defendant's arrest was determined in a prior appeal to have been made without probable cause. He unsuccessfully moved to suppress evidence from the illegal arrest, including a statement he made, police observations, and a police line-up identification. The prosecution's claim that the line-up identification was attenuated from the illegal arrest is unsupported by the evidence, which shows that the defendant's consent to the line-up took place within an hour of the illegal arrest. Because the consent was affected by the primary taint, the ensuing lineup identification flowed directly from the illegal arrest. *See People v Dodt*, 61 NY2d 408, 417. The evidence must be suppressed at a new trial. The prosecution is to be given the opportunity to establish that an in-court identification of the defendant by the complainant stems from the crime and is untainted by the unlawful line-up procedure. Judgment reversed. (Supreme Ct, Monroe Co [Doyle, J at suppression; Wesley, J at trial and sentence; Affronti, J at resentencing])

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

People v Loomis, No. 1294, 4th Dept, 11/13/98

Holding: The defendant's motion to suppress evidence seized from his room should have been granted. Seeking the defendant's consent for a search after he has requested counsel is unconstitutional. *People v Johnson*, 48 NY2d 565, 569. Because counsel was requested on the charges for which the defendant was in custody, uncounseled consent to search for items related to those or any other charges could not be legally obtained. *See People v Burdo*, 91 NY2d 146, 149. Contrary to the suppression court's reliance on the fact that counsel had not yet been appointed or retained, the right to counsel attaches indelibly when a defendant in custody requests counsel. *People v West*, 81 NY2d 370, 373-374. The items seized must be suppressed, and the conviction of possession of stolen property reversed and that count dismissed. Judgment modified, and as modified, affirmed. (County Ct, Ontario Co [Henry, Jr., J])

Prisoners (Correspondence) (Disciplinary Infractions and/or Proceedings) **PRS I; 300(6) (13)**

Matter of Knight v Goord, No. 1333, 4th Dept, 11/13/98

The petitioner was charged in a misbehavior report by Sing Sing correction officers with assaulting another inmate. The evidence presented at the hearing was a letter from the petitioner to his mother admitting the offense. This article 78 proceeding was transferred. (Supreme Ct., Wyoming Co [Dadd, J])

Holding: An inmate's outgoing mail may not be opened or read without the written authorization of the facility supervisor, based on a reasonable belief that "the provisions of any department directive, rule or regulation have been violated, or that such mail threatens the safety, security, or good order of a facility or the safety or well being of any person." 7 NYCRR 720.3 (e). The written authorization must specify the facts forming the basis for such a belief. Because the record here contains no such authorization, the evidence was seized in contravention of prison regulations. All references to the charge must be expunged from the petitioner's file. *See Matter of Ode v Kelly*, 159 AD2d 1000, 1001. Determination annulled.

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

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

Matter of Arvinger v Goord, No. 1358, 4th Dept, 11/13/98

The petitioner, an inmate, was found guilty after a Tier III disciplinary proceeding of two charges of harassment and possession of a weapon. This article 78 proceeding was transferred. (Supreme Ct, Wyoming Co [Dadd, J])

Holding: The issue of insufficient evidence as to the first harassment charge was not raised on the administrative appeal. Because the petitioner failed to exhaust his administrative remedies, the issue cannot be reviewed. *See Matter of Nelson v Coughlin*, 188 AD2d 1071 *app dmsd* 81 NY2d 834. In any event, the misbehavior report supports the determination.

The defense to the weapons charge and other testimony raised an issue of credibility for the Hearing Officer to resolve. The evidence was concededly insufficient to support the second harassment charge; that determination is annulled and the penalty vacated. Determination modified, and the matter remitted for imposition of an appropriate penalty on the remaining violations.

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

Matter of Battiste v Goord, No. 1359, 4th Dept, 11/13/98

The petitioner was charged with possessing unauthorized organizational materials, after a corrections officer found a photograph of the petitioner's hand alleged to portray him displaying a "Bloods" sign. At a Tier II hearing, the petitioner claimed the photograph showed him giving a peace sign, but was found guilty. This CPLR article 78 pro-

ceeding was transferred. (Supreme Ct, Wyoming Co [Dadd, J])

Holding: Although nothing in the record identifies the Bloods as an unauthorized organization, the petitioner did not raise that issue in his appeal and so did not exhaust his administrative remedies. The credibility of the petitioner's testimony was a matter for the Hearing Officer. *See Matter of Perez v Wilmot*, 67 NY2d 615, 616. The written misbehavior report provides sufficient probative evidence that the inmate rule was violated. Determination confirmed.

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

Search and Seizure (Search Warrants [Affidavits, Sufficiency of][Issuance]) **SEA;335(65[a][k])**

People v Pettigrew, No. 1424, 4th Dept, 11/13/98

Holding: The defendant challenged the warrant to search his home as having been issued without probable cause. The warrant application stated that the 76-year-old victim was found raped and murdered, with $10,000 in large bills and a gold pin missing, and referred to the defendant's history of raping elderly women and removing their jewelry, and his purchase of two cars with large bills shortly after the crime. Other testimony by a confidential informant further supported the warrant. There was sufficient information to support a reasonable belief that evidence of a crime would be found. *People v Bigelow*, 66 NY2d 417, 423. The contention that the investigator gave false statements to the Magistrate is unpreserved.

The inconsistent results of the DNA tests go to the weight of the evidence and not its admissibility. The defendant did not challenge the scientific reliability of the polymerase chain reaction method of DNA profiling used nor the procedures used in performing the test. *See People v Wesley*, 83 NY2d 417, 422-423. Any challenges as to the chain of custody of the cash and biological evidence from the victim also relate to the weight of that evidence, since the prosecution provided reasonable assurances that it was identical, unchanged, and had not been tampered with. *See People v Waite*, 243 AD2d 820 *lv den* 91 NY2d 882, 931. Judgment affirmed. (Niagara Co [Hannigan, J])

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

Evidence (Fingerprints) **EVI; 155(58)**

People v McDowell, No. 1438, 4th Dept, 11/13/98

The defendant's indictment on burglary charges was dismissed on the ground that the fingerprint evidence did not establish a prima facie case, because the window area was generally accessible to the public. Following the dismissal, the prosecution appealed. Later, the prosecution submitted additional exhibits. The court reconsidered, but affirmed the dismissal.

Holding: As a matter of discretion the appeal is treated as taken from the order made after the motion for reconsideration. *See* CPL 460.10 [6]. The evidence established that the burglar broke and entered through the bottom portion of a floor-level window. The evidence that the fingerprint was lifted from broken glass found inside the premises was legally sufficient for the grand jury to find a prima facie case. *See People v Swamp*, 84 NY2d 725, 730. Order reversed. (County Ct, Monroe Co [Marks, J])

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

Counsel (Attachment) (Right to Counsel) **COU; 95(9) (30)**

People v Whaley, No. 1445, 4th Dept, 11/13/98

Holding: The defendant was improperly interrogated in the absence of counsel while in custody, as he was represented both on the matter under investigation and on the unrelated charges for which he was in custody. His statement was improperly taken in violation of his right to counsel. However, because the only reference to the statement at trial was elicited by defense counsel in cross-examining a prosecution witness, the defendant forfeited his objection to that evidence. *People v Smalls*, 115 AD2d 783, 784 *lv den* 67 NY2d 890, 1057.

The court did not err in refusing to sever the counts of indictment relating to each murder. The verdict convicting the defendant of murder on the first count was not against the weight of the evidence and the evidence was legally sufficient to support the verdict. The defendant was not denied a fair trial by prosecutorial misconduct. Judgment affirmed. (County Ct, Onondaga Co [Burke, J])

Search and Seizure (Electronic Searches)(Search Warrants) **SEA; 335(30)(65)**

People v Murgas, No. 1464, 4th Dept, 11/13/9

Holding: An eavesdropping warrant was issued for the defendant's telephone, based on the affidavit of a police investigator stating his belief that a wiretap would intercept evidence of illegal activities, based on an investigation including his interpretation of telephone calls involving the defendant. The defendant sought to suppress the evidence, arguing that the overheard conversations were ambiguous and did not provide probable cause. " '[C]ryptic and ambiguous conversations may serve as a predicate for probable cause when reasonably interpreted by an experienced investigator' (*People v Manuli*, [104 AD2d 386], 388." Here, the investigator's interpretation was properly accepted by the judge who issued the warrant. *People v Harper*, 236 AD2d 822, 823. Judgment affirmed. (County Ct, Oneida Co [Donalty, J]) ⚖

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