



Public Defense Backup Center REPORT

VOLUME XIV NUMBER 6

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A P U B L I C A T I O N O F T H E D E F E N D E R I N S T I T U T E

Defender News

32nd Annual Meeting

Informative and inspirational information was presented in a variety of formats during the 32nd Annual Meeting and Conference of the Association in Glens Falls July 29 through August 1. The interchange of ideas began at the lively reception on Thursday evening during which public defense providers from across the state had a chance to become acquainted and continued throughout the conference.

■ PDCMS Demonstrated at Information Exchange

The wide variety of printed and electronic resources on view during Friday's Criminal Defense Information Exchange piqued the interest of those attending. A center attraction was the demonstration by NYSDA Information Specialist Darlene Dollard of the Public Defense Case Management System (PDCMS), which has been installed in several counties and is being considered for or awaiting installation in others. (Anyone who missed the conference can obtain a list of the Exchange materials, and information about PDCMS, from the Backup Center.)

■ MCLE Presented, Materials Offered

Two full days of MCLE training spanned a wide spectrum of issues, from an in-depth look at change of venue motions to a timely discussion of domestic violence cases. Many of the sessions were enlivened by use of multi-media aids, including several computer-generated presentations and a role-playing videotape. The presentation by NYSDA Managing Attorney Charlie O'Brien and Information Consultant Ken Strutin on defense research on the Internet included an introduction of the Association's redesigned and expanded web site at www.nysda.org. (Printed materials from the trainings are available to public defense providers for \$25 through the Backup Center—see ad on p. 2.)

■ Pittari, Whiteman Feted

The Association recognized special dedication to the cause of public defense during Saturday's Awards Luncheon. After receiving a Special Recognition Award, Stephen J. Pittari (Chief Counsel and Executive Director of the Legal Aid Society of Westchester County and NYSDA Board Mem-

ber) spoke powerfully about threats to our clients from criminal justice planning and partnerships that exclude the defense and the defense point of view.

Years of service as NYSDA's *pro bono* counsel earned Michael Whiteman, of the Albany firm Whiteman Osterman & Hanna, the 1999 Service of Justice Award. This award recognizes individuals or organizations that have provided outstanding support to public defense and to the Association. Whiteman has helped the Association deal with administrative but essential issues such as the current office lease as well as matters critical to the Association's very survival.

Since its inception in 1981, the Service of Justice Award has been bestowed upon lawyers, associations, and others who have advanced the Association's work in the cause of justice. The first recipient, in 1981, was the North Shore Unitarian Veatch Program, without whose "seed" funding and encouragement the Association would have remained no more than a group of like-minded people commiserating with one another about their limited ability to address the unequal justice provided to the poor of New York.

Following the presentation of this year's awards, keynote speaker Kevin Doyle of the Capital Defender Office brought humor and passion to the podium. As a result, conferees began the afternoon MCLE sessions energized.

■ Valentine Recognized at Retirement from Board

Ronald C. Valentine, Wayne County Public Defender for 30 years, has retired from the NYSDA Board of Directors, which he joined in 1983. The Board passed a resolution at the summer meeting honoring him and thanking him for his work on the Board—he has served as Vice President of the Board, chaired the Association's Alternatives Committee, and been a member

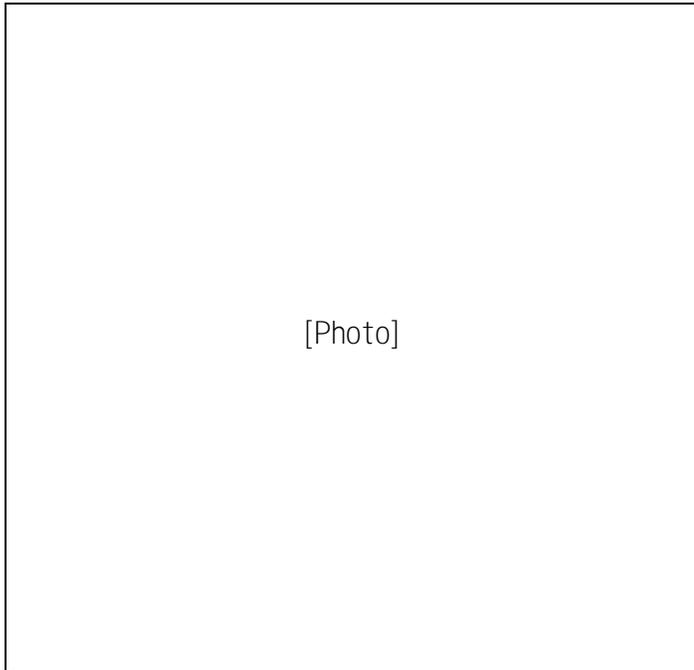
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of its Appeals Committee and Justice Courts Committee—and for the Association in times of great need. He served on the exploratory committee that designed the Basic Trial Skills program that has become nationally known, and was a member of the inaugural BTSP faculty. The resolution also honored his conscientious efforts to serve his community and his clients despite the vicissitudes of public opinion, difficulties of the work, continual struggle for resources and the endless stream of need facing him.

■ **Conference Was Family-Friendly**

While providing non-stop opportunities to learn new approaches to old problems and share ideas on new problems, the conference was also designed to recognize the families of public defense providers, who often sacrifice a great deal so that clients can receive the necessary time and attention. The conference site was within a few minutes drive of the many Lake George/Saratoga region attractions. Friday night's lake cruise was enjoyed by participants and their families alike, while Saturday night was left free for participants to relax with families or combine business and pleasure by joining newly-met or long-time colleagues for dinner or other leisure activities.



[Photo]

NYSDA Staff Attorney Al O'Connor's Powerpoint™ presentation at the Annual Meeting illustrated and informed participants about the right to counsel under NY's State Constitution.

■ **See You at Hudson Valley in 2000**

The Board has approved the Annual Meeting and Conference dates and site for next year. Plan now to be at the Hudson Valley Resort & Spa, (Kerhonkson, NY) on July 27-30, 2000!

Missed the Boat?

Annual Conference MCLE materials are now available to public defense providers. Contents are:

The Thin Bright Line: Recent Developments in the Right to Counsel Under the State Constitution; Change of Venue Motions; Jury Composition Challenges; Counsel or Coercion? Advising Clients to Plead or Not to Plead; Counseling Your Non-Citizen Client About What Happens After the Criminal Case; Recent Developments in Criminal Law and Procedure; Get Help and Get Paid! Law Strategies for 18-B Counsel; Finding and Accessing Client Records; Internet Resources for the New York Criminal Defense Lawyer; Dysfunctional Families, Dysfunctional Prosecution: Issues in Domestic Violence Cases; Criminal Defense Ethical Issues.

\$25. Contact the Backup Center.

Hynes v Tomei Review Denied

The United States Supreme Court has denied review of the Court of Appeals ruling invalidating the part of New York's death penalty statute that renders eligible for capital punishment only those defendants who exercise their right to trial. *Hynes v Tomei*, No. 98-1533 (6/14/99), 65 CrL 2066. The Court of Appeals decision appears at *Matter of Hynes v Tomei*, 92 NY2D 613. (See *Backup Center REPORT*, Vol. XIV, No. 1, p. 2 and Vol. XIV, No. 3, p. 8.) Governor Pataki supports legislative reversal of the case by a statute allowing defendants who plead guilty to capital murder charges to proceed directly to the sentencing phase where the jury would have the option of voting for imposition of a death sentence. (*New York Law Journal*, 5/12/99.)

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The *REPORT* is printed on recycled paper.

■ **Pleading Guilty To Achieve Death**

An example of what such a law might mean to capital clients and their counsel may be found in recent events in a Georgia case. From the day he appeared at a police station to confess that he had killed two people, whom he chose to maximize the possibility that he would be capitally punished, Daniel Morris Colwell said he wanted to die. He said it repeatedly to his lawyers, who argued that his death wish was a symptom of his mental illness. He said it to the judge. After he pled guilty, he said it to the sentencing jury, who sentencing him according to his wishes.

Diagnosed by the state's doctors as a schizophrenic and manic depressive, Colwell is now receiving medication on death row—high doses of an anti-psychotic drug that manages manifestations of acute and chronic psychosis, including schizophrenia.

And he no longer wants to die. He expresses remorse for his actions, wants to continue his treatment and “realizes that the decision which he made before and during his trial were decisions which were not the acts of a sane and rational human being,” according to new pleadings filed in his case. Whether or not his suicide-by-law can now be prevented remains to be seen. (Fulton County [GA] *Daily Report*, 7/14/99)

Jails May Impose Disciplinary Surcharge

The State Commission of Correction has amended 9 NYCRR 7006.9(c) and 7032.2(a) to authorize local correctional facilities to impose a disciplinary surcharge of not more than \$5. Notice of the amendment's adoption was published in the *NYS Register* on June 2; text of the change had been published previously on March 24. The Commission's support for imposing a surcharge on local inmates found guilty of misbehavior is also reflected in the “Minimum Standards and Regulations for Management of County Jails and Penitentiaries,” available online at <http://www.scoc.state.ny.us/minstands.pdf>.

Job Opportunities

Prisoners' Legal Services of New York has several openings for **Managing Attorney, Staff Attorney, Paralegal, Office Manager, and Secretary**. With restoration of funding, staff is needed for offices in Albany, Buffalo, Ithaca, New York City, Plattsburgh, and Poughkeepsie. PLS provides services to people incarcerated in NYS prisons, handling a wide variety of matters including discipline, medical care, conditions of confinement, jail credit, and others. PLS has been extremely successful in the provision of high quality, effective legal services and establishment of important rights for clients. There is a strong emphasis on cooperative and collegial working relationships within and between PLS offices. In-house and outside training are provided, and individual initiative and

innovation are encouraged. With a high percentage of clients who are people of color, PLS seeks to be a well-balanced, multi-cultural organization; people of color, women, and the disabled are especially encouraged to apply. Spanish-speaking staff are needed. Competitive salaries; substantial leave and excellent health insurance benefits. Send resume and 3 references including phone numbers to: David C. Leven, Executive Director, 105 Chambers Street, 2nd Floor, New York NY 10007-1076. Indicate which office(s). If seeking a Managing Attorney position, indicate whether you would accept a Staff Attorney position if other positions are not available.

The National Association of Criminal De-

The regulatory action was taken while a bill to amend Correction Law 500-c to allow for such surcharge, introduced in the Legislature on February 1, languished without action in committee. (1998/1999 Bills S1975 and A3346.)

Defense News—Expanded and Electronic

The “Defender News” section of the *REPORT* cannot provide all the news that's fit to disseminate about legal, social, scientific, and other developments of interest to public defense providers. Now, the *REPORT* is supplemented by a “Defense News” page on NYSDA's web site at www.nysda.org.

Late-breaking news can be placed on the page even before the *REPORT* comes back from the printer, and Internet technology means that entire documents, not just summaries, can be provided, usually by linking directly to a media or other source. Late August items included:

- Bicycle forfeiture threatened in Albany while bikes without bells or lights are being stopped by the police. *Times Union*, 8/29/99; MSNBC (WNYT Albany), 8/27/99
- Florida police use an online mug shot system to record and retrieve photos and identifying information and to create computer generated lineups. *Microsoft Daily News*, 8/27/99
- DWI defendant unsuccessfully attempted to convince a jury, through expert evidence, that the fumes from his lawnmower were responsible for his high BAC reading. MSNBC, 8/26/99
- Underpaid assigned counsel are leaving family court practice to earn a living wage. MSNBC, 8/25/99 (video report)
- Class action filed on behalf of mentally ill inmates released from New York City jails without any provision for aftercare. *New York Times*, 8/25/99

Public defense providers who do not have Internet access may contact the Backup Center for information about these stories. ♪

Defense Lawyers (www.criminaljustice.org) seeks **Indigent Defense Counsel** to lead national and grassroots efforts on indigent defense issues, with particular emphasis on identifying and promoting systemic challenges to the currently over-burdened and under-funded public defender systems. Responsible for developing model pleadings; devising litigation strategies; and working with law firms and affiliated groups on litigation and lobbying. Applicants should possess exceptional organizational, analytical, writing and advocacy skills. Experience as public defender and/or handling civil rights litigation preferred. Send CV and cover letter to: Executive Director, 1025 Connecticut Ave., NW, Ste. 901, Washington DC 20036; fax: (202)872-8690. ♪

No Equal Justice: Race and Class in the American Criminal Justice System

by David Cole
(The New Press 1999)

by Barbara DeMille*

The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor.

—David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System*

David Cole's concern with the United States Supreme Court's lack of support since *Miranda v Arizona* for the equal treatment of minorities[†]—even as the law remains on its face race, gender, and ethnic-neutral—is powerfully illustrated by his contrasting example of the same court's 1886 opinion in *Yick Wo v Hopkins*, in which the Court overturned the conviction of Yick Wo, who was Chinese, for operating a laundry without a permit.

In the mid-1880s in San Francisco all persons arrested for operating without a laundry permit were Chinese, and all Chinese applying for permits were denied while the majority of Caucasians applying had them granted. Ruling on Mr. Wo's conviction within this context the Court said:

Though the law itself be fair on its face, and impartial in its appearance, yet, if it is applied and administered by an authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations, between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Cole cites numerous instances in which the Court has turned a "blind eye" to injustice by refusing to recognize the discrimination inherent in the unevenness of resources and means of redress available to the poor faced with the workings of our American judicial system, and underlines the costs of these injustices not only to black minorities but eventually to everyone. As Cole's epigraph by former Supreme Court Justice Hugo Black states: "There can be no

* **Barbara DeMille** is a freelance writer with a Ph.D. from the State University of New York at Buffalo who has taught literature at the college level and published several scholarly articles. Her work was also heard on Northeast Public Radio, WAMC, from 1993 to 1995, and has appeared in many magazines and newspapers including the New York Times and Christian Science Monitor.

† Cole notes that *Miranda*, while formally based on the 5th Amendment privilege against self-incrimination, was driven by concerns that all interrogation suspects, rich and poor, should be on relatively equal footing

equal justice where the kind of trial a man gets depends on the amount of money he has."

Cole links poverty, poor education, and probability of being physically confronted: factors which add up to more police stops and searches, more arrests for drugs, less effective legal representation, and ultimately greater incarcerations per capita for the black minority in our country as well as more executions per capita for capital crimes. Further, Cole maintains that our criminal justice system depends on this racial and class disparity as a means of efficient operation. In Cole's view, to extend true equal protection would necessarily raise questions about the range of constitutional protections as they interfere with law enforcement for us all.

Moreover, he doubts we are willing to support the increased costs that would follow if the courts truly implemented *Gideon v Wainwright* by providing a well-paid and well-staffed criminal defense system to the indigent equal to that available to the upper and middle classes. Fewer overworked, poorly paid public defenders would mean fewer convictions, less incarceration. More competent representation in capital cases would result in fewer prosecutors seeking the death penalty and ultimately fewer executions. To demonstrate the truth of this, Cole cites reforms in Indiana: beginning in 1991, capital cases require two experienced attorneys, with experience being carefully defined, including periodic refresher courses in capital litigation. Paid \$70 an hour, these attorneys must not be overloaded with other cases, and if public defenders, are not to be assigned additional cases in the months preceding trial.

The results have been that from 1991 to 1996 prosecutions seeking the death penalty have dropped by 50%. Further, within the first three years of the program no jury had recommended the death penalty.

Cole documents the effects of our judicial discrimination against black and Hispanic minorities with many instances that will be too familiar to those involved in public defense. His knowledge of his subject is wide; his experience is as both a professor of law at Georgetown University Law Center and an attorney with The Center for Constitutional Rights.

His footnotes are detailed. His anger is plain. It rings through this book as he cites case after case in which the Supreme Court has dismissed or overturned an appeal on narrow technical grounds while failing to recognize the injustice implicit in the original arrest, prosecution, or conviction: an egregious instance being the chokehold applied to Adolph Lyons by the Los Angeles Police Department during a traffic stop.

Lyons, a black man issued a traffic ticket in 1976 for a burnt-out tail light, challenged use of such force during the stop, which left his larynx permanently damaged. The case reached the Supreme Court, but not before sixteen persons

(Continued on page 31)

Conferences & Seminars

Sponsor: New York State Bar Association
Theme: Computers and the Practice of Law
Dates & Places:
September 14, 1999 — Albany
October 27, 1999 — Syracuse
November 18, 1999 — East Elmhurst
Contact: NYSBA CLE: tel: (800)582-2452 or (518)463-3724; fax: (518)487-5618; fax on demand: (800)828-5472; web site: <http://www.nysba.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: MCLE
Dates and Places:
September 18, 1999 — New York City (Criminal Trial Skills Seminar)
September 25, 1999 — Rochester (CLE Seminar)
October 2, 1999 — Buffalo (CLE Seminar)
October 16, 1999 — New York City (Weapons for the Firefight)
November 5, 1999 — Poughkeepsie (Mid-Hudson Trainer)
December 3-4, 1999 — New York City ('Last Chance '99 Seminar')
Contact: Patricia Marcus: tel: (212) 532-4434; fax: (212)532-4668; e-mail: nysacdl@aol.com; web site: <http://www.nysacdl.org>

Sponsor: Practising Law Institute
Theme: Trial Evidence & Direct and Cross-Examination Techniques
Date: September 29, 1999
Place: New York City
Contact: PLI: tel: (800)260-4754; fax (800)321-0093; web site: <http://www.pli.edu>

Sponsor: National Association of Criminal Defense Lawyers
Theme: DUI Seminar—DUI Means Defend With Ingenuity™
Dates: September 29-October 2, 1999
Place: Las Vegas, NV
Contact: NACDL: tel: (202) 872-8600, ext 241; fax: (202) 872-8690; e-mail: assist@nacdl.com; web site: <http://www.criminaljustice.org>

Sponsor: National Coalition to Abolish the Death Penalty
Theme: 19th Annual National Conference
Dates: September 30-October 3, 1999
Place: Philadelphia, PA
Contact: NCADP: 1436 U Street NW, Suite 104, Washington DC 20009. tel: (202)387-3890; fax: (202)387-5590

Sponsor: National Police Accountability Project of the National Lawyers Guild
Theme: Police Misconduct Litigation: Law and Process
Date: October 1, 1999
Place: New York City
Contact: tel: (212)614-6432; fax: (212)614-6499; e-mail: nlgpp@ccr-ny.org

Sponsor: National Association of Counsel for Children
Theme: Kids, Courts, and Community: Providing Children Access to Justice
Dates: October 8-11, 1999
Place: Portland, OR
Contact: NACC: Imhoff Pavilion, Suite 340, 1825 Marion St., Denver CO 80218. tel: (303)864-5320, (888)828-NACC; fax: (303)864-5351; e-mail: advocate@NACCchildlaw.org

Sponsor: National Institute for Trial Advocacy
Theme: Criminal Trial Advocacy: Breakthrough Techniques that Work and Win
Date: October 8, 1999
Place: Buffalo, NY
Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; e-mail: nita.1@nd.edu; web site: <http://www.nita.org>

Sponsor: New York State Bar Association
Theme: Introduction to Handling the DWI Case in New York
Dates & Places:
October 14, 1999 — Melville, Long Island
October 15, 1999 — New York City
October 21, 1999 — Buffalo, NY
November 5, 1999 — Albany, NY
Contact: NYSBA CLE: tel: (800)582-2452 or (518)463-3724; fax: (518)487-5618; fax on demand: (800)828-5472; web site: <http://www.nysba.org>

Sponsor: New York State Bar Association
Theme: Practice and Procedures in Family Court
Dates & Places:
October 19-20, 1999 — Albany, Buffalo, Melville LI, New York City, Rochester, Syracuse, Tarrytown
Contact: NYSBA CLE: tel: (800)582-2452 or (518)463-3724; fax: (518)487-5618; fax on demand: (800)828-5472; web site: <http://www.nysba.org>

Sponsor: National Child Abuse Defense & Resource Center
Theme: Allegations of Child Abuse: The Law, The Science, The Myths, The Reality
Dates: October 14-16, 1999
Place: Las Vegas, NV
Contact: Todd James: tel: (419)865-0513; fax: 419)865-0526

Sponsor: National Legal Aid and Defender Association
Theme: 77th Annual Conference—Into the Next Millennium: The Future of Equal Justice
Dates: November 10-13, 1999
Place: Long Beach, CA
Contact: NLADA, Defender Legal Services, tel: (202) 452-0620, fax: (202) 872-1031; e-mail: info@nlada.org; web site: <http://www.nlada.org>

Sponsor: National Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law Seminar
Dates: January 30, 1999-February 4, 2000
Place: Aspen, CO
Contact: NACDL: (202) 878-8600; web site: <http://www.criminaljustice.org>

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

INS Announces New Policy of Release on Bond in Some Instances for Noncitizens Released from Criminal Custody Prior to 10/9/98

The Immigration and Naturalization Service (INS) has announced that it will no longer take the position that criminally convicted noncitizens released from criminal custody prior to October 9, 1998 are subject to the new mandatory INS detention provisions in the immigration laws. Under the mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the INS is required to take most noncitizens convicted of deportable offenses into INS custody, without the possibility of release on bond, as soon as the noncitizen is released from criminal custody. Numerous INS detainees had questioned in habeas corpus petitions the application of IIRIRA's mandatory detention provisions to individuals released from criminal custody prior to October 9, 1998, the final effective date of these provisions. See the *Backup Center REPORT* Vol. XIV, #2, at pp. 8-9, and #5, at p. 9.

After several recent federal district court rulings finding that noncitizens released from criminal custody prior to October 9, 1998 were not subject to mandatory detention, see, e.g., *Velasquez v Reno*, 37 FSupp2d 663 (D NJ 4/5/99), the INS announced on July 12, 1999 that it will now consider such individuals for release. Specifically, the INS field memorandum states:

Any alien, regardless of status, who (a) completed a criminal sentence, on or before 10/8/98, based on a conviction which constitutes a removable offense; (b) is currently in INS custody or comes into INS custody in the future; and (c) has not yet been issued a final order of removal, is eligible for a custody determination.

INS July 12, 1999 Memorandum for Regional Directors re: Field Guidelines for applying Revised Interpretation of Mandatory Custody Provisions.

According to the INS memorandum, in cases of such individuals, the INS was to have conducted custody reviews by July 19, 1999, considering factors such as the person's likelihood of danger to the public, flight risk, health factors, equities, family ties, etc. Such individuals will also be provided the opportunity to request a redetermination of custody conditions by an immigration judge. A copy of the INS memorandum is available from the Defense Immigration Project page on NYSDA's website at <http://www.nysda.org> or from the Backup Center.

***Manuel D. Vargas is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. If you have questions about immigration issues in a criminal case, call Manny at (212) 367-9104. Hours are: Tuesdays and Thursdays, 9:30 a.m. to 4:30 p.m.**

Noncitizens released from criminal custody on or after October 9, 1998 are not affected by the new INS position. Such individuals may challenge mandatory detention on constitutional grounds. See, e.g., *Martinez v Greene*, 28 F Supp 2d 1275 (D Colo 1998); *Van Eaton v Beebe*, 1999 WL 312130 (D Ore 4/13/99); *Nguyen v Beebe*, CV 99-340-HV (D Ore 4/13/99); *Danh v Demore*, 1999 WL 219718 (ND Cal 5/28/99); Magistrate's Report and Recommendation in *Chamblin v INS*, 98-97-JD, 1999 US Dist LEXIS 8533 (D NH 6/8/99); but see *Parra v Perryman*, 172 F3d 954 (7th Cir 3/24/99); *Diaz-Zaldierna v Fasano*, 1999 WL 199110 (SD Cal 3/16/99); *Aguirre-Garcia v Fasano*, 99-0629-IEG (SD Cal 5/17/99) (but also found that 236(c) does not apply to persons released from criminal custody prior to October 9, 1998); *Aguiniga-Junes v Reno*, 99-0471JM (JAH) (SD Cal 5/25/99); *Edwards v Blackman*, 1999 WL 350122 (MD Pa 5/27/99); *Galvez v Lewis*, 99-488-A (ED Va 7/7/99). For assistance or guidance in bringing a habeas challenge to mandatory INS detention under IIRIRA, contact the American Civil Liberties Union, Immigrants' Rights Project, 125 Broad Street, New York, New York 10004.

2nd Circuit Issues Several Decisions Relating to Federal Prosecutions of Noncitizens on Illegal Reentry Charges

In recent months, the U.S. Court of Appeals for the 2nd Circuit has issued several decisions on sentencing issues arising in federal prosecutions of noncitizens for illegally reentering the country after being deported. Two particularly notable decisions were:

- *United States v Galvez-Falconi*, No. 97-1614 (2d Cir 4/12/99) — The Court held that, in exceptional circumstances, a district court has the authority under USSG 5K2.0 to grant a downward departure in sentencing on the basis of a defendant's consent to deportation even in the absence of the government's consent to such a departure.
- *United States v Pornes-Garcia*, No. 98-1335 (2d Cir 3/26/99) — The Court held that the test it had applied in the past to determine whether a prior conviction was an aggravated felony for purposes of the USSG 2L1.2(b)(1) (A) sixteen-level sentencing enhancement for illegal reentry into the United States was not altered by its 1996 decision in *Aguirre v INS*, 79 F3d 315 (2d Cir 1996), where the Court ruled that "aggravated felony," as defined in the Immigration and Nationality Act, excludes drug offenses that are state, but not federal, felonies.

Updated Checklist of Defenses in Removal Proceedings Available Online

The NYSDA Criminal Defense Immigration Project has updated a checklist of removal defense arguments and strategies for lawyers counseling or representing noncitizens in removal proceedings based on criminal charges. The updated *Removal Defense Checklist in Criminal Charge Cases* is available from the Defense Immigration Project page on NYSDA's website at <http://www.nysda.org> or from the Backup Center. ♪

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.

United States Supreme Court

Search and Seizure (Search Warrants [Execution]) SEA; 335(65[f])

Witnesses (Immunity) WIT; 390(25)

Hanlon et al v Berger, No. 97-1927, 5/24/99

The respondents (homeowners) sued petitioners (federal law enforcement officials) for damages under *Bivens v. Six Unknown Fed. Narcotics Agents* 403 US 388 (1971) because the officers brought the media to observe and record the execution of a search warrant.

Holding: The conduct of the officers violated the respondents' 4th Amendment rights under the United States Constitution, as set out in the contemporaneous opinion of *Wilson v Layne*. But because this law was not clearly established at the time of the incident, the police in this case are entitled to the defense of qualified immunity. Order vacated and remanded.

Concurrence in part, dissent in part: [Stevens, J] The constitutional rule recognized in *Wilson v Layne* had been clearly established long before 1992. Therefore, there should be no qualified immunity defense for the petitioners.

Search and Seizure (Search Warrants [Execution]) SEA; 335(65[f])

Witnesses (Immunity) WIT; 390(25)

Wilson et ux et al v Layne et al, No. 98-83, 5/24/99

Petitioners (homeowners and parents of the defendant) sued the respondents (federal law enforcement officials) for violation of their Fourth Amendment rights under the United States Constitution after the officers brought the media to observe and record the attempted execution of the arrest warrant. The District court denied respondent's motion for summary judgment on the basis of qualified immunity. The Court of Appeals, reversed, but declined to decide whether the officers' actions violated the Fourth Amendment.

Holding: The Fourth Amendment requires that police actions in execution of a search warrant be strictly limited to the objectives of the authorized intrusion. Therefore, the Fourth Amendment rights of homeowners are violated when police officers bring members of the media or other

third parties into their homes during the execution of a search warrant since the presence of the third parties was not in aid of the warrant's execution.

Even though the petitioners' Fourth Amendment rights were violated, that right was not "clearly established" at the time of the search in 1992. For qualified immunity purposes, "clearly established" means that it is sufficiently clear that a reasonable official would understand that his actions violate that right. See *Harlow v Fitzgerald* 457 US 800, 818 (1982). It is not obvious from the Fourth Amendment's general principles, nor were there any judicial opinions holding that media "ride-alongs" in execution of a search warrant were unlawful. Since the law was not clearly established, the officers are entitled to the qualified immunity defense.

Concurrence in part, dissent in part: [Stevens, J]. The police action here violated the Fourth Amendment. The law requiring police action in the execution of a warrant to be strictly limited to the objectives of the authorized intrusion was clearly established long before the date of this incident, thus no qualified immunity should be extended.

Federal Law (Crimes)

FDL; 166(10)

Instructions to Jury (Marshalling of Evidence)

ISJ; 205(45)

Narcotics (Evidence)

NAR; 265(20)

Richardson v United States, No. 97-8629, 6/1/99

A federal jury convicted the defendant for violation of 21 USC Section 848—which forbids any "person" from "engag[ing] in a continuing criminal enterprise" (CCE). Section 848(a) defines a continuing criminal enterprise as involving a violation of any of the federal drug statutes—where such violation is part of a "continuing series of violations." The Seventh Circuit upheld the trial judge's instructions to the jurors that they must unanimously agree that the defendant committed at least three federal narcotics offenses, but they need not agree as to the particular offenses committed.

Holding: Consideration of statutory language, tradition and fairness requires the term "violations" to be an element, not a means, of the CCE statute. Therefore, federal jurors must unanimously agree that the defendant committed each of the individual "violations" the prosecution alleges, assuming without deciding that proof of three underlying drug crimes is sufficient to establish a series. The jury need not unanimously decide which of several possible means the defendant used to commit the violations. "[W]hether to engage in harmless error analysis, and if so, whether the error was harmless in this case" is left to the court below. Order vacated and remanded.

Dissent: [Kennedy, J] Congress intended the "continuing series of violations" to be one of the defining characteristics of a continuing criminal enterprise, and therefore to be a single element of the offense, subject to fulfillment in various ways. The "continuing series" element reflects Con-

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gress' intent to punish those who organize or direct ongoing narcotics related activity. Neither Congress' intent nor the Due Process Clause requires the result that the Court reached, which rewards those drug kingpins whose operations are so vast that the individual violations cannot be recalled or charged with specificity. The Court of Appeals judgment should be affirmed.

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

Habeas Corpus (Federal) **HAB; 182.5(15)**
O'Sullivan v Boerckel, No. 97-2048, 6/7/99

A federal district court found that the respondent, seeking habeas relief from a state conviction, had procedurally defaulted three of his claims by failing to include them in his petition to the state supreme court. The 7th Circuit found no default because the defendant was not required under the exhaustion provisions of 28 USC 2254(b)(1), (c), to present all claims in a petition for discretionary review to the state high court.

Holding: The habeas statute provides that a petitioner shall not be deemed to have exhausted the available state remedies if the petitioner failed to exercise a right provided under the law of the State to raise, by any available procedure, a question later presented in state habeas. Illinois law provides a normal, two-tier appellate review process. An intermediate appellate court hears most criminal appeals first, and a party may petition the state supreme court for discretionary review. As state prisoners have the right to raise their claims through a petition for discretionary review in the state's highest court, requiring them to give that court the opportunity to resolve constitutional errors serves the comity interests that drive the exhaustion doctrine. The respondent failed to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion, therefore he procedurally defaulted those claims. Order reversed.

Concurrence: [Souter, J] Whether the Court will force state high courts to rule on discretionary review applications when they make plain that they do not wish to remains unanswered.

Dissent: [Stevens, J] Exhaustion and procedural default, or waiver, are separate questions. It should be enough that the petitioner raised the disputed claims at trial and in the appeal by right; there is no reason to force state high courts to explicitly disavow a desire to consider all claims on discretionary review.

Dissent: [Breyer, J] The presumption as to discretionary review should be that, absent a statement to the contrary, a state does not mind that a state prisoner does not present all claims to its high court before seeking federal habeas review.

Due Process (Vagueness) **DUP; 135(35)**
Disorderly Conduct (Loitering) **DSO; 115(15)**

City of Chicago v Morales, No. 97-1121, 6/10/99

A Chicago ordinance prohibited loitering in public places by criminal street gang members and people with them. Trial courts split on its constitutionality. The intermediate appellate court found this a violation of the federal 1st Amendment and Illinois Constitution. The state supreme court affirmed.

Holding: A law violates due process if it is so vague and standardless as to leave the public uncertain as the conduct prohibited. *See Giaccio v Pennsylvania*, 382 US 399, 402-403 (1966). The entire ordinance here fails to give ordinary citizens adequate notice of what is forbidden and what is allowed. It is vague in the sense that no standard of conduct is specified at all. *Coates v Cincinatti* 402 US 611, 614 (1971). The ordinance is invalid on its face. The freedom to loiter for innocent purposes is part of the "liberty" protected by the 14th Amendment. The ordinance contains no mens rea requirement, *see Colautti v Franklin* [439 US 379, 395 (1979)], and infringes upon constitutionally protected rights. *See id.*, at 391. The ordinance as interpreted by the Illinois Supreme Court establishes no guidelines to govern law enforcement. The ordinance's application depends on whether some purpose is "apparent" to the officer on the scene. The ordinance fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *See Kolender v Lawson* 461 US 352, 358 (1983). Judgment affirmed.

Concurrences: [O'Connor, J] There are ways for state courts to construe gang loitering ordinances to make them constitutional. [Kennedy, J] Some police commands must be obeyed but not every unexplained order must be followed without notice of the order's lawfulness. [Breyer, J] While this case differs from 1st Amendment overbreadth cases, there is an analysis by which the ordinance is facially invalid.

Dissent: [Scalia, J] The majority invalidates this reasonable ordinance by ignoring the rules governing facial challenges, by elevating loitering to a constitutional right, and by discerning vagueness where none exists.

Dissent: [Thomas, J] The ordinance simply confirms the well-established principle that the police have the duty and power to maintain the public peace, and to disperse groups of individuals who threaten it.

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

Juries and Jury Trials (General) **JRY; 225(37)**
Neder v United States, No. 97-1985, 6/10/99

The petitioner was convicted of filing false federal income tax returns and of federal mail and bank fraud. The court instructed the jury that to convict on the tax offense, it

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need not consider the materiality of any false statements even though such language was used in the indictment. A similar instruction was given for bank fraud, and the court found that the evidence established the materiality of all the false statements at issue. The court did not include materiality when instructing the jury on mail and wire fraud. The 11th Circuit affirmed the conviction.

Holding: The judge's instructions to the jury which removed an element of a criminal offense from the jury consideration was unconstitutional but subject to harmless error review. *See Chapman v. California*, 386 US 18, 23 (1967). The instructional error as to the tax charge was harmless. Reversal would send the case back for retrial focused not on materiality, which was omitted from the instructions, but on issues for which a jury already received proper instruction, and materiality as to that charge was uncontested. However, materiality of falsehood was an element as to the fraud charges, and the court below did not pass on the harmlessness of the error with regard to that issue. Judgment as to the tax fraud counts, affirmed, judgment on the remaining counts is reversed and remanded.

Concurrence: [Stevens, J] The majority wrongly rules that judges may find elements satisfied when a defendant fails to contest those elements. The history set out in the dissent provides support for the view that the Court has not been sensitive to the importance of jury-resolution of critical fact issues "when there is a special danger that elected judges may listen to the voices of voters rather than witnesses."

Concurrence in part, dissent in part: [Scalia, J] Depriving a defendant of the right to have the jury determine every element can never be harmless error, but the error can be waived if not preserved.

Witnesses(Confrontation of Witnesses)

WIT; 390(7)

Lilly v Virginia, No. 98-5881, 6/10/99

The petitioner, his brother, and another were involved in a series of criminal activities. During a custodial interrogation, the brother made statements identifying the petitioner as the shooter of the decedent. When the brother was called to testify at the petitioner's trial, he invoked his 5th Amendment rights. The prosecution sought to introduce the statements that the brother had made to the police as statements from an unavailable witness against penal interest. The petitioner's objections were overruled and he was convicted of murder and other charges. The Virginia Supreme Court affirmed.

Holding: It is assumed that the brother's statements were against penal interests as a matter of state law, but the federal constitutional question is whether those statements fell within a "firmly rooted" hearsay exception making them sufficiently dependable to allow their untested admission

against an accused. *Ohio v Roberts*, 448 U.S 56 (1980). Statements "against penal interests" constitute too large a class for Confrontation Clause review. *Lee v Illinois*, 476 US 530, 544 n. 5 (1986). Accomplice statements that shift the blame to a criminal defendant are not so trustworthy that adversarial testing can be expected to add little to their reliability. *White v. Illinois*, 502 US 346, 357 (1992). Here, the brother was in custody for his involvement in, and knowledge of, serious crimes, made his statements under governmental authorities' supervision, was primarily responding to leading questions, had a natural motive for attempting to exculpate himself, and was under the influence of alcohol during the interrogation. His statements cannot be said to be inherently reliable. Judgment reversed, case remanded.

Concurrence: [Breyer, J] The question of how closely the Confrontation Clause is tied to the hearsay rule remains open. [Scalia, J] This was a paradigmatic Confrontation Clause violation. [Thomas, J] The Confrontation Clause extends only to witnesses actually testifying at trial and extrajudicial statements in formalized testimonial material. [Rehnquist, J] The brother's statements inculcating the petitioner were not in the least against the brother's penal interest and so does not raise the question of whether a self-inculpatory statement also inculcating another could be offered against the other.

Gambling (General)

GAM; 178(17)

Speech, Freedom of (General)

SFO; 353(10)

Greater New Orleans Broadcasting Association, Inc. v United States, No. 98-387, 6/14/99

The petitioners sought to enjoin enforcement of federal law prohibiting radio and television advertising about privately operated commercial casino gambling regardless of the station's or casino's location. The government's motion for summary judgment was granted. A divided panel of the 5th Circuit affirmed. After the judgment was vacated and remanded upon a petition for certiorari, the 5th Circuit adhered to its conclusion.

Holding: Based upon the application of the four-part test in *Central Hudson Gas & Elec. Corp. v Public Serv. Comm. of NY*, 447 US 557, 566 (1980), the law cannot be applied to advertisements where such gambling is legal. The ads constitute commercial speech, their content is not misleading, and they concern lawful activities, satisfying the first part of *Central Hudson*. While the Solicitor General's interests (reducing the social costs associated with casino gambling, and assisting states that restrict or prohibit casino gambling) are substantial, the conclusion that gambling contributes to corruption and organized crime and other illegal conduct is by no means self-evident. Both Congress and state legislatures have found that the social costs of gambling are sometimes outweighed by economic benefits, making the scope and application of the ban difficult to defend under the second

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part of *Central Hudson*. Nor can the law satisfy the last two *Central Hudson* standards—whether the speech restriction directly, materially, advances the asserted interest, and is no more extensive than necessary. Advertising may only channel gamblers from one casino to another rather than increase the overall demand for gambling. While the government tries to minimize the social costs of gambling, Congress is simultaneously encouraging tribal casino gambling. The broadcast prohibition in 18 USC Section 1304 and 47 CFR Section 73.1211 (1998) violates the 1st Amendment. Order reversed.

Discovery (*Brady* Material and Exculpatory Information) DSC; 110(7)

Habeas Corpus (Federal) HAB; 182.5(15)
Strickler v Greene, No. 98-5864, 6/17/99

The petitioner was convicted of capital murder, robbery, and abduction and sentenced to death. Prior to trial, the prosecutor maintained an open file discovery policy with the defense counsel. Based on that policy, the petitioner's counsel did not file a pretrial motion for discovery of possible exculpatory evidence. The prosecutor failed to disclose notes taken by a detective during interviews with the only witness to the abduction and letters written by the witness to the detective. *Brady v Maryland*, 373 US 83 (1963). After state appeals were exhausted, the federal district court granted petitioner's habeas corpus and vacated his capital murder conviction and death sentence on the grounds that the State had failed to disclose *Brady* evidence; and as a result, petitioner had not received a fair trial. The Fourth Circuit reversed because petitioner had procedurally defaulted by failing to raise the *Brady* claim in the state collateral proceedings, and in any event, his claim was without merit.

Holding: The petitioner has satisfied two of the three components of a *Brady* violation since the undisclosed evidence was favorable to the accused and it was suppressed by the state. The petitioner has also demonstrated "cause" for his procedural default, *ie*, failure to raise this claim during trial or on state post conviction review. Here, where the failure to raise the *Brady* motion is caused by the suppression of evidence by the state when an open file policy is in effect, trial counsel could not have been aware of a factual basis for the claim. The third component of a *Brady* violation requires a showing of sufficient prejudice to warrant a new trial. Although there was a reasonable "possibility" of a different result at trial, the petitioner fails to demonstrate that the exculpatory evidence could reasonably "put the whole case in a different light as to undermine the confidence in the verdict." *Kyles v Whitley*, 514 US 419, 434 (1995). The record contained ample, independent evidence of guilt, as well as evidence sufficient to support findings of "vileness" and

"future dangerousness" that warranted the death penalty. Order affirmed.

Concurrence in part, dissent in part: [Souter, J]

There is a "reasonable probability" that disclosure of the witness's material would have led the jury to recommend life, not death. The withheld documents would have shown that many of the details the witness confidently mentioned on the stand had apparently escaped her memory in her initial interviews with the police.

New York State Court of Appeals

Statute of Limitations (Tolling of) SOL; 360(20)

People v Seda, No. 69, 5/11/99

During the period from 1990 to 1996 the identity of the defendant was known only as "The Zodiac." The court dismissed 10 counts on the defendant's motion that the statute of limitation had run. The Appellate Division reversed.

Holding: The tolling provision of CPL 30.10(4)(a)(ii) provides in pertinent part that a period in which the defendant's whereabouts "were continuously unknown and continuously unascertainable by the exercise of reasonable diligence" shall not be included in calculating the time limitation applicable to commencement of a criminal action. The section is derived from section 143 of the former Code of Criminal Procedure which, in listing the periods to be excluded from the calculation of time for commencement of prosecution, included "if he remains in the state under a false name." The present version of the statute replaces "false name" with "whereabouts of the defendant." The plain language of the current tolling statute emphasizes the difficulty of apprehending a defendant who is outside New York State or whose whereabouts are unknown, regardless of the defendant's specific intent to hide. There was ample record to support the Appellate Division's finding that during the time between the shootings and the defendant's arrest six years later, his whereabouts were continuously unknown and unascertainable by the exercise of reasonable diligence. Order affirmed.

Accusatory Instruments (General) ACI; 11(10)

Grand Jury (Procedure) GRJ; 180(5)

People v Morris, No. 79, 5/11/99

The prosecutor's initial indictment was dismissed by the court as legally insufficient to establish the offenses charged. The second presentation resulted in no true bill by the grand jury. The court again granted leave to resubmit and on the third presentation the grand jury indicted the defendant.

Holding: CPL 190.75 does not require dismissal of the instant indictment because that statute limits the number of times the prosecution can resubmit only when a grand jury

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dismisses the charges. The first indictment was dismissed by the court, pursuant to CPL 210.20(4). Discretionary judicial dismissals do not present the same potential for prosecutorial abuse, and are subject to their own check of appellate review. Accordingly, the provision in CPL 190.75 limiting the number of times that a prosecutor can resubmit to a grand jury does not apply to the first dismissal here. Order affirmed.

Grand Jury (Procedure) **GRJ; 180(5)** Juries and Jury Trials (Waiver) **JRY; 225(65)** **People v Gelman, No. 82, 5/11/99**

After calling two witnesses at a grand jury hearing who did not implicate the defendant, the prosecution withdrew the case because necessary witnesses were not available during the grand jury's prescribed term. The Appellate Division affirmed an order of the trial court denying the defendant's motion to dismiss the indictment.

Holding: The "two bite rule" embodied in CPL 190.75 does not apply here because there was no dismissal of the charges by the grand jury, but rather a withdrawal of the charges by the prosecution. Under limited circumstances, withdrawal of the charges after the prosecution has presented evidence may be deemed a dismissal within the meaning of CPL 190.75. See *People v Wilkins*, 68 NY2d 269. In *Wilkins* it was noted that "the key factor in determining whether an unauthorized withdrawal of the case must be treated as a dismissal is the extent to which the grand jury considered the evidence and the charge" See *People v Wilkins*, 68 NY2d at 274. This grand jury did not consider the evidence or the charge against the defendant, and its refusal to extend its term cannot be equated to a disapproval of the prosecution's case or a manipulation of the grand jury process.

There was no promise of favorable treatment where the judge's law clerk imprudently agreed with defense counsel during a hallway encounter that a bench trial would be a better option than a jury trial, and said that the judge would certainly give the defendant a fair trial. The defendant's waiver of jury trial was not invalid. Cf *People v Selikoff*, 35 NY2d 227. Order affirmed.

Weapons (General) **WEA; 385(22)** **People v Owusu, No. 052, 5/13/99**

The Appellate Division reversed a determination that the defendant's teeth did not constitute a "dangerous instrument" within the meaning of Penal Law 10.00(13).

Holding: Under a plain meaning interpretation of the statute, a part of one's body is not an "instrument." Early jurisprudence demonstrates that although the Penal Law invokes criminal liability for innocuous objects capable of

causing physical harm, a person's body has never fallen within the statute's scope. See *gen People v Adamkiewicz*, 298 NY 176. In every case where the Court has been called upon to decide whether something constitutes a dangerous instrument, the focus has been on an object. Eg *People v Galvin*, 65 NY2d 761. Increased criminal liability stems from the use or threatened use of a dangerous instrument because the perpetrator has increased the seriousness of the situation by employing a device to assist in the criminal endeavor. See *Commonwealth v Davis*, 10 Mass App Ct 190, 196-197, 406 NE2d 417, 421-422 (teeth can not constitute a "dangerous weapon"). Order reversed.

Dissent: [Bellacosa, J] The court's ruling contradicts the plain language definition of a "dangerous instrument," fails to properly interpret the legislative intent, and ignores practical context and common sense. The statute does not *exclude* all body parts from the words "any instrument." The legislature may considered amending the statute in the wake of the majority opinion.

Homicide (Murder [Evidence]) **HMC; 185(40[j])** **People v Mateo, No. 60, 5/13/99**

The defendant was charged with, *inter alia*, intentionally causing the death of four persons, under Penal Law 125.27(1)(a)(xi). Two counts of the indictment charged the defendant under a theory that he acted "in a similar fashion" when, within a 24-month period, he intentionally murdered four victims. The County Court dismissed these two counts, asserting that the statute was meant to punish serial killers. The Appellate Division affirmed on the grounds that the evidence before the Grand Jury was legally insufficient.

Holding: The County Court correctly held that the proof fell short of establishing that the crimes were "committed in a similar fashion." The statutory phrase relating to crimes "committed in a similar fashion" clearly includes serial killings. See Governor's Mem approving L 1995, ch 1; Assembly Committee Bill Mem approving L 1995. In the present case however, the murder victims were of different ethnic and racial backgrounds and were different ages. The weapons used in each homicide were different, as were the places and styles of the executions. The only common denominator of these crimes is that four young men were murdered with firearms. By any standard, this evidence was found to be legally insufficient to establish the "committed in a similar fashion" element of the statute. Order affirmed.

Arrest (Probable Cause) (Warrantless) **ARR; 35(35) (54)** **People v Ketcham, No. 102, 6/3/99**

The Appellate Division affirmed the defendant's conviction.

Holding: A pretrial hearing was held regarding the admissibility of evidence recovered from the defendant at the

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time of his warrantless arrest. The arresting officer testified that he was part of a “buy and bust” field team, maintaining radio contact with a “ghost” officer who said that there had been a positive buy from the undercover officer by a black male wearing black shirt and pants, and a white hat, who was walking toward Christopher Street on Sutter, on the project side. Proceeding that way, the arresting officer saw an individual matching the description. When the officer arrested the defendant, his identity as the suspect was confirmed by radio transmission. It was not improper for the prosecution to establish probable cause with double hearsay (the undercover to the ghost to the arresting officer) so long as the reliability of the “informant” officer and the basis of that officer’s knowledge satisfied the *Aguilar-Spinelli* test. The suppression court reasonably inferred from the arresting officer’s testimony that the ghost’s information was based upon a first-hand observation of a signal from the undercover. *People v Gonzalez*, 91 NY2d 909, 910. Unlike the officer in *People v Parris* (83 NY2d 342, 347-348), who conclusorily assumed that a neighbor who gave a statement was an eyewitness, this officer knew beforehand that the objective of the operation was to have an undercover buy drugs and signal that to the ghost, which information was to be passed through the ghost to the arresting officer. The evidence supports the finding of probable cause to arrest. Order affirmed.

Due Process (Vagueness)

DUP; 135(35)

People v Graham, No. 113, 6/3/99

Holding: “Whether ‘in any place’ in Penal Law §240.36 includes a private residence was disputed below but conceded by defendant on this appeal. Defendant’s present argument—that the statute so construed is void for vagueness—is unpreserved for our review, as is defendant’s remaining contention.” Order of Appellate Term affirmed.

Evidence (Sufficiency)

EVI; 155(130)

People v Feerick, No. 75, 6/8/99

All the defendants are police officers convicted of various crimes arising from their entry into two apartments where they restrained and threatened the occupants while trying to recover a police radio. The Appellate Division affirmed, with one dissent in part.

Holding: The statute establishing the crime of official misconduct (Penal Law 195.00[1]) encompasses not only corruption, but misconduct in the course of police duties. It replaced more than 30 prior crimes, including police misconduct such as oppression under color of law. The current section is separate from the crime of bribery, and the “benefit” element includes not just monetary gain but “any gain or

advantage.” Penal Law 10(17); *see eg People v Hochberg*, 62 AD2d 239. The inclusion of a *mens rea* requirement was not to limit the types of conduct that could be culpable, but to protect honest error. The evidence here showed that the defendants knew that their actions were an “unauthorized exercise” of their police functions. They were looking for an object whose loss could have subjected them to ridicule or discipline, so that its retrieval could be viewed as an advantage, and they specifically disobeyed an order given to one to get a warrant before proceeding to search the premises.

While the word “unlawful” would have been better avoided in describing reasonable searches, there is not meaningful possibility that the carefully-drawn jury charge misled the jury. *People v Maher*, 89 NY2d 456, 464. While the court’s instruction that “stop and frisk” is a permissible action only in public places was incorrect, the jury verdict reflected that there was no finding that the officers were justifiably present in a private place—the defendants were found guilty of trespass.

The prosecution’s failure to turn over six *Rosario* documents before or during the *Kastigar* hearing did not entitle the defendant’s to a *de novo* hearing. The “new” hearing required in *People v Banch* (80 NY2d 610) was a reopening of the hearing to the extent necessary to explore the newly disclosed documents. Here, the hearing court properly permitted some background questions and limited the cross-examination to those documents.

The officer who was convicted of perjury for false testimony to the grand jury enjoys no immunity from prosecution for charges arising out of incidents on the date in question. He testified about an imaginary event in the alley—the connection between that and the crimes with which he was charged here is by definition illusory. To allow witnesses to invent encounters with real people, hoping to shield themselves from prosecution, would be inconsistent with justice and the intent of the legislature. Order affirmed.

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

People v Peña, No. 114, 6/8/99

Holding: The conduct of the prosecution in arranging for a codefendant to plead guilty in secret, then allowing that codefendant to sit at the defense table through one day of a suppression hearing before informing the court and counsel of the plea, is disapproved. However, where the court then found that the codefendant had not heard anything of substance at the defense table, nor disclosed anything heard from the other defendants or at the table, there was no prejudice to the defendant. The Appellate Division correctly concluded that reversal is not warranted. Order affirmed.

Discovery (Brady Material and Exculpatory Statements) DSC; 110(7)**Instructions to Jury (General) ISJ; 205(35)****People v Doshi, No. 97, 6/10/99**

The Appellate Division vacated four counts of the judgment, relating to criminal sale of lorazepam 2.5, due to an erroneous jury charge essentially directing a guilty verdict on those counts by indicating that good-faith possession and selling by the defendant, a psychiatrist, was irrelevant. Conviction on other counts was affirmed.

Holding: There was no reasonable possibility that the erroneous charge or evidence relating to the tainted counts influenced the jury's decision as to the remaining counts. Where the court's charges as to the other controlled-substance counts correctly placed the burden on the prosecution to prove no good faith, and the jury did acquit the defendant on some other counts, the lorazepam counts could not have had more than a tangential effect. This meets the test for "spillover" effect set out in *People v Baghai-Kermani* (84 NY2d 525).

There is no obligation under *Brady v Maryland* (373 US 83 [1963]) to supply a defendant with evidence the defendant knew or reasonably should have known of, such as the Medicaid records at issue here. See *eg US v Leroy*, 687 F2d 610, 618 (2d Cir). The billing statements were essentially generated by the defendant, and he does not appear to have contested the prosecution's assertion that he received a copy of all the statements at issue when he received Medicaid payment. Order affirmed.

Juveniles (Delinquency—Procedural Law) JUV; 230(20)**Matter of Desmond J., No. 116, 6/10/99**

Holding: The respondent, 14 at the time of the proceedings below, was charged in a felony complaint based on a detective's hearsay allegations with rape and other crimes. After arraignment, the case was transferred to Family Court under CPL 180.75, in an order containing an uncontested finding of reasonable cause to believe that the respondent committed the crimes charged. The felony complaint and supporting papers were deemed a juvenile delinquency petition in Family Court. Family Court Act 311.1(7). An affidavit affirming the truthfulness and accuracy of the complaint was signed by the complainant the day after the transfer. At the respondent's first appearance in Family Court the next day, the deposition was handed up over the respondent's objections that only the felony complaint and other papers transferred from criminal court could be deemed the petition, and that they were jurisdictionally defective for lack of non-hearsay allegations. Dismissal was denied by the Fam-

ily Court and Appellate Division. The presentment agency filed the deposition at the earliest possible stage in Family Court, and no such document was required in criminal court, to which the "non-hearsay" requirement of Family Court Act 311.2 does not apply. To require filing of such a document in anticipation of a Family Court transfer would not be sound practice. To delay transfer for the holding of a felony hearing or grand jury proceeding that would become part of the petition upon transfer might contravene the legislative purpose of providing for quick removal. *Matter of Vega v Bell*, 47 NY2d 543, 550. Order affirmed.

Probation and Conditional Discharge (Conditions and Terms) PRO; 305(5)**Search and Seizure (Parolees and Probationers) SEA; 335(50)****People v Hale, No. 117, 6/10/99**

Holding: The defendant consented in writing to probation provisions permitting his probation officer to search his person, vehicle, and home for drugs and paraphernalia. During the first several months of his probation on charges arising out of a death caused by his operation of a boat while impaired, he tested positive for drugs. Then the family of the decedent notified the probation officer that the defendant was selling drugs from his home. The probation officer and police entered the home with the defendant and found guns, drugs, and a scale. Under *Griffin v Wisconsin* (483 US 868 [1987]), probationary status (parole status is specifically not addressed here) changes the usual warrant and probable cause requirements for searches. Consent-to-search provisions have been upheld in other jurisdictions. See *eg US v Germosen*, 139 F3d 120 (2nd Cir 1998) *cert den* __US__, 119 SCt 829. In New York, a probationer remains in the custody of the court, and requires supervision to ensure or assist the probationer's leading of a law-abiding life. Penal Law 65.10(1). The search provision and others of the probationary sentence here were individually tailored to and had the statutorily-required rehabilitative objective (*People v McNair*, 87 NY2d 772, 774) of keeping the defendant from using drugs. The probation officer, although police accompanied him, initiated and carried out the search by reason of his supervisory responsibility for and relationship to the defendant. See *US v Ooley*, 116 F3d 370 (9th Cir 1997) *cert den* __US__, 118 SCt 2391. This case is distinguishable from *People v Jackson* (46 NY2d 171, 177). Further, the defendant's consent to the search provision was not coerced. Order affirmed.

Juveniles (Delinquency—Procedural Law) JUV; 230(20)**Matter of Raymond G., No. 118, 6/10/99**

Holding: At 15, the respondent was charged in a Family Court petition with delinquency for multiple counts of as-

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sault in varying degrees. He moved to dismiss the top counts because the court lacked original jurisdiction over acts for which a juvenile was subject to criminal prosecution. The motion was denied. The Appellate Division correctly reversed his adjudication as a juvenile delinquent. The Family Court's jurisdiction over acts that a 15-year-old could be held criminally responsible for is limited to transferrals from criminal court. Prior to 1978, the offenses here would have unquestionably been subject to Family Court's original and exclusive jurisdiction. But then the legislature criminalized several serious acts by 13-to-15-year-olds, divesting Family Court of original jurisdiction in such acts. *See eg* Donnino, Practice Commentaries, McKinneys' Cons Laws of NY, Book 39, Penal Law 10.00, at 24. The definition of juvenile delinquent under current Family Court Act 301.2(1), along with the amendment of Penal Law 30.00 excluding the availability of the infancy defense to juvenile offenders, eliminated Family Court's original jurisdiction in cases such as this. This is consistent with the legislative goal that juvenile offenders be, as a general rule, prosecuted as adults. The presentment agency's argument that statutory construction shows original jurisdiction to have been preserved is rejected. It is contrary to the clear language of the relevant statutes and the legislative intent, and would also confer more discretion upon the prosecutor than is envisioned by the statutory scheme. The legislative directive is to have juvenile offenses criminally prosecuted except where a court finds removal appropriate. Order affirmed.

First Department

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

People v Butler, No. 2745, 1st Dept, 2/23/99

Holding: After five jurors were selected, a venire person said that he was a correction officer and recognized the defendant. Defense counsel unsuccessfully sought a mistrial, as the comment inferred that the defendant had a prior record. The officer was dismissed, as was another venireperson. Eight others who had heard it were polled and five were admonished to ignore it. Of the five already-seated jurors, one said that the information would affect her ability to hear the case. In camera, she initially said she could not put the remark out of her head, especially in light of a further remark by the officer in the hallway that he feared for his safety if he was on the jury and later encountered the defendant in the course of his duties. After a 20-minute conference, the juror promised to "try" to put the impressions out of her mind and be fair. Defense counsel objected that she had been badgered. The juror's statement that she would "try" to be impartial was not the unequivocal declaration necessary to purge her earlier-expressed bias. *See People v Torpey*, 63 NY2d 361. A

later incident in which the foreperson told the juror that he was afraid, because his name had been mentioned in open court, added to the conclusion that the participation of the juror in question deprived the defendant of a fair trial. Judgment reversed, remanded for a new trial. (Supreme Ct, Bronx Co [Silverman, J])

Dissent: [Saxe, J] The correction officer's remark did not justify an inference that the defendant was a repeat offender. After the court explained the juror's obligations, she unequivocally said she would not be affected, and properly remained on the jury. *See People v Ortega*, 245 AD2d 213 *lv den* 91 NY2d 1011. The foreperson was excused following his comment, and the juror said that his comments would not affect her.

Defenses (Entrapment)

DEF; 105(30)

Trial (Public Trial)

TRI; 375(50)

People v Tocco, No. 3245, 1st Dept, 2/23/99

Holding: The defendant's entrapment claim was not preserved where he failed to assert that the police engaged in egregious conduct or that their conduct mandated dismissal under *People v Isaacson*, (44 NY2d 511). No reasonable view of the evidence supported an entrapment defense charge to the jury, where the evidence was that the defendant was but one of many targets of the long-term investigation, and the undercover officer was instructed to engage in drug purchases with anyone interested in selling. The prosecution had a right to introduce evidence to rebut an entrapment defense once the defendant declared unequivocally that he was relying on such a defense. *See People v Mann*, 31 NY2d 253, 260. That did not give the defendant an absolute entitlement to an entrapment instruction; the defense always has the burden of making the required showing. *People v Brown*, 82 NY2d 869, 871.

The undercover testified behind a screen that permitted spectators to hear but not see him, the defendant and jury could observe his demeanor, and the court's instructions prevented the jury from drawing any improper inference. Besides, the proof at the *Hinton* hearing included evidence of organized-crime involvement and violence (threatened and actual) against informants and undercover officers, sufficient to meet even the test for complete closure of the courtroom. There was ample basis for the officer being permitted to testify anonymously. *People v Kears*, 215 AD2d 104 *lv den* 86 NY2d 797. Judgment affirmed. (Supreme Ct, Bronx Co [Price, J])

Instructions to Jury (Missing Witnesses)

ISJ; 205(46)

Trial (Presence of Defendant)

TRI; 375(45)

People v Keen, No. 925, 1st Dept, 2/25/99

Holding: The defendant's waiver of his right to be present at sidebar conferences with prospective jurors was not invalid because it was made through counsel. *People v Holli-*

First Department *continued*

day, 241 AD2d 399. There was no ambiguity here as there was in *People v Bennett* (238 AD2d 138); counsel presumably discussed the right with the defendant.

The defendant was not entitled to a missing witness instruction. His ex-girlfriend and mother of his child had told a defense investigator that she and the defendant were in the hallway when they heard a shot from 50 feet away. She was subpoenaed, and in an *ex parte* bench conference with defense counsel and the court, said that her earlier statements were not accurate. The defendant testified in accordance with his ex-girlfriend's initial statement, but she was not called. Counsel objected to the missing witness charge because the ex-girlfriend was not in the defendant's control. These facts made it natural to expect that the ex-girlfriend would be called to corroborate the defendant's statement. Further, the jury instruction given allowed the jury to determine whether the missing witness was under the defendant's control. Judgment affirmed. (Supreme Ct, New York Co [Bell, J])

Dissent: [Wallach, J] A woman's status as the mother of a child gives rise to no presumption that she is under the control of the child's father from whom she is estranged. "Medea's slaughter of Jason's children is a very old story." Further, defense counsel should not be put in the position of having to choose between proffering testimony believed to be perjured and adverse to the client, or refraining from putting on the witness and accepting the adverse witness charge.

Defenses (Justification) **DEF; 105(37)**
Grand Jury (Procedure) **GRJ; 180(5)**
People v Torres, No. 3194, 1st Dept, 2/25/99

Counts one through six and eight of an indictment including charges of attempted murder, first and second-degree assault and possession of a knife were dismissed. Grounds for the dismissal were prosecutorial failure to instruct the grand jury on the justification defense and an improper instruction on the defendant's accessorial liability.

Holding: The grand jury proceedings make clear that there was no reasonable basis upon which to charge justification where, even if the defendant subjectively believed that use of deadly physical force was imminent, there was no objective basis to conclude that such belief was reasonable. *Abbott v People*, 86 NY 460, 470-471. Also, since the defendant could have retreated with complete safety, he is not entitled to the justification defense. Penal Law 35.15 [2][a]. The prosecutor's acting in concert charge, taken as a whole, correctly conveyed the proper legal standard (*see People v Herrera*, 219 AD2d 511 *app den* 87 NY2d 847), and there was no evidence of conduct that the grand jurors could have improperly scrutinized on the basis of the criticized instruction. The only evidence presented clearly established that the defendant

was directly responsible for the criminal acts charged, not an accessory. Order reversed, dismissed counts reinstated. (Supreme Ct, Bronx Co [Cirigliano, J])

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

Article 78 Proceedings (General) **ART; 41(10)**
In Re Application of Johnson v Torres, No. 771,
1st Dept, 3/18/99

Holding: The prosecution has the right to compel a defendant in a criminal case to be present in court for the purpose of an in-court identification. *People v Winship*, 309 NY 311, 313-314. The respondent Justice's order to the prosecution to provide "fillers" for a lineup to be conducted during the trial of Santos Alvarez was without legal authority.

Prohibition and mandamus are available article 78 remedies only when there is an "unlawful use or abuse of the entire action or proceeding as distinguished from an unlawful procedure or error in the action or proceeding itself related to the proper purpose of the action of proceeding." *Matter of State of New York v King*, 36 NY2d 59, 62. Such proceedings are simply unavailable to correct even grievous trial error of substantive law or procedure. *LaRocca v Lane*, 37 NY2d 575, 579 *cert den* 424 US 968. Petition denied; proceeding dismissed.

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15) (23)**
(Malpractice)

Federal Law (General) **FDL; 166(20)**
Graziano v Kaplan & Katzberg, No. 316,
1st Dept, 3/23/99

The plaintiff pled guilty in federal court to conspiracy to murder and was sentenced to ten years imprisonment and the maximum fine of \$250,000. His challenge to, *inter alia*, the sentence on the grounds that misrepresentation and improper advice had unlawfully induced the plea was rejected by the district court and the 2nd Circuit. He sued for malpractice, and the defendants' motion to dismiss was denied.

Holding: The plaintiff's malpractice complaint for failure to take a direct appeal from his sentence should have been dismissed. The plaintiff's fine exceeded the applicable sentencing guideline range, but was not subject to collateral attack because the plaintiff failed to raise this issue on direct appeal. However, the law barred the plaintiff from appealing his conviction. *Cf Carmel v Lunney*, 70 NY2d 169. A federal defendant is precluded from appealing on the ground that his negotiated sentence exceeds the applicable guidelines if the sentence actually imposed is not greater than the agreed upon sentence. 18 USC 3742(c)(1). Furthermore, the guidelines do not bar a court from accepting a negotiated sentence that exceeds them. *United States v Aguilar*, 884 F Supp 88

First Department *continued*

[EDNY]). Having had a full and fair opportunity to contest the court's decision, the plaintiff is collaterally estopped from pursuing this malpractice action. *Vavolizza v Krieger*, 33 NY2d 351. Order reversed; motion granted; complaint dismissed. (Supreme Ct, New York Co [DeGrasse, J])

Prior Convictions (Sentencing) PRC; 295(25)

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

People v Varlack, No. 574, 1st Dept, 3/23/99

Holding: Several incorrect trial rulings did not amount to reversible error. The prosecution failed to establish that the defendant's presence at the precinct was legally secured (see *People v Dodt*, 61 NY2d 408, 416) but the evidence obtained related to charges of which the defendant was acquitted. Out-of-court identifying statements by a witness were not prejudicial where the witness testified extensively and with detail. *People v Meadows*, 64 NY2d 956, 957 *cert den* 474 US 820. The court's announced *Sandoval* policy of never shielding a defendant who specializes in a crime is just as improper as a blanket rule shielding a defendant from cross-examination on all such crimes. *People v Gonzalez*, 221 AD2d 203, 206. Reversal is not required given the overwhelming evidence of guilt. See *People v Jones*, 220 AD2d 251, 252 *lv den* 88 NY2d 880.

The court abused its discretion in sentencing the defendant as a persistent felony offender by taking into account charges of which the defendant was acquitted. A sentencing court may not base its sentence on such crimes. *People v Grant*, 191 AD2d 297 *lv den* 82 NY2d 719. The robbery sentenced is reduced to seven and a half to 15 years. See *People v Howard*, 217 AD2d 530 *lv den* 86 NY2d 873. Judgment modified, and otherwise affirmed. (Supreme Ct, Bronx Co [Covington, J])

Trial (Public Trial) TRI; 375(50)

People v Bass, No. 400, 1st Dept, 3/25/99

Holding: The court acted erroneously when it excluded the defendant's common-law wife, where it was on express notice that the ruling would result in the exclusion of a family member who was actually present at the trial and whom defendant wished to have in the courtroom. Where the court knows that a defendant's relatives have been attending the proceeding, or that the defendant wants certain members present, exclusion of those individuals is permitted only if necessary to protect the interest advanced by the prosecution in support of closure. See *People v Nieves*, 90 NY2d 426, 430. The prosecution offered no showing that the defendant's wife posed any threat to the officer's safety or operations. The defendant's right to a public trial was vio-

lated. Judgment reversed, matter remanded for a new trial. (Supreme Ct, New York Co [Wittner, J])

Evidence (Destruction)

EVI; 155(49)

People v Grant, No. 669, 1st Dept, 3/30/99

Holding: The defendant was not prejudiced by the routine destruction of a Narcotics Investigative Tracking Recidivist Offender form which contained on-line booking and voucher information about the defendant. The subject matter and approximate contents of the form could be ascertained despite its destruction. See *People v Joseph*, 86 NY2d 565, 570, 572. The defendant was given a computer printout of the information contained on the destroyed form. Counsel not only rigorously cross-examined the police witnesses but also used police failure to preserve the form as an argument in summation. See *People v Gonzalez*, 214 AD2d 308 *lv den* 86 NY2d 735. Judgment affirmed. (Supreme Ct, Bronx Co [Iacovetta, J])

Speedy Trial (Cause for Delay) (Statutory Limits)

SPX; 355(12) (45)

People v Fagan, No. 739, 1st Dept, 4/13/99

Holding: Several periods of delay were not includable under the speedy trial statute, including the period of adjournments for motion practice (CPL 30.30[4] [a]), at defense request or based on an affirmation of engagement by defense counsel (CPL 30.30[4] [b]), and absence of defense counsel through no fault of the court and occasioned by exceptional circumstances, *ie* a blizzard. CPL 30.30 (4)(f) and (g). Several of the contested days were includable because the record does not show that counsel requested a further adjournment. *People v Daniels*, 217 AD2d 448, 451 *app dmsd* 88 NY2d 917. However, only 7 days beyond the 165 found by the trial court were includable, less than the 182 days in which the prosecution must be ready for trial. Judgment affirmed. (Supreme Ct, New York Co [Rettinger, J])

New York State Agencies (Social Services, Department of)

NYA; 266.5(220)

In Re Application of Raitport v NYC Dept. of Social Services, No. 486, 1st Dept, 4/15/99

The 71-year-old petitioner sought emergency public assistance to pay rent arrears. New York City Department of Social Services (NYC DSS) refused the request. The New York State Department of Social Services (NYS DSS) affirmed NYC DSS's denial, and the petitioner brought an article 78 action.

Holding: These circumstances clearly do not comprise the "unforeseen crisis situation" covered by the statute. See *Matter of Ghartey v Commissioner, NYS Dept. of Soc. Servs.*, 237 AD2d 521. Missing from the record is a showing of future

ability to pay rent and to repay the grant, which governing regulations require. 18 NYCRR 352.7[g][4][ii].

“Little comfort can be derived from the legal disposition of this matter. The petitioner appears to be as old as he claims to be, as frail as his medical condition indicates, and difficult to understand. His monthly rent of \$750 exceeds the maximum payable by DSS to a person living alone, but placing him in an assisted living residence will cost the state over \$1500 a month. The respondents agree that Social Services Law 209 does not preclude assistance to someone not receiving SSI benefits, but argue that the petitioner did not claim eligibility for those funds at the administrative proceeding and so is barred from raising it now.”

“While respondents’ expression of the principle governing judicial review of an administrative determination is legally unassailable, it reflects an unfortunate degree of organizational insensitivity. A welfare agency does not fulfill its legislative mandate by operating under a policy that extends benefits only to those persons who are sufficiently familiar with the law to effectively demand them . . . [I]t would be far more consistent with the role assigned to the Department of Social Services to resolve petitioner’s problem than to steadfastly resist his efforts to secure a solution, however flawed they might be from a purely legal standpoint.” Determination confirmed, petition denied, proceeding dismissed. (Transferred from Supreme Ct, New York Co [Kapnick, JJ])

Admissions (Miranda Advice)**ADM; 15(25)****People v Hotchkiss, No. 772, 1st Dept, 4/15/99**

Holding: Arrest processing had begun when it was discovered that further investigation was warranted and the defendant faced more serious charges. *See People v Quartieri*, 171 AD2d 889, 891 *lv den* 78 NY2d 1079. Since the judicial process had not begun, the police properly conducted a second interview with the defendant. There was no need to re-administer *Miranda* warnings. The defendant, not a novice to the criminal legal system, had waived those rights earlier. *See People v Crosby*, 91 AD2d 20, 29 *lv den* 59 NY2d 765. Nothing indicates the defendant no longer understood his rights. Further, before the third statement, which was videotaped, the defendant acknowledged that he had already been advised of and understood his rights. Even if the second statement was inadmissible, the third—made four hours after the second, and following administration and waiver of the *Miranda* rights—was sufficiently attenuated so that he was no longer under the influence of the prior questioning. *See People v Rodriguez*, 231 AD2d 477 *lv den* 89 NY2d 1099. Judgment affirmed. (Supreme Ct, New York Co [Obus, JJ])

Rape (Evidence)**RAP; 320(20)****People v Wigfall, No. 3120-3120A, 1st Dept, 4/20/99**

Holding: The rape shield law clearly contemplates that a prosecutor might introduce evidence of a complainant’s sexual history, which a defendant would then have a right to rebut. CPL 60.42(3). The legislative history relied upon by the defense to assert that the shield applies to both defense and prosecution ignores the context of the language in question. 1975 NYS Legislative Annual at 48, Memorandum of Assemblyman Fink. No New York caselaw supports the defense position. The law from other jurisdictions proffered by the defense is inapposite and not binding (*eg Government of Virgin Islands v Jacobs*, 634 FSupp 933, 937 [D VI]). The defendant ignores decisions emphasizing that a rape shield law is intended to protect complainants, not the accused. *Eg Forrester v State of Indiana*, 440 NE2d 475. Judgments affirmed. (Supreme Ct, New York Co [Beeler, JJ])

Trial (Presence of Defendant)**TRI; 375(45)****People v Rivera, No. 3322, 1st Dept, 4/22/99**

Holding: The prosecution sought to introduce a videotape made of the drug transaction in which the defendant allegedly participated, and its aftermath. The defense successfully moved for an audibility hearing regarding the tape, but the defendant and his codefendants were excluded. The tape was ruled admissible despite problems with its audibility. Audibility hearings appear to be ancillary proceedings that will often not require defendants’ presence. The determination to be made is within the sound discretion of the court. *See People v Mitchell*, 220 AD2d 813 *lv den* 87 NY2d 905. That discretion includes deciding who is to be present at the hearing; in some cases, even counsel may be excluded. Judicial economy or security considerations, which are prudential matters, may be the basis for such a determination. *See In re Audibility of Certain Recorded Conversations*, 691 FSupp 588, 596-599 *affd sub nom United States v Melendez-Carrion*, 996 F2d 302. The probative value of a tape is to be weighed against its potential for prejudice, and the tape may be admissible even if it has inaudible segments. *People v Harrell*, 187 AD2d 453 *lv den* 81 NY2d 789. Once the defense has had a chance to tell the court its contentions, there is little that counsel or the defendant can add, and the court may choose to review the tape out of their presence. The case of *People v Stevens* (221 AD2d 937 *lv den* 88 NY2d 854), which concerned a third party’s statements, does not require a defendant’s presence at an audibility hearing where the statements at issue are his own. That no transcript was made of the tape is immaterial—only three of 13 tapes presented were transcribed. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

First Department *continued*

Evidence (Rebuttal)

EVI; 155(123)

People v Moux, No. 3343, 1st Dept, 4/29/99

Holding: By prior order, this case was held in abeyance (*People v Moux*, __ AD2d __, 682 NYS2d 586). The record now before us supports the reconstruction court's finding that the defendant was present at the *Sandoval* hearing. The trial court properly allowed the prosecution to rebut a defense witness's testimony. The witness, an attorney, said that he represented the complaining witness and not the defendant when he prepared an affidavit in which the complainant alleged that she had been coerced by police into bringing charges. The prosecution was entitled to present evidence showing the attorney did in fact represent the defendant. *People v Harris*, 57 NY2d 335, 345 *cert den* 460 US 1047. Judgment affirmed. (Supreme Ct, New York Co [Leff, JJ])

Speedy Trial (Cause for Delay)

SPX; 355(12) (32)

(Prosecutor's Readiness for Trial)

People v Lacey, No. 3391, 1st Dept, 4/29/99

The defendant's motion for dismissal under CPL 30.30 was granted.

Holding: After an initial ruling by the court finding 177 days of delay attributable to the prosecution, the defense made a supplemental motion arguing that in addition to those days, 90 other days were due to the inaction and delay of the prosecutor and should be counted as well. The court agreed as to 79 days and dismissed the indictment. The Court of Appeals then decided two cases in which the prosecutor's statement of readiness was said to "toll" the speedy trial clock. *People v Stirrup*, 91 NY2d 434, 440 and *People v Chavis*, 91 NY2d 500, 506. At issue here was post-readiness delay. The court's original order improperly included 111 days where the prosecution had filed notices of readiness prior to adjourned dates set by the court. The court specifically said in its decision regarding the supplemental motion that it was not revisiting the original determination, which the prosecution had not contested. The court found the prosecution made inadequate efforts to get the minutes of the various proceedings. But delay during the pendency of a speedy trial motion is not generally chargeable to the prosecution, as the matter is collateral to readiness for trial. *People v Shannon*, 143 AD2d 572, 572-573 *lv den* 73 NY2d 860. The delay was caused by stenographers, who were not within the prosecution's control, not the prosecutor's failure to timely order the minutes or seek court assistance in obtaining the minutes when they were not forthcoming. The initial 30.30 motion was filed Dec. 5, 1996, and the prosecution responded on Jan. 13, 1997, two days before the deadline. The court's ruling that the prosecution should have acted more quickly as to the minutes failed to consider the need to

first review the defendant's allegations. Order reversed, indictment reinstated. (Supreme Ct, Bronx Co [Hunter, Jr., JJ])

Grand Jury (Procedure)

GRJ; 180(5)

People v Rodriguez, No. 99, 1st Dept, 5/4/99

The defendant was charged with third-degree sale and other drug charges. The prosecution asked a Special Narcotics Grand Jury to consider only the sale charge. An undercover officer gave conflicting testimony about a field test, and the grand jury returned a vote of no true bill. The prosecution later presented evidence to the same grand jury and asked them to only consider a possession charge. A lab report was introduced, along with testimony by the same undercover officer. The defendant successfully moved to dismiss the resulting indictment.

Holding: Because the prosecution submitted a different charge to the grand jury, judicial authorization to use the same officer's testimony was not required under CPL 190.75(3). *Matter of Colf v Serra*, 58 NY2d 837, 839-840. The statute does not bar the submission to a grand jury of witnesses' testimony, or any other evidence, which was previously presented and resulted in a no true bill. Only the specific charge, not the evidence, falls within the statute, which permits the resubmission of evidence where judicial authorization is appropriate. Cases involving the same charge, or a single criminal act resulting in multiple deaths, are distinguishable. Order reversed, indictment reinstated. (Supreme Ct, New York Co [Adlerberg, JJ])

Juries and Jury Trials (Challenges)

JRY; 225(10)

Witnesses (Police)

WIT; 390(40)

People v Johnson, No. 907, 1st Dept, 5/4/99

Holding: The court properly denied a defense challenge for cause of a prospective juror whose daughter was a complaining witness in a matter that would be prosecuted by the Bronx District Attorney's office in court the following week. There had been no contact with the district attorney's office by either the prospective juror or her daughter, and the defendant failed to prove that the prospective juror had any relationship with the district attorney's office that would preclude her from rendering an impartial verdict. *See People v Colon*, 71 NY2d 410, 418 *cert den* 487 US 1239.

The defendant moved for a mistrial because an undercover officer, as he took and left the witness stand, made a gesture which appeared to be a greeting towards the defendant, which implied a familiarity that could influence the jurors. The court properly denied the motion where the record established that the undercover officer was greeting his friend, a court officer seated behind the defendant. It was a remote possibility that any of the jurors noticed the gesture or that it influenced their verdict. *See People v Ortiz*, 54 NY2d 288. Judgment affirmed. (Supreme Ct, Bronx Co [Benitez, JJ])

First Department *continued*

Auxiliary Services (Interpreters) **AUX; 54(30)****Continuances (General)** **CTN; 90(14)****People v Nunez, No. 909, 1st Dept, 5/4/99**

Holding: The defendant did not preserve his contentions that the court should have granted an unspecified adjournment so that *Rosario* material provided the weekend before jury selection could be translated into Spanish for his benefit, and that the lack of an adjournment deprived him of his constitutional rights to effectively discuss his case with his attorney, confront witnesses, and actively participate in his own defense. The defense made no specific request for an adjournment, or specific objection to proceeding with the jury selection. He also made no further mention, after a one-day hiatus due to the defendant's illness, of the documents or his need to review them. *See People v Rogelio*, 79 NY2d 843. Judgment affirmed. (Supreme Ct, New York Co [Torres, J])

Parole (Revocation Hearings [Warrant]) **PRL; 276(45[g])****People ex rel. Cross v NYS Division of Parole, No. 937, 1st Dept, 5/4/99**

Holding: The petitioner failed, in seeking habeas corpus relief, to establish that the respondent did not exercise due diligence in executing the parole warrant against the petitioner. There was no demonstration that the respondent manifested a gross disinterest in retaking the petitioner (*see People ex rel. Stracci v Warden of the NYC House of Detention for Men*, 72 AD2d 393), nor did the petitioner establish that there was unwarranted delay on the part of the respondent. The respondent executed the warrant before the expiration date of the petitioner's underlying sentence, making execution timely. The respondent was not required to serve the petitioner with a copy of the parole warrant. The notice required by Executive Law 259-i(3) (c) (iii) was provided by serving the petitioner with the Notice of Violation and Violation Release Report. Judgment affirmed. (Supreme Ct, Bronx Co [Byrne, J])

Juries and Jury Trials (Discharge [Qualifications]) **JRY; 225(30) (50)****People v Santiago, No. 2233, 1st Dept, 5/6/99**

Holding: Witnesses were improperly allowed to refer to the defendant by his nickname, "Murder Mike." As there was overwhelming proof of the defendant's guilt—the eyewitness recognized him at the scene of the crime and observed him before, during and after the shooting (*see People*

v Carter, 166 AD2d 660, 661 *lv den* 77 NY2d 837)—there was no "significant probability" that the defendant would have been acquitted without this evidentiary error. While the shooter was wearing a ski mask and the witness testified that he could only see the shooter's eyes, the witness was also unwavering in his identification of the defendant.

The defendant argued on appeal that a juror, who expressed concern after one day of trial that he lived too close to the crime scene thereby endangering him or his family if he continued, was "grossly unqualified" (CPL 270.35). The defendant argued against the juror's removal at trial, so this is unpreserved. CPL 470.05[2]; *see People v Liriano*, 177 AD2d 423, 424 *lv den* 79 NY2d 949. As to the defendant's absence during questioning of the juror, *in camera* questioning of a seated juror is not a material part of the trial, so the personal presence of the defendant is not required. *See People v Darby*, 75 NY2d 449, 453. Further, the defendant could not have made a contribution to that interview; his presence would have been superfluous. *See People v Roman*, 88 NY2d 18, 26. While the juror had discussed his concerns with others, there is no showing that he talked about the facts of the case or discussed it except in general terms. *Cf People v Fox*, 172 AD2d 218 *lv den* 78 NY2d 966. Judgment affirmed. (Supreme Ct, Bronx Co [Stadtmauer, J])

Civil Practice (General) **CVP; 67.3(10)****Forfeiture (General)** **FFT; 174(10)****Morgenthau v Rodriguez, No. 291, 1st Dept, 5/11/99**

When a search warrant was executed for the defendant's apartment, police seized cocaine, drug paraphernalia and \$4,228. The district attorney sought civil forfeiture of the \$4,228. The defendant did not respond nor appear. The court denied the district attorney's motion for a default judgment, dismissed the complaint and ordered the money returned to the defendant because "nothing in the moving affidavit ties the conviction for drug possession to the money found in the defendant's apartment." The district attorney's motion for reargument, which the defendant opposed, was denied. **Holding:** If a court determines that a plaintiff's affidavit in support of its motion for a default judgment is inadequate, and that the relief is unwarranted, the court's proper remedy is to deny the default judgment. *Kahn v Friedlander*, 90 AD2d 868, 869. Application of the rebuttable statutory presumption that currency found in close proximity to drugs is proceeds of narcotics (CPLR 1311 [3][d][ii]) established the requisite proof here, entitling the district attorney to a default judgment. The defendant's belated and undocumented factual assertions were not credible or reliable, and could not defeat the presumption. Judgment reversed. (Supreme Ct, New York Co [York, J])

First Department *continued*

Parole (Revocation Hearings [General]) PRL; 276(45[d])

**In re Serrano v NYS Executive Dept-Div of Parole,
No. 833, 1st Dept, 5/11/99**

Holding: The petitioner masterminded a violent robbery at his employer's market. The parole board's discretionary determination to deny parole release was based on the serious nature of the offense. *See Garcia v New York State Div of Parole*, 239 AD2d 235, 239. The disposition of the petitioner's article 78 proceeding, which annulled the parole board's determination, was erroneous. The parole board's determination was made in accordance with the proper statutory standards and was not arbitrary and capricious; the petition should be dismissed. Judgment reversed. (Supreme Ct, New York Co [Lippmann, JJ])

Aliens (Deportation) (General) ALE; 21(10) (30)
Judgment (Modification) JGT; 220(15)

People v Cuaran, No 993, 1st Dept, 5/11/99

Holding: The defendant pled guilty to second-degree attempted robbery and was sentenced to a term of one year. The prosecution conceded that the interest of justice would be served by a one-day reduction in the defendant's sentence in order to relieve him of an unanticipated effect on his immigration status that would result from a sentence of one year. As a matter of discretion in the interest of justice, the sentence is modified to 364 days. Judgment modified, and otherwise affirmed. (Supreme Ct, New York Co [Schlesinger, JJ])

Misconduct (Prosecution) MIS; 250(15)

**Trial (Joinder/Severance of Counts
and/or Parties)** TRI; 375(20)

People v Logan, No. 1005, 1st Dept, 5/11/99

The defendant was convicted of second-degree murder and sentenced to a term of 25 years to life.

Holding: Because the defenses of the defendant and his codefendant were not "so antagonistic or irreconcilable as to require separate trials. . ." (*see People v Mahboubian*, 74 NY2d 174) and the defendant was not prejudiced by the joint trial, the court properly exercised its discretion by denying the defendant's motion for severance. The prosecution was properly allowed to impeach its own witness with grand jury testimony. *See CPL 60.35; People v Saez*, 69 NY2d 802. The prosecutor's erroneous comments in summation concerning the evidentiary significance of the grand jury testimony were not preserved for appellate review because the defendant failed to make timely and specific objections and the court thereafter granted the defendant's request for curative instructions and no further relief was requested. Judgment affirmed. (Supreme Ct, Bronx Co [Barrett, JJ])

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

People v Bilsky, No. 1009, 1st Dept, 5/11/99

The defendant pled guilty to second-degree criminal possession of a controlled substance and was sentenced to six years to life.

Holding: The magistrate to whom the search warrant had initially been presented signed the warrant but then withdrew her signature and permitted the prosecution to seek another magistrate, who signed it. The "law of the case doctrine" had no applicability to the unusual circumstances here, which evinced no determination of the issues surrounding events described in the warrant affidavit. The defendant's challenge to the truth of the information contained in that affidavit was insufficient to require a hearing pursuant to *Franks v Delaware* (438 US 154 [1978]). In light of the interpretations supplied by the experienced officer, the affidavit provided ample information to support a reasonable belief that drug activity was taking place on the premises. *See People v Tambe*, 71 NY2d 492. "The officer properly obtained information in support of the warrant by listening from the hallway outside defendant's apartment, since defendant has failed to establish a legitimate expectation of privacy in the common hallways of his building, accessible to all tenants and their invitees." *See People v Coppin*, 202 AD2d 279, *lv den* 83 NY2d 966. Judgment affirmed. (Supreme Ct, New York Co [Scherer, JJ])

Counsel (Choice of Counsel (Standby and Substitute Counsel)) COU; 95(9.5) (39)

Speedy Trial (Cause for Delay (General)) SPX; 355(12) (30)

People v Bracy, No. 1021, 1st Dept, 5/11/99

Holding: The defendant's case had been pending for over a year including numerous adjournments due to retained counsel's other engagements. The court denied the defendant's request for a further delay of many month's duration in order to permit counsel to complete a federal trial of extraordinary length, and instead directed the defendant to proceed with substitute retained counsel. *See People v Childs*, 247 AD2d 319, 324-326, *lv den* 92 NY2d 849. "The danger of fading memories or unavailability of witnesses (albeit police witnesses), the risk of flight by defendant, and the public interest in prompt resolution of the serious charges against this multiple violent felony offender were compelling concerns that justified interference with an established attorney-client relationship given the length of the potential delay." Judgment affirmed. (Supreme Ct, New York Co [Beeler, JJ])

Second Department

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

Instructions To Jury (Witnesses) ISJ; 205(55)

People v. Brown, No. 96-01809, 2nd Dept, 4/5/99

Following a jury trial, the defendant was convicted of third-degree criminal possession of a weapon. The defendant moved to suppress the gun. The trial court granted a hearing on standing; but the defense counsel abandoned the application prior to the hearing.

Holding: The defendant did not receive effective assistance of counsel during the trial because the defense counsel was confused as to the theory of the prosecution's case. Further, the record did not reveal any strategic or other legitimate explanation for the counsel's withdrawal of the application to suppress the gun prior to the hearing. *See People v Rivera*, 71 NYS2d 705, 709. The trial court erred when it failed to instruct the jury on accomplice liability because as a matter of law, the record revealed that the prosecution's rebuttal witness was an accomplice. *See People v Ramos*, 68 AD2d 748. Judgment reversed, new trial ordered. (County Ct, Orange Co [Patsalos, J])

Counsel (Waiver) COU; 95(40)

People v Maxime, No. 96-10764, 2nd Dept, 4/5/99

The court denied the defendant's request for a new attorney, but gave the defendant the option of continuing with his attorney or proceeding *pro se*. During a portion of the trial, the defendant represented himself and the jury convicted him of two counts of second-degree assault and first-degree reckless endangerment.

Holding: The defendant's implied waiver of his right to counsel is ineffective because the court failed to make an inquiry or warn the defendant about the risks of proceeding *pro se*. *People v Slaughter*, 78 NY2d 485, 491. This failure constitutes reversible error. *See People v Anderson*, 125 AD2d 580. Judgment reversed; new trial ordered. (Supreme Ct, Kings Co [Minardo, J])

Juries and Jury Trials (Selection) (Voir Dire) JRY; 225(55)(60)

People v White, No. 97-00539, 2nd Dept, 4/5/99

The defendant was convicted after trial of second-degree assault and fourth-degree criminal possession of a weapon. During jury selection, a juror expressed that she could not understand why an innocent defendant would not testify. After further questioning, she indicated that she would not be able to give "a truthful verdict" without hearing from the defendant. Another juror indicated that because his brother was murdered during the course of a robbery, it

would be "pretty hard" for him to remain "fair and impartial." Both jurors remained.

Holding: The court's error in denying defense counsel's challenge for cause of prospective jurors constitutes reversible error and mandates a new trial, since the defendant exhausted all his peremptory challenges. *See People v Molinari, _AD2d_*, (2nd Dept 7/13/98) and CPL 270.20(2). Once a prospective juror has indicated bias, hesitation, or any limitation on his ability to render a fair and impartial verdict, the juror should be discharged unless a subsequent "unequivocal" promise to set aside their prior state of mind and to render a verdict based solely on the evidence is made. *See People v Blyden*, 55 NY2d 73, 77-78). Order reversed, new trial granted. (Supreme Ct, Queens Co [Flug, J])

Juries and Jury Trials (Selection) (Voir dire) JRY; 225(55) (60)

People v Light, No. 97-03357, 2nd Dept, 4/5/99

The defendant was convicted after trial of an unauthorized use of a motor vehicle and petit larceny. During jury selection, one juror expressed that his mother's and his car was broken into within the last year. The juror stated that he did not know how it would affect the way he listened to the evidence and that it may have an effect upon how he evaluated the evidence. Further questioning revealed that the juror was still angry because he had to pay a high price for car insurance because of the robberies in New York.

Holding: The court's error in denying defense counsel's challenge for cause of the prospective juror mandates a new trial, since the defendant exhausted all his peremptory challenges. *See People v Molinari __ AD2d __* (2nd Dept 7/13/98). "[W]here there is a prima facie showing of actual bias, the Trial Judge should require the prospective juror to 'expressly state that his prior state of mind*** will not influence his verdict, and*** that he will render an impartial verdict based solely on the evidence.'" *People v Torpey*, 63 NY2d 361, 367. Here, the defendant's equivocal statements that he "would try" and "I don't know" were insufficient to establish that he would be an impartial juror. Order reversed; new trial granted. (Supreme Ct, Kings Co [Ruchelsman, J])

Identification (General) (Lineups) (Suggestive Procedures) IDE; 190(17) (30) (50)

People v Breitenbach, Nos. 97-07097, 98-05330, 2nd Dept, 4/5/99

The defendant was convicted of robbery and burglary. The photograph of the lineup indicated that the defendant was the only thin, blond person seated among five other "fillers" who had dark hair color and a "hefty" appearance. The complainant's testimony, which included her description of the lineup identification and her in-court identifica-

Second Department *continued*

tion of the defendant, was the only evidence connecting the defendant to the crime. At the *Wade* hearing there was no other evidence of an independent source presented for the in-court identification.

Holding: The photograph of the lineup shows a significant contrast in the defendant's appearance, which was unduly suggestive. *See United States v Wade*, 388 US 218. Therefore, the conviction must be reversed, and a new trial preceded by an independent source hearing must be held. Appeal from the amended sentence is dismissed as academic. Judgment reversed. (Supreme Ct, Queens Co [Flug, J])

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

Judges (Powers) **JGS; 215(10)**

Matter of Attorney General of the State of New York v Firetog, No. 98-10348, 2nd Dept, 4/5/99

The respondent judge (Supreme Ct, Kings Co) had made an informal, "preliminary" determination at an unrecorded bench conference that the evidence before the grand jury was "probably" sufficient. Then, relying on CPL 210.30(3), he directed the petitioner to release the grand jury minutes to the defense counsel in order to aid them with their preparation of a written motion to reduce the counts of the indictment for legal insufficiency. *See* CPL 210.20(1)(b). The petitioner filed this article 78 to prohibit enforcement of the order.

Holding: There is no authority for a judge to order the release of the grand jury minutes once a determination has been made as to their legal sufficiency. *See Matter of Brown v LaTorella*, 229 AD2d 391, 392. CPL 210.30(3) only permits the release of the minutes when a written motion to dismiss or reduce has been made, with reasonable notice to the prosecution (*see* CPL 210.45[1]; *People v Rodriguez*, 244 AD2d 364), and the court finds that the release of relevant portions is necessary to assist it in deciding the motion. There was no written motion here. Petition granted; order prohibited.

Dissent: (Friedmann, J) The petitioner and majority ignore the requirement that a ruling on a defendant's motion to inspect is only final when it is placed on the record. *See* CPL 210.30 (5). Reliance on *LaTorella* and other authority is misplaced since they are distinguishable. The majority's rule divests the court of its inherent power to reconsider a preliminary opinion on a pretrial motion, even in a very complicated case where the court concludes it needs input to rule. There is no statutory or judicial requirement that the "motion to inspect" be in writing. If there were, it was arguably waived.

Speedy Trial (Prosecutor's Readiness for Trial) **SPX; 355(32)**

People v Burwell, No. 95-06188, 2nd Dept, 4/12/99

Holding: The defendant was deprived of his statutory right to a speedy trial. *See* CPL 30.30. The prosecution announced that they were ready for trial 166 days after they filed the accusatory instrument. As part of an omnibus motion, the defendant sought an *in camera* inspection of the grand jury minutes. *See* CPL 210.30. Although the prosecutor consented, the minutes were not turned over for an additional 76 days, causing more than six months delay and requiring dismissal. *See People v Harris*, 82 NY2d 409. At the hearing, the prosecutor's only witness was the grand jury stenographer, who testified as to the delay caused by a backlog of work. The witness did not indicate that the prosecutor made any effort to expedite the production of the transcript nor indicate the amount of time that it would have taken to type the transcript. *See People v Sutton*, 209 AD2d 878. Judgment reversed, indictment dismissed. (County Ct, Westchester Co, [Murphy, J])

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

Robbery (Evidence) **ROB; 330(20)**

People v Alfaro, No. 96-03294, 2nd Dept, 4/12/99

The defendant was convicted of second-degree robbery conviction.

Holding: The complainant testified at trial that an altercation arose between him, the defendant and the co-defendant, who had an unsatisfied civil judgment against the complainant's former business. During the altercation, the complainant's gold chains were pulled off, but he was unsure of who grabbed his chains. "The jury's determination was against the weight of credible evidence. . . [A]n intent to steal the gold chains was not apparent. A reasonable inference from the evidence was that the codefendant broke the chains without the defendant realizing that he had done so (*see, People v West*, 195 AD2d 490, 491. . .)". The prosecutor made clearly improper comments to the jury during summation stating that the presumption of innocence was "gone" or "vanquished" and that the jury should consider the victim's rights. The prosecutor also asked the jury to infer guilt where the defendant was present at the scene and had a lawyer when he surrendered to the police. Judgment reversed, indictment dismissed; matter remitted for a CPL 160.50 order. (Supreme Ct, Queens Co [Katz J])

Juries and Jury (Challenges (Selection) (Voir Dire)) **JRY; 225(10) (55) (60)**

People v Zachary, No. 96-05231, 2nd Dept, 4/12/99

The defendant unsuccessfully challenged for cause eight prospective jurors. One prospective juror was the fiancée of a police officer, while another was a spouse of a police officer. The two indicated that they could be fair and impartial, however, neither one believed that police officers would lie.

Second Department *continued*

When one was asked if she had an affinity for police officers, she answered affirmatively. Two other prospective jurors had been victims of crimes and indicated that their feelings might impact their view of the case.

Holding: “Where there remains any doubt in the wake of such statements, when considered in the context of the juror’s over-all responses, the prospective juror should be discharged for cause.” *See People v Blyden*, 55 NY2d 73, 78. The court erred in refusing to dismiss these four jurors since their statements indicated that they would be unable to render an impartial verdict based upon the evidence (*see* CPL 270.20[1][b]; *People v Torpey*, 63 NY2d 361), and the defense counsel exhausted his allotment of peremptory challenges. Judgment reversed; new trial ordered. (County Ct, Nassau Co [Palmieri, JJ])

Identification (Eyewitnesses) **IDE; 190(10)**

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

People v Calabria No. 97-06055, 2nd Dept, 4/12/99

Despite initial comments that “she got a quick glance” and “a glimpse” of the suspect, the complainant testified at trial that the defendant was the man who had robbed the school where she taught. She stated that he was directly facing her, pointing a gun in her direction, when she observed his face for 5 to 10 seconds. Several months after the incident, the complainant viewed a line-up and identified the defendant as the one who had confronted her.

Holding: The identification evidence was legally sufficient to establish the defendant’s guilt because the complainant had the opportunity to see the defendant at close range and in good lighting. The accuracy of the identification and the resolution of issues of credibility are primarily questions for the jury and should not be disturbed unless clearly unsupported by the record. *See People v Joyiens*, 39 NY2d 197, 203. The prosecution erred in eliciting testimony from witnesses which inferentially bolstered the complainant’s identification, but such error was harmless in view of the complainant’s testimony. *See People v Trowbridge*, 305 NY 471. The prosecutor’s comments during summation did not deprive the defendant of a fair trial. *See People v Galloway*, 54 NY2d 396, 399. Judgment affirmed. (Supreme Ct, Kings Co [Lebowitz, JJ])

Dissent: [Goldstein, J] In light of the multiplicity of errors, and the prosecutor’s repeated refusal to comply with the court’s directives, a new trial is mandated.

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

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

**People v Robinson, No. 97-11584, 2nd Dept,
4/12/99**

Holding: The defendant was deprived of a fair trial. The prosecutor improperly vouched for the complainant’s truthfulness. The prosecutor informed the jury that they would “walk this guy [the defendant] right out the door” if they thought that the complainant was “full of crap.” *See People v Robinson*, 191 AD2d 595. The prosecutor then appealed to the jury’s sympathies and fears (*see People v Nevedo*, 202 AD2d 183, 185); by describing the elderly, disabled complainant as someone who would be a “classic victim anywhere in this city.” *See also People v Walters*, 251 AD2d 433. The prosecutor remarked to the jury that the defense was following a “script” that was “like right out of Perry Mason,” told the jury he was displeased that members of the defendant’s family were present when the defense witness testified, and concluded by asking the jurors to honor their oaths, stating that “the only way this defendant walks out of the courtroom is if you let him.” “[S]ummation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all the rhetorical devices at his command.” *People v Ashwal*, 39 NY2d 105, 109. Proof of guilt in this one-witness identification case was not overwhelming. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Spire, JJ])

Discovery (Prior Statements of Witness) **DSC; 110(26)**

People v Lewis, No. 97-03358, 2nd Dept, 4/19/99

Holding: The prosecutor’s failure to produce *Rosario* material consisting of a “daily activity report” prepared by the undercover officer who made the purchase denied the defendant a fair opportunity to cross-examine the officer. “Such failures constitute per se reversible error requiring a new trial preceded by disclosure of the material.” *People v Martinez*, 71 NY2d 937, 940. “[T]hat the material is related to the subject matter of the witness’s testimony is critical and dispositive” (*People v Rios*, 182 AD2d 843, 844), but the violation “cannot be considered harmless error even if the nondisclosed material would have been of limited impeachment value to the defense” (*People v Smith*, 206 AD2d 102, 109). Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Lipp, JJ])

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

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

People v Ward, Jr., No 97-11430, 2nd Dept, 4/19/99

Holding: The defendant’s contention that Penal Law 70.08(3)(c) violates the equal protection clauses of the state and federal constitution is without merit. In this case, neither a suspect class nor a fundamental interest is involved and,

Second Department *continued*

therefore, the statute need only be supported by a rational basis. See *People v Walker*, 81 NY2d 661, 668. “In applying the rational basis test, [courts] defer to the Legislature, which is presumed to know all the facts that would support a statute’s constitutionality - a presumption which must be rebutted beyond a reasonable doubt.” A statute is constitutional if it is rationally related to any conceivable legitimate state purpose. *Id* at 668. The legislature’s determination to increase the minimum sentence for a persistent violent offender for a period of ten years, at which point the lower minimum would go back into effect, has a rational basis. The scheme provides for a limited period within which to evaluate whether an increase in the minimum sentence has an effect on the rate of violent crime. Judgment affirmed. (County Ct, Westchester Co [Dillon, J])

Civil Rights Actions (USC § 1983 Actions) CRA; 68(45)
Statute of Limitations (General) SOL; 360(13)

Lopez v Shaughnessy, No 98-05086, 2nd Dept, 4/19/99

In October 1995, the plaintiff, an inmate, commenced a negligence action and federal civil rights action against Westchester County “its agents, servants, and/or employees” for personal injuries suffered when other inmates attacked him at the county jail. In October 1997, plaintiff filed this suit arising out of the same attack, naming Westchester County police and corrections officers as defendants. The defendants successfully moved to dismiss the complaint on the grounds that there is another action pending between the same parties for the same cause of action (CPLR 3211[a][4]); and that the action was time-barred per General Municipal Law 50-i.

Holding: The plaintiff’s cause of action pursuant to 42 USC 1983 in the instant action and his cause of action against the County are neither the same nor substantially the same. The county cannot be held liable under 42 USC 1983 solely upon the doctrine of respondeat superior or vicarious liability. To prevail, the plaintiff must plead and prove an official policy or custom that caused the denial of a constitutional right. See *Jackson v Police Dept of City of New York*, 192 AD2d 641, 642 *cert den* 511 US 1004. The plaintiff is not required to show this in the action against the individual defendants.

The plaintiff’s federal civil rights causes of action are not subject to the notice of claim requirements of General Municipal Law 50-i. See *Felder v Casey* 487 US 131. Such actions are for personal injury (see *Wilson v Garcia*, 471 US 261) and have a three-year statute of limitations. See CPLR 214[5]. Judgment reversed, complaint reinstated. (Supreme Ct, Westchester Co [Barone, J])

Third Department

Defenses (Justification) DEF; 105(37)
Instructions to Jury (Theories of Prosecution and/or Defense) ISJ; 205(50)

People v Cataldo, No. 10572, 3rd Dept, 4/1/99

Holding: The defendant maintained that he had displayed the knife used in a fight resulting in another’s death to dissuade the decedent from engaging in the fight. The court’s initial jury charge included a justification instruction pursuant to Penal Law 35.05(2), that if the defendant displayed the knife to avoid injury in a situation occasioned through no fault of his, displaying the knife was not a criminal act. The court then gave the justification charge pursuant to Penal Law 35.15 relating to the use of physical force in defense of a person. The jury found the defendant guilty of criminally negligent homicide, but when the court began to thank the jury for its work, they inquired about further proceedings with regard to self-defense. They then declared that they had not reached a verdict, and agreed that they would like the instruction on self-defense read again. The court reiterated the charge as to PL 35.15 but refused to again charge pursuant to PL 35.05(2). While the trial court generally has discretion in responding to jury inquiries (see *People v Steinberg*, 79 NY2d 673, 684), these supplemental instructions were insufficient. The defense of justification was of critical importance here, and the failure to provide both charges regarding justification deprived the defendant of a fair trial. See *People v Gittens*, 196 AD2d 795, 796-797 *lv den* 82 NY2d 849. Judgment reversed, remitted for new trial. (County Ct, Tioga Co [Sgueglia, J])

Accusatory Instruments (General) ACI; 11(10)
Prosecutors (Decisionmaking) PSC; 310(10) (20)
(General)

People v Fox, No. 10613, 3rd Dept, 4/1/99

Holding: Acting General Counsel for the Department of Environmental Conservation (DEC) wrote the Attorney General (AG) in 1997 asking that the AG’s office investigate for possible prosecution a trespass and theft of timber from privately-owned lands designated as tax-exempt forest. The letter did not reference the Acting Commissioner of DEC other than in the letterhead, nor was he copied with the letter. An indictment was then obtained by the AG, and the defendant was convicted. While he raised the AG’s lack of authority to prosecute him for the first time on appeal, a valid accusatory instrument is a nonwaivable jurisdictional prerequisite to conviction. *People v Moore*, 132 AD2d 776, 777 *lv den* 70 NY2d 802. The presence of an unauthorized prosecutor before the grand jury is likely to result in prejudice to the defendant and a resulting conviction cannot stand. *People v Huston*, 88 NY2d 400, 410. Executive Law 63 provides that

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the AG shall investigate and prosecute violations of law upon the request of, *inter alia*, the head of any department, authority, division or agency of the state. Here there is no indication that the head of DEC even knew a request was being made. Compare *People v Liebowitz*, 112 AD2d 383 *lv den* 65 NY2d 928. The indictment must be dismissed, which does not necessarily foreclose prosecution, as the court may transfer the matter to the appropriate district attorney and authorize leave to submit the charges to a proper grand jury. *People v DiFalco*, 44 NY2d 482, 488. Judgment reversed, indictment dismissed, matter remitted. (County Ct, Delaware Co [Estes, J])

Driving While Intoxicated (General) **DWI; 130(17)**

Sentencing (Excessiveness) (Fines) **SEN; 345(33) (36)**

People v Helm, No. 10651, 3rd Dept, 4/15/99

Holding: Where the defendant had numerous alcohol-related driving offenses, his prison sentence of one and one-third to four years for felony driving while intoxicated was not an abuse of the court's sentencing discretion, despite the prosecution's recommendation following a guilty plea that a short jail term and long probation be imposed. See *People v Hamm*, 249 AD2d 623. The \$5,000 fine, which was the statutory maximum (see Vehicle and Traffic Law 1193[1][c][i]), is reduced to the minimum permissible amount "as there is no dispute that defendant is indigent and qualified for assigned counsel, a situation that the People assure us is only possible in Franklin County for persons with incomes at or below the poverty level. . . ." Judgment modified, fine reduced to \$1,000, and as modified, affirmed. (County Ct, Franklin Co [Main Jr., J])

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

Identification (Eyewitness) **IDE; 190(10)**

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

People v Alexander, No. 10392, 3rd Dept, 4/22/99

Holding: The court erred by overruling the defendant's timely objection to the prosecutor's argument that an off-duty corrections officer's identification of the defendant was more reliable because both were African-American. See *People v Williams*, 40 AD2d 812. However, the single comment was not a persistent pattern of racial references. *People v Glenn*, 185 AD2d 84, 90-91 *cert den* 520 US 1108. The error was not so prejudicial as to require reversal given the totality of the evidence. The officer observed the scene in sufficient detail to notice that the slide on the gun was pushed back, he spontaneously identified the defendant after reporting the incident and returning to the scene, and a police officer said that the defendant's appearance at that time matched the description

the witness had furnished earlier. The defendant initially denied being present but later said that gun powder might be found on him because he was next to the person who discharged a weapon; the evidence of his guilt is compelling. Judgment affirmed. (County Ct, Albany Co [Breslin, J])

Dissent: [Mikoll, J] Arguments encouraging jurors to weigh testimony on the basis of racial similarity are inherently improper, and offend the principle that race, in itself, provides no reason for believing or not believing someone's testimony. *People v Hearn*s, 18 AD2d 922, 923. The prosecutor also improperly commented on the defense failure to present scientific evidence despite having called witnesses. See *People v Proper*, 177 AD2d 863 *lv den* 79 NY2d 922.

Admissions (Interrogation)

ADM; 15(22)

Counsel (Attachment) (Right to Counsel)

COU; 95(9) (30)

People v Grant, No. 10864, 3rd Dept, 4/22/99

Holding: The Court of Appeals sent the instant case back to the trial court to consider whether interrogation of the defendant had violated *People v Cohen* (90 NY2d 632). The trial court found no violation and denied suppression of the defendant's statements. Early questioning of the defendant, without counsel and while the defendant was not in custody, by Schenectady police about the type of weapon and facts involved in a Brooklyn gun possession charge on which the defendant was represented, was very limited and not calculated to add pressure for the defendant to confess to the Schenectady murder. Questioning by a Schenectady officer after the defendant was arrested as a parole violator initially focused on his general knowledge of guns, then he was asked about the New York City gun case, and he responded that he was charged with possession of the type of gun involved in the Schenectady case. Questioning then turned to the facts of the Schenectady matter. A parole officer later challenged the defendant's version of events, and the defendant changed his statement. This was the most damaging statement, and was obtained without reference to the New York City charge. *Cohen* was not violated. Judgment affirmed. (Supreme Ct, Schenectady Co [Sheridan, J])

Assault (Evidence)

ASS; 45(25)

Evidence (Sufficiency)

EVI; 155(130)

People v Darrow, No. 10297, 3rd Dept, 4/29/99

Holding: Evidence at trial showed that another person punched the complainant in the face, then kicked or stomped on the complainant's head three or four times and punched him two or three more times. That assailant then went to his car, after which the defendant came on to the porch where the complainant was lying, kicked him in the head two to four times, and left in the other assailant's car. The complainant was in a coma as a result of hypoxic injury,

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a lack of oxygen to his brain because his airway was blocked with blood and vomitus due to a diminished gag reflex resulting from concussion and extreme intoxication. Three medical witnesses testified. One said that it was impossible to determine which blows created the hypoxic injury. One opined that the other assailant's "stomp" on the complainant's head was the major cause of the hypoxic condition. A third rejected that "single significant blow" theory, but could not say to a reasonable medical certainty that what the defendant had done had worsened the complainant's condition. The failure to establish beyond a reasonable doubt that the defendant caused the complainant's serious physical injury (see *People v Dlugash*, 41 NY2d 725, 731) requires reversal of the first-degree assault conviction. The jury necessarily found that the defendant intended to cause serious physical injury (see Penal Law 120.10[1]), and his conduct tended to effect the commission of first-degree assault. See *People v Santos*, 213 AD2d 302 *affd* 86 NY2d 869. The conviction is reduced to attempted first-degree assault. Judgment modified, matter remitted for resentencing, and as modified, affirmed. (County Ct, Broome Co [Smith, J])

Impeachment (Of Defendant [Including Sandoval]) **IMP; 192(35)**

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

People v Wright, No. 10473, 3rd Dept, 4/29/99

Holding: At a *Sandoval* hearing the court ruled that the prosecution could use a prior burglary conviction to impeach the defendant if he took the stand, but not a felony murder conviction that arose from the burglary. At the defendant's trial for promoting prison contraband and possession of a weapon, the prosecutor asked the defendant on cross-examination if he was in the correctional facility because he was convicted of murder. Defense counsel unsuccessfully objected, and the prosecutor went on to ask "Do you remember who it was you murdered?" obtaining a name in response. The defense sought a mistrial. Defense counsel said the defendant would not have taken the stand if he had known the murder would be brought up, and that by asking about "murder" rather than "felony murder," the prosecution had misrepresented the prior conviction. Despite no argument by the prosecution, the court concluded the questioning was permissible. The jury was later told that the defendant's prior conviction could not be used as proof that he committed the charged offenses. The court's error is conceded by the prosecution. Absent a prompt and appropriate response to the prosecution's original error, there was no realistic opportunity for effective curative action. Compare *People v Davis*, 208 AD2d 1062, 1063, *lv den* 84 NY2d 1010. The error was not harmless. There was direct conflict between

the testimony of the correction officer and the defendant and his corroborating witness, and the surveillance videotape did little to resolve the issue. Judgment reversed, remitted for new trial. (County Ct, Sullivan Co [La Buda, J])

Rape (Evidence) (Statutory Rape) **RAP; 320(20) (35)**

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

People v White, No. 11039, 3rd Dept, 5/6/99

Holding: The court was free to credit the interrogating officer's testimony at the *Huntley* hearing over that of the defendant and find that the defendant's statement was not coerced. Refusal to permit the defendant to cross-examine witnesses concerning the 11-year-old complainant's contraction of syphilis was not error. The current charges came to light when the complainant was diagnosed. The argument on appeal that the complainant had a motive to falsely accuse the defendant to protect her 12-year-old boyfriend was not made in the court below. Because the prosecution did not intend to show that the defendant infected the complainant with the disease, the exception in the rape-shield statute that makes evidence of a complainant's sexual conduct admissible to rebut such accusation (CPL 60.42[4]) was inapplicable. Imposition of consecutive sentences for the two charged acts was not improper, where the complainant said that the defendant put his penis in her mouth and in her vagina "at different times" while they were in his truck. These constituted distinct sexual acts. See *People v Radage*, __AD2d __, 681 NYS2d 772. Judgment affirmed. (County Ct, Montgomery Co [Sise, J])

Kidnapping (Degrees and Lesser Offenses) (Elements) **KID; 235(10) (15)**

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

People v Saunders, No. 75671, 3rd Dept, 6/13/99

The defendant was sentenced as a second felony offender to an aggregate prison term of 29 years to life for crimes including kidnapping, assault, escape, endangering the welfare of a child and unlawful imprisonment.

Holding: The evidence was legally sufficient to establish that the abduction of the defendant's girlfriend and baby at their home several hours after the defendant walked away from a prison work detail advanced the commission of the crime of escape; it served to help the defendant evade custody by remaining beyond the control of the Department of Correctional Services. The defense failed to show prejudice arising from the prosecution's delay in providing to the defense certain photographs not used at trial. The court sanctioned the prosecution \$250 (see CPL 240.70[1]) and mandated immediate access for the defense to the photos, eliminating any prejudice.

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At the time of the commission of the instant crimes the defendant had been convicted of three prior unrelated drug felonies and two separate parole revocations. The court did not abuse its discretion when it sentenced the defendant to the harshest permissible sentence. However, taking into consideration the defendant's age, and the absence of aggravating factors usually associated with kidnapping, the minimum terms imposed upon the two convictions for first-degree kidnapping are reduced to 20 years. The sentences for unlawful imprisonment and escape are to run concurrently with the sentences for kidnapping, totaling not less than 20 years and no more than life. Judgment modified, and as modified, affirmed. (Supreme Ct, Albany Co [Keegan, J])

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

Harmless and Reversible Error (General) **HRE; 183.5(20)**

People v Gaston, No. 10444, 3rd Dept, 5/20/99

The defendant was convicted of attempted murder, assault and criminal possession of a weapon.

Holding: The prosecution sought, by way of a pretrial *Ventimiglia* hearing, to use in its case in chief as evidence of motive the fact that the defendant had loaned the deceased \$500 with regard to narcotics trafficking. Even though the court erred in admitting evidence of drug trafficking, it was harmless given the overwhelming proof of the defendant's guilt and the specific limiting instructions given by the court at the time of the receipt of such evidence, as well as the time of the court's final instructions. Judgment affirmed. (County Ct, Broom Co [Smith, J])

Appeals and Writs (Arguments of Counsel) (Scope and Extent of Review) **APP; 25(5) (90)**

Counsel (General) **COU; 95(22.5)**

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

People v Serna, No. 10799, 3rd Dept, 6/3/99

The defendant pled guilty to criminal possession of a controlled substance and was sentenced to eight and a third years to life. Appellate counsel asserted that no nonfrivolous appealable issues existed and sought to be relieved of his assignment. The defendant contended in his *pro se* brief that his sentence was excessive for his first felony offense and that his guilty plea was not entered into knowingly and intelligently because he could not communicate effectively with his attorney.

Holding: The plea minutes indicate that the defendant responded in English when questioned by the court. How-

ever, the court did not question the defendant as to his proficiency in English or his understanding of the proceedings, and did not explain why the defendant was provided an interpreter only at the sentencing. Despite the defendant's failure to withdraw the plea or seek to vacate the judgment of conviction (*see People v Espinal*, 176 AD2d 417, 418), the record revealed that arguable nonfrivolous issues existed as to the voluntariness of the plea and the appropriate of the sentence. Appellate counsel is relieved. Decision withheld, new counsel to be assigned. (County Ct, Ulster Co [Bruhn, J])

Contempt (General)

CNT; 85(8)

Domestic Violence (Spousal Abuse)

DVL; 123(50)

People v Clark, No. 10733, 3rd Dept, 6/10/99

The defendant was arraigned upon charges of assaulting and menacing his wife. As a condition of pretrial release, the court issued a temporary order of protection. The defendant, his wife, and his daughter got into an altercation at their home, and he was charged with two counts of criminal contempt for violation of the court order. He moved to dismiss the indictment on the grounds that, *inter alia*, the evidence before the grand jury was not legally sufficient to support the underlying charges.

Holding: The county court erred by granting the defendant's motion as to two counts on the ground that the court order did not name the defendant's wife or oldest daughter, nor did it inform the defendant of the conduct he was to avoid. The law is now clear that a person may be found guilty of criminal contempt when he or she violates a duly served order of protection or an order given orally in court. *See People v McCowan* 85 NY2d 985, 987. A temporary order of protection against the defendant will not be dismissed because the court failed to write or type the "victim's" name into the appropriate space in the preprinted order. The order provided that the defendant not "assault, harass, intimidate, threaten or otherwise interfere with [specify victim(s), or witness(es) or member(s) of victim's[s'] or witness's[es'] family or household]; ___." This was personally served upon the defendant and signed by him at arraignment. The town justice orally communicated to the defendant that the order pertained to his wife. Judgment reversed in part, affirmed in part. (County Ct, Essex Co [Halloran, J])

Dissent: The order of the court should be affirmed because the prosecution produced no competent testimony establishing the contents of the order and the conduct it prohibited. The prosecution relied solely on testimony which was clearly hearsay and inadmissible to establish any substantive terms.

Fourth Department

Editors Note: The 4th Department has changed its case numbering system. Letters at the beginning of the case number indicate its type: CA = Civil, CAF = Family, KA = Criminal, KAH = Habeas Corpus, OP = Original Proceedings, and TP = Article 78 Transfer.

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

Guilty Pleas (General) GYP; 181(25)

People v Roman, Jr, No. KA 98-8034, 4th Dept, 3/31/99

The defendant entered a guilty plea to a reduced charge of second-degree assault (Penal Law 120.05[7]) in exchange for a promise of a five-year determinate prison term. During the plea colloquy, the defendant agreed to waive his right to appeal. During sentencing, the court denied the defendant's motion to withdraw the guilty plea. The defendant refused to execute a written appeal waiver.

Holding: The court, which sentenced the defendant as a second violent felony offender to a seven-year determinate sentence because the defendant did not live up to his end of the bargain, should have given the defendant the opportunity to withdraw his plea, as the sentence was in excess of what was bargained for. *See People v Schultz*, 73 NY2d 757, 758. The court did not inform the defendant that imposition of the bargained-for sentence was conditioned upon the defendant's execution of a written appeal waiver. *Cf People v Outley*, 80 NY2d 702. Consequently, the sentence must be vacated and the matter remitted to impose the sentence promised or to afford the defendant the opportunity to withdraw his plea. *See People v Lefler*, 193 AD2d 1143. Judgment affirmed as modified. (County Ct, Oneida Co [Donalty, JJ])

Evidence (Other Crimes) EVI; 155(95)

Informants (Production) INF; 197(30)

People v Ortiz, No. KA 98-8105, 4th Dept, 3/31/99

Holding: The defendant's conviction for criminal sale of a controlled substance was supported by testimony of the undercover officer involved, together with audio and videotapes. Such evidence legally rebuts any agency defense and establishes that the defendant knowingly and unlawfully sold cocaine. *See People v Robles*, __AD2d__ [12/ 7/98]; The defendant was not prejudiced by the delay in producing the confidential informant, where the informant was out of the country at the time of the request, and the prosecution exercised due diligence in producing the informant within five days. *See People v Jenkins*, 41 NY2d 307, 309-311.

The court's *Sandoval* and *Molineux* rulings were concrete and definitive. In reserving ruling on the prosecution's

Molineux application, the court in effect held that the prosecution could not introduce prior bad acts of the defendant as part of their case-in-chief unless the defendant raised an agency or entrapment defense. The motion to suppress the defendant's statement was properly denied because the record belies the assertion that the defendant does not speak English well and thus could not have voluntarily and intelligently waived his *Miranda* rights. Neither defense counsel's failure to challenge the voluntariness of the defendant's statement, nor his withdrawal of the agency defense after the court's ruling on the *Molineux* evidence amounted to a denial of effective assistance of counsel. Judgment affirmed. (Supreme Ct, Monroe Co [Mark, JJ]).

Appeals and Writs (General (Judgments and Orders Appealable) APP; 25(35) (45)

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

People v Daniel A., No. KA 98-5289, 4th Dept, 3/31/99

Holding: The defendant's waiver of the right to appeal encompassed the original sentence of probation (*see People v Seaberg*, 74 NY2d 1), but did not encompass the resentencing following a hearing at which violations of probation were established. The sentence imposed was neither unduly harsh nor severe, and it need not be modified as a matter of discretion in the interest of justice. Although the defendant contends that the court erred in failing to order an updated presentence report, the record establishes that the defendant waived that report at the resentencing. Judgment affirmed. (Supreme Ct, Erie Co [Forma, JJ])

Sentencing (Restitution) SEN; 345(71)

People v Barton, No. KA 98-8033, 4th Dept, 3/31/99

The defendant pled guilty to criminal possession of marijuana and was sentenced to probation and directed to pay restitution in a fixed sum. The plea agreement provided for restitution, but no amount appears in the record of the plea colloquy.

Holding: Where there was no proof before the court concerning the loss sustained, the court should have held a hearing to determine the proper amount of restitution. *See* Penal Law 60.27[2]; *People v Millar*, 144 AD2d 1032. Even though the defendant failed to request a hearing at the time of sentencing, he is nevertheless entitled to a restitution hearing because of the "essential nature" of the right to be sentenced as provided by law." *People v Fuller*, 57 NY2d 152, 156. Judgment modified by vacating the amount of restitution and matter remitted for a hearing to determine the amount of restitution. Judgment affirmed as modified. (County Ct, Jefferson Co [Clary, JJ])

Fourth Department *continued*

**Search and Seizure (Arrest/
Scene of the Crime Searches
[Probable Cause (Informants)])
(Motions to Suppress [CPL
Article 710])**

SEA; 335(10[g(iii)])(45)

**People v Saunders, No. KA 98-8140, 4th Dept,
3/31/99**

Holding: The court properly granted the defendant's suppression motion because the police did not have reasonable suspicion to stop the defendant as he was driving from a given address. *See People v Sobotker*, 43 NY2d 559, 563-64. That address was under police surveillance based on information received by the police from a confidential informant. The only basis for the informant's knowledge was the informant's observation of a single drug transaction at that address within two weeks of the stop and the informant's observation of the dealer at that address on "more than one occasion." The police saw the defendant exit from the house with a gym bag, and they knew that the dealer's truck was parked outside, but they did not know who was inside the house. The defendant entered his vehicle and drove from the area. Standing alone, those observations were not suggestive of criminal activity and therefore did not sufficiently corroborate the informant's information. *See People v Elwell*, 50 NY2d 231, 237. Order affirmed. (Supreme Ct, Erie Co [Rossetti, J])

**Counsel (Competence/Effective
Assistance/Adequacy)**

COU; 95(15)

**Sentencing (Concurrent/
Consecutive) (Presentence
Investigation and Report)**

SEN; 345(10) (65)

People v Bruce, No. KA 98-5169, 4th Dept, 3/31/99

The defendant was convicted of attempted assault upon his *Alford* plea (*see North Carolina v Alford*, 400 US 25) and sentenced as a second felony offender to an indeterminate term of incarceration to be served consecutively to a sentence previously imposed upon the defendant.

Holding: The defendant was properly sentenced in accordance with his plea bargain. Remarks during the plea colloquy establish that the court was fully aware of its discretion in sentencing the defendant, and also aware that concurrent sentences were permissible. The record did not indicate that the defendant was denied the effective assistance of counsel at sentencing. The record is silent though as to whether the presentence report was provided to counsel at least one day before sentencing. *See CPL 390.50(2)(a)*. "If the defendant is to establish a claim of ineffective assistance on that basis, he must develop the record by means of a CPL

article 440 motion." Judgment affirmed. (County Ct, Genesee Co [Noonan, J])

**Counsel (Right to Counsel)
(Right to Self-Representation)**

COU; 95(30) (35)

Defenses (General)

DEF; 105(31)

**People v Cabrera, No., KA 97-5225, 4th Dept,
3/31/99**

Holding: The defendant was not denied the right to proceed *pro se* simply because the jail in which he was held had an inadequate law library, since there is no "abstract, free-standing right to a law library or legal assistance." *Lewis v Casey*, 518 US 343, 351 [1996]. The court properly fashioned a reasonable alternative "to assure meaningful access to the courts." *Bounds v Smith*, 430 US 817, 830 [1977].

The prosecution has no obligation to disprove a defense by the close of their proof, so the defendant's motion to dismiss for this reason was properly denied. Evidence of uncharged criminal conduct had "a tendency to disprove a defense raised by the defendant" and was properly admitted as part of the prosecution's case on rebuttal. *People v Castaneda*, 173 AD2d 349, 350 *lv den* 78 NY2d 963. The defendant was not given a copy of the presentence report at least one day prior to sentencing (*see CPL 390.50(2)*), but he was "afforded an opportunity to refute those aggravating factors which may have negatively influenced the court." *People v Perry*, 36 NY2d 114, 119.

The court properly denied the defendant's oral motion to set aside the verdict, pursuant to CPL 330.30. The prosecution was not given "reasonable notice thereof and an opportunity to appear in opposition thereto." CPL 330.40(1). The issues raised in the oral motion have been raised on appeal. Judgment affirmed. (County Ct, Genesee Co [Griffith, J])

Evidence (Sufficiency)

EVI; 155(130)

**Sex Offenses (Corroboration)
(Juveniles)**

SEX; 350(2)(12)

**People v Anthony D., No. KA 98-8113, 4th Dept,
3/31/99**

Holding: The prosecution did not have to prove that the defendant touched the victim's vagina for the purpose of gratifying sexual desire (*see Penal Law 130.00(3)*), in order to prove the defendant guilty of first-degree sexual abuse. Penal Law 130.65(3). The element of sexual gratification may be inferred from the conduct itself. *See People v Dehler*, 216 AD2d 643, 644, *lv den* 86 NY2d 734. The prosecution presented corroborative proof placing the defendant at the crime scene (*see People v Lipsky*, 57 NY2d 560, 571, *rearg den* 58 NY2d 824), and "there was additional corroborative evidence presented

Fourth Department *continued*

by the victim's prompt outcry." *People v Bott*, 234 AD2d 625, 626 *lv den* 89 NY2d 1009.

The contentions that the 28-day delay between the conclusion of the trial and the verdict deprived him of his right to a prompt verdict (*see People v Munn*, 184 AD2d 1061, *lv den* 80 NY2d 932) and that the indictment did not sufficiently specify the time period in which the crime was committed (*see People v Harris*, 150 AD2d 723, 724) were not preserved for review. Judgment affirmed. (County Ct, Ontario Co [Henry, Jr, J])

Counsel (Advice of Right to Attachment) (Right to Counsel) **COU; 95(5) (9) (30)**

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

People v Little, No. KA 98-8059, 4th Dept, 3/31/99

Holding: The prosecution met their burden of establishing good cause for the nine-year preindictment delay. The evidence was insufficient to present to a grand jury until the defendant provided inculpatory statements; the informants' statements could then be corroborated. *See People v Singer*, 44 NY2d 241, 253-254. The defendant's statements were not obtained in violation of his right to counsel. *See People v Rogers*, 48 NY2d 167. Although he had been represented in 1988 by an attorney who participated in plea negotiations, the right to counsel did not indelibly attach as a result. The defendant accepted a plea only as to the robbery, not the homicide charges, and made two *pro se* motions while incarcerated on the robbery. Furthermore, the police were unaware, when the investigation began, that the defendant had had counsel in 1988. *See People v Stern*, 226 AD2d 238, 239 *lv den* 88 NY2d 969, 1072. The court properly determined that the 1988 representation terminated upon the sentencing for the robbery conviction "without any indication that the representation continued." *People v Mann*, 60 NY2d 792, 794. The defendant could waive his right to counsel with respect to this investigation although represented by counsel on unrelated charges. *See People v Steward*, 88 NY2d 496, 500 *rearg den* 88 NY2d 1018.

The court did not err in permitting the victim's family to speak at sentencing in violation of CPL 380.50(2)(a)(2) and (b) as it existed at the time of the homicide in 1988; the statute is procedural. *See People v Nival*, 33 NY2d 391, 396. Judgment affirmed. (County Ct, Niagara Co [Griffith, J])

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

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

People v Uria, KA No. 98-8128, 4th Dept, 5/7/99

Holding: To support the defense theory that the defendant's confession was involuntary due to aggressive interrogation tactics, counsel elicited testimony during cross examination of a police investigator that the witness and other officers had asked the defendant to take a polygraph test. The defense elicitation of this testimony did not permit the prosecution to improperly question the defendant concerning his reasons for not taking the polygraph. The prosecutor improperly asked the defendant during cross examination if he had refused to take a polygraph test because "you knew that you had done it, and they could tell you were lying on a polygraph." *See People v Morales*, 147 AD2d 381, 385. The prosecution also improperly commented during summation that the defendant's reason for not taking the polygraph test was "because he had something to hide." *See People v Grice*, 100 AD2d 419, 421. Due to the prosecutor's misconduct, the defendant was deprived of a fair trial. Judgment reversed, new trial granted. (Supreme Ct, Oneida Co [Dwyer, J])

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

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

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

People v Tucker, No. KA 98-8150, 4th Dept, 5/7/99

Holding: By repeatedly insisting that he did not wish to remain at his trial and engaging in disruptive behavior, the defendant waived his constitutional right to be present at all stages of his trial. *See People v Lewis*, 231 AD2d 919 *lv den* 89 NY2d 1096. The defendant was not deprived of his right to counsel by the County Court's refusal to assign him a third successive attorney prior to *voir dire*, as there was no showing of good cause for the change. *See People v Sawyer*, 57 NY2d 12, 18-19 *rearg dismsd* 57 NY2d 776 *cert den* 459 US 1178.

The defendant was not denied equal protection under *Batson v Kentucky* (476 US 79 [1986]) where the prosecutor's peremptory challenges of two black jurors were race-neutral and were not pre-textual. *See People v Hernandez*, 75 NY2d 350, 356-358 *affd* 500 US 352. The court acted within its discretion when it restrained the defendant where it articulated a reasonable basis for requiring the defendant to remain in handcuffs. *See People v Rouse*, 79 NY2d 934. The sentence was not unduly harsh or severe. Judgment affirmed. (Supreme Ct, Onondaga Co [Mulroy, J])

Death Penalty (Defense) (Legislation) **DEP;100(45) (105)**

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

Mahoney, et al. v Pataki, No. 98-8222, 4th Dept, 5/7/99

Fourth Department *continued*

Pursuant to Judiciary Law 35-b, the Court of Appeals approved, in November 1996, a capital defense counsel fee schedule that included fees for legal assistants and paralegals in addition to fees for lead and associate counsel. The Capital Defender Office was informed by the Division of the Budget (DOB) that DOB's interpretation of the statute did not "support compensation beyond lead and associate counsel."

Holding: The plaintiffs sought a declaratory judgment that Judiciary Law 35-b (5) empowered the statutorily established screening panels to promulgate, and the Court of Appeals to approve, a fee schedule for capital cases that included rates of compensation for staff (associates, paralegals and clerks) of appointed counsel. The court erred in granting the defendants' motion to convert the action into a CPLR article 78 proceeding because, although the DOB's determination had been issued, it was not final since discussions regarding staff reimbursement had not been concluded. See CPLR 7801 (1). The cross motion for class certification was untimely (see CPLR 902) and in any event was not warranted as the plaintiffs did not comply with CPLR 901. Order modified "by denying defendants' motion to convert the action to a CPLR article 78 proceeding and to change venue and by denying in its entirety defendants' motion to dismiss the complaint." (Supreme Ct, Genesee Co [McCarthy, JJ])

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

Paralegals (General) PLG; 273(10)

Matter of Hicks v Shoetz, No. 98-3206, 4th Dept,
5/7/99

The petitioner appealed from an order that directed the respondents to allow petitioner in his capacity as a paralegal to visit with inmates at the holding center, but denied petitioner's application to hold respondents in contempt of court for their alleged willful violation of a prior judgment of the court.

Holding: Insofar as a subsequent order narrowed the petitioner's access, that order was in error and is modified.

Book Review *(continued from p. 4)*

had died via the chokehold, twelve of them black men. The Court ruled that Lyons lacked "standing." Lack of "standing" was based on the little likelihood of Lyons being stopped by the LAPD and subjected to the chokehold again, thus he had no basis for protesting the chokehold's use.

After listing numerous other insults to "equal justice," Cole finishes on a positive note. Observing that our present rate of incarceration of young black men is becoming prohibitively expensive, while it also destroys communities and

The respondents must allow the petitioner, in his capacity as a paralegal for an attorney, unmonitored contact visitation with inmates at the holding center as is accorded other legal personnel. The court did not abuse its discretion in refusing to find respondents in contempt of court. Enforcement of the court's prior judgment, which was executory, not prohibitory (see *State of New York v Town of Haverstraw*, 219 AD2d 64, 65), was automatically stayed by the filing of a notice of appeal. See CPLR 5519 (a) (1). Contempt is an enforcement measure (see CPLR 5104), so the automatic stay precluded a successful contempt proceeding against respondents during the pendency of the appeal. See CPLR 5519 (a)(1)(e). Order modified, and as modified, affirmed. (Supreme Court, Erie Co [Pigott, Jr., J])

1999 Parole Representation Manuals Ready

The 1999 update of *Parole Representation in New York State*, by Roger Brazill, Marty Rosenbaum, and Donald Zuckerman is now available to public defense providers, courtesy of The Legal Aid Society. \$15. Contact the Backup Center.

Harassment (General)

HRS; 184(17)

Matter of Felder v Herbert, No. 98-8241 4th Dept
5/7/99

CPLR art 78 proceeding (transferred from Supreme Ct, Erie Co [Whelan, JJ]).

Holding: The petitioner, an inmate, was found guilty of harassing a correction officer when he allegedly told the officer to " 'check' " himself and " 'dig in because your [sic] not that tough.' " The petitioner admitted making the first part of the statement but denied making the latter. He contended that even if he did make the statement, he was not guilty of harassment because harassment referred to persistent or repeated attacks. But the regulation defined harassment as "using insolent, abusive, or obscene language or gestures." The hearing officer properly relied on the misbehavior report, and concluded that the petitioner was guilty of harassment. Cf *Matter of Brown v Coughlin*, 168 AD2d 947. Petition dismissed. ⚡

simultaneously breeds a distinct mistrust of the criminal justice system, he suggests "communal reintegration." Examples of this form of social control can be as widely separated as Boston's Operation Cease Fire or the Japanese social structure, which reintegrates by "shaming" while concurrently rehabilitating.

But whatever means we choose, Cole insists we must choose, and we must begin by publicly confessing we now live by a fiction: "all are equal before the law." ⚡

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