



Public Defense Backup Center REPORT

VOLUME XIV NUMBER 5

June 1999

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

Gradess Garners Public Service Award

The Executive Director of NYSDA, Jonathan Gradess, received a Distinguished Public Service Award for Outstanding Contribution to Public Service from the Nelson A. Rockefeller College of Public Affairs and Policy of the University at Albany, State University of New York. Presenting the award at a ceremony on May 21, 1999 was Associate Professor James Acker of the School of Criminal Justice, Rockefeller College.

Assigned Counsel Fees Remain Hot Topic

Long an issue for the public defense bar, concern about the effects of New York state's low assigned counsel rates has recently been expressed by others as well.

■ Chief Judge Calls for Fee Increase

Court of Appeals Judge Judith Kaye held a press conference on June 2, 1999 in support of raising assigned counsel fees. Stating that stagnant fees were making it increasingly hard to find attorneys to represent those unable to afford counsel, Kaye said: "In recognition of the grave situation this is creating for our system of justice, the entire legal community stands united today in calling for immediate increases in these fees."

■ Judicial and Law Enforcement Support Shown

Kaye was joined by the presiding justices of the Appellate Divisions' First and Third Departments, and law enforcement officials including a representative from Attorney General Eliot Spitzer's office and Onondaga County District Attorney and NYS District Attorneys Association President William J. Fitzpatrick. Fitzpatrick was quoted in the *Times Union* coverage of the event, saying "I don't know any lawyer, from Brooklyn to Buffalo to Massena, that can possibly make ends meet at \$25 an hour." Also joining in the press conference were the presidents of the State Bar Association, New York County Lawyers Association and the Association of the Bar of the City of New York.

Attached to the Court of Appeals press release were statistics showing a decline in the number of attorneys on assigned counsel panels, the impact of that decline on the

courts, including delays and disruption, and the impact on attorneys—since fees were last increased, the cost of living has gone up approximately 47%.

■ AC Fees Contrast to Other Legal Recompense

Contrasts abound to the current assigned counsel rates, dating from 1986, of \$25 out of court and \$40 in court. The attorney for one of two police officers charged and acquitted of brutality in a recent high-profile Albany case will bill the city \$150 an hour out of court and \$200 in court. (*Times Union*, 6/16/99.) A national survey of law firms showed that in 1998, half of firm partners billed at a rate of \$200-\$300 per hour, while only 3.9 percent billed at under \$150 per hour. Associates who graduated in 1997 averaged billings of \$139 per hour. (*ABA/BNA Lawyers' Manual on Professional Conduct*, p. 39, 2/17/99.) Across the nation, appropriations for indigent defense increased last year. (*Indigent Defense* [publication of the National Legal Aid and Defenders Association (NLADA)], March/April 1999.)

This year the New York legislature has taken a break in mid-June without acting on fees, and without passing a state budget, leaving public defense providers and others not included in an interim budget bill on a fiscal cliff edge.

■ Federal Fees and Funds Also News

Less than two weeks after the U.S. Department of Justice's observance of May 1 as Law Day, in which the importance of indigent defense received some mention, President Bill Clinton announced a new crime bill that would provide millions of dollars for additional prosecutors and police—and nothing for defense. (*The Criminal Practice Report*, Vol. 13, No. 10, 5/19/99.)

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Meanwhile, the \$75 per hour fees authorized by Congress for appointed counsel under the Criminal Justice Act in 1986 have never been fully funded. An hourly rate of \$40/\$60 was set in 1984, and increased by \$5 in 1996, for all but 16 districts. Chief Justice William Rehnquist wrote at the end of 1998 that inadequate compensation was seriously hampering the recruitment of lawyers to provide effective representation in federal courts. (*Indigent Defense*, March/April 1999.)

■ **Suit Filed Over Capital Fees**

In the separate arena of death penalty cases, fees also remain a hot issue. The New York State Association of Criminal Defense Lawyers (NYSACDL) and four individual attorneys have sued the judges of the state's highest court over the decision to cut capital fees. (See *Public Defense Backup Center REPORT*, Vol. XIV, #1, Dec 98/Jan 99.) The suit was filed on April 16, 1999. A spokesperson for the Court has said there would be no comment while the case is pending. (*New York Law Journal*, 5/12/99.)

Defender Institute's BTSP Trains 56

New lawyers and experienced lawyers new to public defense trial work spent a week in June learning client-centered representation skills from a national team of communications experts and experienced trial lawyers. Rural and urban public defense jurisdictions were represented. Participants came from Albany, Bronx, and Clinton counties, from Jefferson, Kings, Monroe, and more—19 counties in all. The coaches came from even more varied locales, with a diversity of experiences to match. NYSDA board members, public defenders from other states, private lawyers, actors, and others helped participants overcome both universal and individual barriers to peak performance in the courtroom. Some demonstrations and exercises addressed traditional trial skills such as jury *voir dire*, opening and closing statements, and that hallmark of the trial lawyer, cross-examination.

Additional lectures, discussions and exercises addressed equally important skills not always taught in trial training programs, such as listening to the client, learning about the client's life beyond the immediately identifiable "facts of the case," and using the resulting information to best present the client's case. The response from the participants was strongly positive. For example, one said: "This is why we do this work. This is why this work recharges us. This is why this work is a privilege. This is the way to be effective for our client but especially the 'invisible client.' Since it is so different an approach, given heavy caseload, low pay and my old age, I will be *distinctively* effective."

As has become routine for this Basic Trial Skills Program, the "jurors" who made the *voir dire* exercises possible were not actors or legal colleagues, but members of the public. Their patience not only in answering similar questions from different people but also in sitting quietly while coaches gave the participants pointers on how to phrase questions to get

necessary information was greatly appreciated. In the words of one participant, "The jurors were great. If you can believe it, that was the first time I've ever done *voir dire*. It was thrilling. My confidence has soared. I can do this!"

The Defender Institute's BTSP is a major component of the training done by NYSDA, an accredited MCLE provider. Detailed evaluations from this year's program are being tabulated and analyzed so that BTSP in 2000 will be even better.

Merit Time Not Applicable to One-Year Minimums

Inmates whose minimum sentence is one year are ineligible for merit time credit under the 1997 amendment to Correction Law 803(d), which states that every person under the custody of the state who is "serving an indeterminate sentence of imprisonment with a minimum term **in excess of** [emphasis added] one year" and is not serving a determinate sentence for a sentence for an A-1 felony, a violent felony, and other specifically excepted felonies, may receive merit time. One commentator believes the wording, which "inexplicably excludes from eligibility" inmates who were sentenced for the least serious felony offenses, to have been a drafting oversight "that can be easily rectified." However, at the present time many inmates who received a one-to-three-year sentence are currently barred from accruing merit time. (McKinney's Consolidated Laws Annotated, Supplementary Practice Commentaries, 1999 Electronic Pocket Part Update by Mark Bonacquist.)

Modification of the minimum sentence to a year and a day, thereby making merit time available, may be possible in cases where this "drafting oversight" comes to the court's attention after sentencing but before a defendant's sentence has "commenced." Indeterminate sentences do not commence until the prisoner is received into the jurisdiction of the Department of Correctional Services. (See, Criminal Procedure Law 430.10; Penal Law 70.30(1); *People v Baghai-*

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Managing Editor

Charles F. O'Brien

Editor

Mardi Crawford

Contributors

**David L. Austin, Stephanie Batcheller,
Sybil A. McPherson, Al O'Connor**

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Kermani, 221 AD2d 219 (1st Dept. 1995). If appellate or post-conviction lawyers have devised other successful strategies for adding a vital one day to one-year minimums, they are encouraged to notify the Backup Center so that the information can be shared. In the meantime, barring legislative correction of this “oversight,” defense counsel should seek year-and-a-day minimum sentences in new cases involving otherwise merit-time-eligible defendants.

Issues Surround State-Ready Inmates in County Jails

In mid-June, a proposed agreement was announced between the New York Association of Counties (NYSAC), the state Budget Department, and the Department of Correctional Services (DOCS) concerning payment for the cost of holding prisoners in county jails until they are picked up by DOCS. This is an issue of long standing—part of the deal includes an agreement that counties would forgive any debt owed to them by the state for holding state-ready prisoners during 1990-1994. Caselaw requires that inmates be picked up by DOCS within 10 days of sentencing (*Ayers v Coughlin*, 72 NY2d 346) but that time limitation is honored infrequently.

MCLE and More in the
Saratoga/Lake George Region
NYSDA 1999 Annual Meeting and Conference
(See page 5)

(If you are reading this online before the hotel registration cutoff date of July 5, please register NOW!
If you missed the cutoff, find a colleague with room to spare, and register soon.)

One relatively new method for dealing with the issue of cost is for counties to enter into contracts with the state to hold some prisoners for a longer period of time, up to six months, for a fee of up to \$100 per day per capita. (See Correction Law 95.)

The cost of keeping state ready prisoners in local facilities is only part of the problem. Jail crowding is another. Dutchess County, despite jail expansions in 1985 and 1996, had 27 county inmates housed in facilities other than its own jail in June. The jail administrator said this was due to the presence of 60 state-ready prisoners in the jail, 27 of whom had been there more than the 10 days allowed. (*Daily Freeman* [Northern Dutchess edition], 6/16/99.)

Besides systemic issues, the holding of DOCS prisoners—both state-ready inmates after sentencing and parole violators who are being reincarcerated—in local facilities creates questions and problems for the individuals held. A lack of programming, a delay in beginning the Willard 90-day program if that is the designated resolution of a parole violation, and a question of how to earn merit time on short

sentences are but some of the problems posed for public defense clients and others caught in this limbo.

Eventual action by the state legislature on the Fiscal Year 1999-2000 state budget may, if it includes the proposed agreement, address the issue of cost. But the longstanding nature of the state ready issue indicates that what will actually happen to a defendant after sentencing should be a practical consideration when advising clients about the consequences of a plea bargain, etc. The Backup Center will continue to monitor these issues; public defense providers with knowledge of state ready problems in their jurisdictions are encouraged to call.

Federal Habeas Barred on Issues Not Raised in State High Court

The US Supreme Court has held that state prisoners seeking federal habeas corpus review must have presented all the issues in their petition for discretionary review to the state high court to satisfy 28 USC 2254(b)(1) (c), if such review is part of the state’s ordinary appellate review procedure. *O’Sullivan v Boerckel*, No. 97-2048 (6/7/99). New York lawyers should already be preserving errors by including them in leave applications, as the new opinion is consistent with *Grey v Hoke*, 933 F2d 117, 120 (2d Cir. 1991). *Grey* indicated that having all issues in a copy of the Appellate Division brief submitted with a letter application for leave to appeal to the Court of Appeals was not sufficient exhaustion of any issues omitted from the letter application.

Court Rules and Regs Revised

■ **1st Department Amends Rules**

The Appellate Division, 1st Department, has amended sections of the Rules of the Court concerning, among other things, application for leave to appeal to the Appellate Division and motions for reargument or leave to appeal to the Court of Appeals. Effective May 12, these and other rules are available on the Unified Court System web site (courtesy of the *New York Law Journal*) at <http://www.nycourts.com>, (changing on July 1 to <http://www.courts.state.ny.us>).

■ **Family Court Revises Forms**

On May 21, 1999, the Chief Administrative Judge of the Unified Court System (UCS) issued an administrative order rescinding 47 Family Court forms and replacing them with 51 new forms to conform with legislation implementing the federal Adoption and Safe Families Act. Among the changes are incorporation of language regarding “permanency hearings” and notices concerning termination of parental rights consequences of voluntary placement and child abuse and neglect proceedings. Placement of a child as a result of a delinquency or Person in Need of Supervision (PINS) adjudication constitutes a compelling reason for an agency **not** to file a termination of parental rights proceeding, an accompanying memorandum notes, but delinquency and PINS pro-

ceedings are covered by the requirement to convene annual permanency hearings. Relevant forms have been revised to reflect this. A hard copy and a WordPerfect disk set of the new forms is being provided to each Clerk of the Family Court. The forms will also be posted on the UCS web site: <http://ucs.ljx.com> (changing on July 1; see above).

■ **New Address for Attorney Registration Statements**

There is a new address for the attorney registration statements which must be filed with the Office of Court Administration under Rules of the Chief Administrator of the Courts: State of New York Office of Court Administration, General Post Office, PO Box 29327, New York NY 10087-9327.

■ **2nd Circuit Policy Set On Criminal Appeals Neglect**

Cases in which attorneys fail to file appellate briefs in criminal cases, cause the dismissal of their clients' appeals and then fail to respond to an order to show cause why they should not be disciplined are apparently common enough in the 2nd Circuit to warrant a formal policy for punishing the attorneys. A graduated set of fines, censures, and suspensions have been established, which emphasizes the importance of attorneys' promptly responding to the court's order and providing acceptable reasons and cures for delays and defaults. All cases found to warrant punishment of counsel will also be brought to the attention of the district courts in the circuit as well as appropriate state disciplinary bodies. (*New York Law Journal*, 6/15/99.)

District Judge Finds No IAC in Dow Case

Focusing on the narrow question of whether an attorney constitutionally erred by asking for a client's release between a guilty plea and sentencing, a federal district judge has declined to follow a magistrate judge's recommendation that Durrel S. Dow's habeas corpus petition be granted. (*See Backup Center REPORT*, Vol. XIV, #1.) Judge Thomas J. McAvoy distinguished Dow's case from *Boria v Keane*, 99 F3d 492, 495 [corrected opinion] (2d Cir. 1996) *affd on rehear* 90 F3d 36 (2d Cir. 1996). In *Boria*, ineffective assistance of counsel was found where a lawyer failed to provide professional advice about the wisdom of rejecting a plea agreement. Dow had complained that his attorney's actions similarly deprived him of counsel. His attorney had successfully requested Dow's release pending sentencing despite the risk created by the trial judge's admonition that the maximum sentence would be imposed if Dow, who had a record of truancy and a missed court date in the same case, failed to appear. The opinion by Judge McAvoy does not address the detailed facts set out in the report by Magistrate Judge David S. Hurd concerning the number of different attorneys from a public defense office who appeared at different proceedings in the

case, or their apparent failures to communicate with one another and with Dow. *Dow v Smith*, No. 97-CV-517 (No. Dist. N.Y. 5/4/99).

Tetranet Donates "Bot Suite" for New Web Site Release

NYSDA has received a generous donation of a trio of software products—Linkbot,™ Wisebot,™ and Metabot™—from Tetranet (<http://www.tetranet.com>) of Kanata, Ontario, Canada. This "Bot Suite" will play a key role in the development and maintenance of the Association's new web site (<http://www.nysda.org>) scheduled to debut the first week of July. The Backup Center's MIS Director David Austin describes the donations below:

- The first of the three Windows™ programs, Linkbot,™ automatically scans a web site for more than 50 potential types of problems, and generates graphical reports detailing errors that need to be fixed.
- Wisebot™ will automatically create and maintain multiple web site navigation solutions, including a 'Portal Interface' or gateway that allows a person to easily browse the contents of a web site in a familiar hierarchical interface. With Wisebot,™ web site developers can easily provide the same type of powerful navigation paradigm that is used by Yahoo!,™ Excite,™ and Netscape/AOL's Netcenter™ for their own content.
- Metabot™ is the industry's first automated Metatag creation, insertion, and testing tool. Metatags are code items that are inserted into web pages; the tags are used to store information relevant to viewers other than the ordinary visitor of the page. Such information includes the title and author of the page or keywords for search engines to use in indexing.
- Using a familiar spreadsheet style interface, Metabot Pro™ makes it simple to generate and manage Metadata for HTML documents. This indispensable tool allows web authors to view what Metatags exist in their files, to insert Metatags into many files simultaneously, and to test for Metatag standard compliance.

NYSDA thanks Tetranet for its generosity and corporate commitment to supporting the efforts of the public defense community.

Former Public Defense Lawyer Heads Parole

Martin Cirincione, who was the Schenectady County Public Defender from 1987 to 1996, and a NYSDA board member from 1988 to 1996, has been named Executive Director of the Division of Parole. He became Executive Deputy Director of the Division of Probation and Correctional Alternatives in 1996, and moved to Parole in May of this year. ♪

Conferences & Seminars

Sponsor: National Institute for Trial Advocacy

Theme: Workshops and other CLE

Dates & Places:

July 16, 1999 New York City (Mastering Federal Evidence)
July 23, 1999 Rochester, NY (Criminal Trial Advocacy:
Breakthrough Techniques that Work and Win)
August 10-17 Hempstead, NY (Building Trial Skills)
Sep. 10, 1999 Syracuse, NY (Criminal Trial Advocacy:
Breakthrough Techniques that Work and Win)
Oct. 8, 1999 Buffalo, NY (Criminal Trial Advocacy:
Breakthrough Techniques that Work and Win)

Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; e-mail: nita.1@nd.edu; web site: <http://www.nita.org>

Sponsor: National Association of Criminal Defense Lawyers

Theme: "Why We Do What We Do—And *How*" Annual Meeting & Seminar

Dates: July 21-24, 1999

Place: Washington, DC

Contact: NACDL: tel: (202) 872-8600; fax: (202) 872-8690; web site: www.criminaljustice.org; e-mail: assist@nacdl.com

Sponsor: National Bar Association

Theme: 74th Annual Convention & Exhibits

Dates: July 24-31, 1999

Place: Philadelphia, PA

Contact: NBA: 1225 11th Street NW, Washington DC 20001. tel: (202)842-3900; fax: (202)289-6170

Sponsor: New York State Defenders Association

Theme: 32nd Annual Meeting & Conference

Dates: July 29-August 1, 1999

Place: The Queensbury Hotel, Glens Falls, NY

Contact: NYSDA: tel: (518)465-3524; fax: (518)465-3249; e-mail: info@nysda.org; web site: www.nysda.org

Sponsor: National Institute for Trial Advocacy

Theme: Representing the Accused in a Capital Trial

Dates: August 5-8, 1999

Place: Chapel Hill, NC

Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; e-mail: nita.1@nd.edu; web site: <http://www.nita.org>

Sponsors: Santa Clara University, California Attorneys for Criminal Justice, California Public Defenders Association & ABA Death Penalty Representation Project

Theme: Bryan R. Schechmeister Death Penalty College

Dates: August 7-12, 1999

Place: Santa Clara, CA

Contact: Ellen Kreitzberg, Santa Clara University School of Law, Santa Clara, CA 95053. (408)554-4724; e-mail: ekreitzberg@scu.edu

Sponsor: National Association of Criminal Defense Lawyers

Theme: Making the Case for Life III—Mitigation Investigation in Capital Cases

Dates: September 10-12, 1999

Place: Boise, ID

Contact: Tanya Greene, NACDL, 83 Poplar St. NW, Atlanta GA 30303. (404)688-1202.

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
October 2, 1999 Buffalo
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: 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: 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: National Legal Aid and Defender Association

Theme: 77th Annual Conference

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>

Job Opportunities

North Country Legal Services, Inc., a not-for-profit providing free legal services to low income people and protection and advocacy services to the developmentally disabled and mentally ill in the 5 northernmost counties of New York, seeks a **Staff Attorney** for the Plattsburgh office. Duties would include handling a general caseload and providing training to clients and human services providers on substantive legal issues. Required: NYS bar admission, commitment to poverty law, and strong advocacy skills. Salary: up to \$37K DOE, excellent benefits. Open until filled. Send cover letter, resume and writing sample to: Peter Racette, Director, North Country Legal Services, Inc., PO Box 989, Plattsburgh NY 12901.

The National Legal Aid and Defender Association (NLADA) seeks a **Senior Manager** for its National Defender Clearinghouse, to provide support for the organizational development and management capacity of member indigent defense programs and interface with other organizations providing programs or services relevant to indigent defense program management. Requirements: 7 years experience as an attorney in an indigent defense program office, including at least 4 years legal practice experience and 3 years managerial experience in an indigent defense program or association; experience with: information clearinghouse database; design and implementation of organizational development and management systems; and training programs for indigent

defense. Strong supervisory and management skills; ability to coordinate multiple tasks; initiative; good judgment; work well with all levels of personnel; knowledge of all types of indigent defense systems and structures, and management and litigation systems within each structure; strong analytical and writing abilities; broad perspective of systemic problems and opportunities for reform or improvement; creative vision; deep commitment to the improvement of indigent defense. Salary \$75K+ DOE. AA/EOE. Minorities, women, the elderly and disabled encouraged to apply. Send resume, cover letter, references, writing sample and any salary requirements to: NDC Search, 1625 K Street NW, Suite 800, Washington DC 20006.

The New Hampshire Public Defender (NHPD) seeks experienced criminal defense **Staff Attorneys**. NHPD has a long-standing commitment to providing the highest quality indigent defense services. Through a nationally recognized training program, advanced computer information systems, & caseload limits, NHPD ensures that attorneys have the best possible legal knowledge and ability to aggressively and creatively litigate cases. NHPD represents the overwhelming majority of people in the state charged with homicides, felonies, misdemeanors and juvenile delinquency. In each of nine offices, lawyers represent each client from initial appearance through disposition. Significant investigative and secretarial

support allows attorneys to thoroughly investigate and litigate each case. A variety of professional advancement opportunities are offered through 2-year rotations in the appellate defender office, as statewide Training Director, and numerous supervisory and management positions. Send letter of interest and resume to: Amy Messer, Assistant Director, New Hampshire Public Defender, 117 North State Street, Concord NH 03301. (603)224-1236, ext. 124.

Newly established Office of the Federal Public Defender of Northern New York and Vermont seeks seven **Assistant Federal Public Defenders**. Two positions will be in Albany, NY; three in Syracuse, NY; and two in Burlington, VT. Required: Licensed attorneys with significant criminal trial experience, eligible to practice in federal court. May start as soon as September, 1999. EEO. Send resume to: Federal Public Defender, c/o Clerk, US District Court, 445 Broadway, Rm 345, Albany NY 12207-2936.

The new federal defender office is also seeking an **Administrative Officer** to assist the Federal Public Defender in management and administration of personnel, accounting, procurement, inventory, automation, and record keeping. Based in Albany, travel to the branch offices required. Required: experience supervising others, use of automated spreadsheets. Background with federal courts, law, or accounting preferred. Position grade JS-11 through 14 (now \$39,960-\$67,298) DOE. EEO. Send resume to address above. ♪

Resources Sighted, Cited, or Sited

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

- ✓ "Does *Gideon* Still Make a Difference?" Thomas F. Liotti, 2 *New York City Law Review* 105 (1998). A history of the right to counsel, and a discussion of current problems, such as low assigned counsel fees, that result in unfair treatment of indigent defendants.
- ✓ "Police Manuals Hold Hidden Gems for Cross-Examination," Practice Aids column in *The Criminal Practice Report*, Vol. 13, No. 9 (5/5/99), [Pike and Fisher publication].
- ✓ "The Grand Jury Project: Report to Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman," Vol. I, [Findings and Recommendations]. 3/31/99. Recommendations include: pilot projects to test the feasibility of reducing the term of grand jury service; an OCA study of the reasons for delay in grand jury proceedings and ways to make the proceedings more efficient; changes in grand jury terms based on the findings of the pilot projects; development of plans by those responsible for the production of detained defendants to improve such production as well as the timely appearance of other witnesses; devise ways to have grand

jurors present only when necessary to hear a case; schedule grand jury appearances efficiently and effectively; eliminate the practice of conducting tours of local jail facilities for grand jurors; review all grand jury facilities statewide and develop a comprehensive plan to improve them; pay grand jurors, on a weekly basis, \$60 per day for each day of service between 11 and 20 days and \$80 per day for each day of service over 20 days; relieve grand jurors who serve more than 10 days of further mandatory jury or grand jury service for an additional four years; permit note-taking with guidance; allow grand jurors to request written copies of relevant statutes; and allow questions from grand jurors to be asked by the prosecutor when proper. Available on the Internet at: <http://ucs.ljx.com/gjrr.html> (changing on July 1 to <http://www.courts.state.ny.us>). For a hardcopy, call the UCS Communications Office: (212)428-2500.

- ✓ "Report to the Chief Judge and Chief Administrative Judge," The Committee to Promote Public Trust and Confidence in the Legal System (May, 1999). [Among the recommendations are: recognize that both criminal and civil legal services have historically been underfunded; create a permanent fund for civil legal services; increase public defender office funding and compensation to assigned counsel; encourage pro bono work; help develop loan forgiveness programs to help new law graduates' ability to work in offices representing low income clients, and create pro se positions in courts to help those people representing themselves.] A copy is available from the Backup Center. ♪

Defense Practice Tips

How to Get a Trial Consultant Appointed by the Court

by Beth Bochnak*

In October, 1998, New York City attorney Lawrence Wright was the first in recent years to ask—and get—a New York City judge (Hon. Neil Jon Firetog) to appoint a trial consultant in an 18b case. In the past months, two other New York City judges have appointed a trial consultant. Trial consultants have been appointed in four out of the five 35B cases.

If you are on state or federal court appointment panels, ask the judge to appoint a trial consultant. Although there is

no attorney *voir dire* in federal court, a trial consultant can help you with case analysis, theme development, writing—and getting—a supplemental juror questionnaire (one was used in the last trial of Don King), and *voir dire* questions.

The affirmation below, concerning a battered woman's self-defense case, can be used as a model. You can see where you would supply pertinent facts about the issues in your case—such as drug abuse or sexual abuse. Feel free to contact Beth Bochnak at NJP/East for help in fashioning your case-specific affirmation.

Supreme Court of the State of New York
County of _____: Criminal Term

_____ x
People of the State of New York
v.
_____ x

ATTORNEY AFFIRMATION

Indictment No. _____

_____, an attorney admitted to practice law in the State of New York hereby affirms the following to be true and subject to the penalty for perjury:

I am the attorney of record for the above named defendant, and as such I am familiar with all of the pleadings and proceedings heretofore had herein. _____ is charged with manslaughter II in the shooting death of _____. I submit this affirmation in support of defendant's request for appointment of Beth Bochnak, a trial consultant with the National Jury Project/East to assist me in preparing the defense to the charges now contained in Indictment no. _____.

The services of a jury trial consultant are essential in assuring that my client have the opportunity to select a fair and impartial jury. A trial consultant's professional expertise is in the areas of juror decision making, juror questioning, juror comprehension and juror evaluation. These skills are needed to formulate *voir dire* questions and to design a supplemental juror questionnaire that will effectively elicit bias and also provides me and my client with the information needed to intelligently exercise peremptory challenges. These skills are also necessary to assist me in court, evaluating jurors' responses to *voir dire* questions and making decisions about exercise of peremptory challenges. A professional trial consultant will enable me to prepare and present a defense and effectively represent my client.

This case presents areas of bias requiring that special attention be paid to *voir dire* and jury selection. My client faces two areas of potential bias. In any case involving criminal charges, there is a danger that juror bias will prevent the defendant from obtaining a fair and impartial trial. This is because a substantial proportion of prospective jurors enter the courtroom believing that an indictment is tantamount to guilt and that persons on trial ought to be required to take the witness stand and testify and prove their innocence.

Surveys conducted in jurisdictions throughout the country indicate that: between 16% and 45% of jury-eligible respondents believe that a person who is brought to trial is probably guilty; 50% to 66% believe a defendant should be required to testify; and 30% to 62% of jury-eligible respondents expect defendants to prove their innocence, despite judge's instructions to the contrary. Krauss and Bonora, eds. *Jurywork: Systematic Techniques*, Figures 2.1 and 2.2.¹

For some jurors, these attitudes are a result of misinformation or misunderstanding; for others these attitudes are expressions of deeply held beliefs and opinions that will prevent them from following the law. A trial consultant can help design questions that will identify and distinguish between those jurors who cannot be fair and those who simply misunderstand the law.

The second area of bias concerns experiences with and attitudes toward domestic violence. Domestic violence is unfortunately fairly prevalent in American society. According to the New York State Division of Criminal Justice Services, in 1995 there were 87,591 police reports of family offenses, which include spousal and child abuse. Also in 1995, the New York State Department of Social Services reported

¹ These data have been collected between 1974 and 1997. There has not been of significant change in these opinions over the years. They are supported by national surveys. A 1983 nationwide survey found that fifty percent (50%) of adult Americans agreed that "in a criminal trial, it is up to the person who is accused of the crime to prove his innocence." *The American Public, The Media and The Judicial System: A national survey on public aware-*

ness and personal experience, Table 5D at 15. Survey conducted by Research and Forecasts, Inc. for the Hearst Corporation in 1983. In October 1998, a nationwide poll of juror eligible adults found that 42% believe that a defendant who doesn't testify has something to hide. "Decision Quest: National Law Journal Juror Outlook Survey, 1998." Reported in *National Law Journal*, November 2, 1998.

that 4,848 battered women received residential services; 15,434 battered women received nonresidential services; and 23,165 battered women and children were denied shelter because of lack of space. According to the New York City Program for the Prevention of Domestic Violence, an incidence of adult domestic violence occurs every three minutes in New York State. As a result of this prevalence, a number of jurors in the panel can be expected to have personal knowledge of or experience with physical abuse.

Jurors will bring many assumptions and misconceptions about domestic violence into the courtroom. Many prospective jurors tend to blame women for domestic violence, either for bringing it on themselves by their behavior or for failing to leave an abusive relationship. In this case, where the defendant and the victim had no children, jurors may find it even more difficult to understand why _____ did not end the relationship.

In this case, the danger of juror bias is even greater than in other criminal cases because the defendant is asserting a defense of self-defense. Many jurors will be unable to comprehend how one person could be forced to take the life of another. It is impossible to imagine that *any* prospective juror will arrive in the courtroom free of opinions concerning domestic violence and intentional murder. These opinions may be the result of exposure to publicity and/or the result of personal experiences. Under these circumstances the court and counsel are faced with a delicate and complex task: eliciting sufficient information from the jurors about their experiences and opinions concerning domestic violence and the defense of self-defense to ascertain whether those opinions or experiences will interfere with impartiality, while at the same time assuring that individual jurors' biased opinions do not affect or influence other jurors. A trial consultant provides the professional expertise necessary to help draft questions that will elicit complete responses from prospective jurors and to assist counsel in interpreting the meaning of those responses.

The field of trial consulting began more than 20 years ago. Today, its professional association—the American Society of Trial Consultants, founded in 1982—has over 300 members providing professional trial consulting services throughout the nation. Trial consultants are routinely hired by attorneys representing criminal defendants in high profile cases and unknown cases tried in federal and state courts in virtually every state in the nation. Some recent high profile cases where financial resources were available to pay for trial consulting services included the trials of Don King in the Southern District of New York, OJ Simpson in California, and Louise Woodward in Massachusetts. Individuals represented by public defenders or court-appointed lawyers in numerous states, including California, New Jersey, New York, Minnesota, Pennsylvania and Vermont have had the benefit of professional trial consulting assistance in connection with trial preparation.

This affirmation seeks funds to retain Beth Bochnak of the National Jury Project, a national trial consulting company with offices in New York City, Minneapolis, MN, and Oakland, CA. Over the past 25 years, National Jury Project trial consultants have been retained to consult on more than one thousand criminal trials. They have conducted research on juror bias and juror decision making; provided expert testimony on approaches to minimizing bias in jury selection; designed *voir dire* questions and supplemental juror questionnaires; assisted in court during jury selection; and interviewed jurors post-trial. The defendants in these trials include individuals who could afford to pay for these services, and those who could not; they have had private or court appointed counsel or public defenders. In at least 125 of these cases trial consultants were appointed by courts to assist counsel to indigent defendants. (Krauss and Bonora, eds. *Jurywork: Systematic Techniques*, Appendix A). Recently, Beth Bochnak of the National Jury Project has been appointed as a trial consultant by Brooklyn judges for two felony cases on behalf of indigent clients at the request of their attorneys.

Ms. Bochnak has a masters degree in social psychology and has completed the course work for her doctoral degree. She has been associated with the National Jury Project since 1979. She is the editor and a co-author of *Women's Self-Defense Cases: Theory and Practice* (Michie Co. 1981), a practice manual for attorneys representing abused women charged with homicide. She has consulted on over one hundred cases in which women homicide defendants claimed they were acting in self-defense.

The defendant is currently incarcerated in _____ on a remand status. S/he is not in a position to work to earn money to help pay in any way for any and all expenses necessary to her/his defense. Furthermore, on information and belief, s/he has no money saved nor any money from any source available to pay for any of the expenses incurred regarding any aspect of her/his defense.

I have examined the financial resources available to my client and have found and determined that s/he is unable to pay any of the costs of the services needed. My client is as deserving of a fair and impartial jury as those defendants who are able to pay for these services,

WHEREFORE, it is respectfully requested that this Court grant defendant's request and issue an Order in the form annexed, providing the appointment of _____, a trial consultant with _____, pursuant to Art. 18B, §722-C of the County Law, and that s/he be compensated in accordance with said law.

Dated: _____ Attorney's Name/Address: _____

* Beth Bochnak will be a presenter at NYSDA's Annual Meeting and Conference (see p. 5). She may be reached at the National Jury Project/East, 285 West Broadway, Suite 500, New York NY. tel: (212)219.8962; fax: (212)219.9599; e-mail: njpeast@njp.com

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

Early Parole for Deportation on Hold for Most Noncitizens

Although New York law allows for the early release from prison of certain nonviolent noncitizen offenders subject to immediate Immigration and Naturalization Service (INS) custody and prompt deportation, the state's Early Conditional Parole for Deportation Only program remains suspended until further notice for those who had not already received release decisions from the State Board of Parole prior to the program's suspension in 1998.

New York law provides that the Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant early parole to certain noncitizens with final orders of deportation. Under state law, such early parole is statutorily barred only for an inmate convicted of either a violent felony offense or an A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. See New York Executive Law 259-i(d). In March 1998, however, the State suspended the early parole program due to controversy over the early release and deportation of certain A-1 drug felons.

Earlier this year, the New York State Division of Parole reported that the State had reactivated the early parole program beginning with the processing of some of the backlog of cases that had previously been approved. (See *Backup Center REPORT*, Vol. XIV, #2, at pg. 9.)

Despite the reactivation of the program, state prisoners requesting early parole continue to receive written notices from the Division of Parole informing them that the program is presently on hold until further notice. Parole officials informed NYSDA when contacted that to date the only individuals who have been processed for early parole since March, 1998 are a small number of eligible D and E felons who had received release decisions from the Board of Parole prior to March 1998. According to Parole, a larger group of eligible B and C felons with pre-March 1998 Board release decisions may also be processed soon. As for eligible non-citizen state prisoners who are still awaiting Board action on their requests, however, apparently no action is being taken on their cases until the Parole Division's new Executive Director (see p. 4) completes review of a new protocol for the program. A Parole official reports that this review might be completed and Board action on these cases may resume as early as July 1999.

* 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.

Court Challenges to New Mandatory INS Detention Policy Yield Mixed Results

As reported earlier, the INS is now 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. This detention policy was mandated by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), but full implementation was delayed until October 9, 1998. Under the IIRIRA terms now in effect, an individual may be released pending completion of removal proceedings only if release "is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation." INA 236(c), 8 U.S.C. 1226(c). (See *Backup Center REPORT*, Vol. XIV, #2, at pp. 8-9.)

Since the previous report, numerous INS detainees have brought habeas corpus petitions in various parts of the country challenging this mandatory INS detention policy on statutory and constitutional grounds. The following is a listing compiled by the Immigrants' Rights Project of the American Civil Liberties Union of the federal court decisions issued to date:

236(c) Unconstitutional

Martinez v Greene, 28 FSupp. 1275 (D. Colo. 1998)
Van Eeton 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 (N.D. Cal. 5/28/99)

236 (c) Does Not Apply (statutory grounds)

Velasquez v Reno, 37 FSupp.2d 663 (D. N.J. 4/5/99)
Alwaday v Beebe, 1999 WL 184028 (D. Ore. 1/29/99)
Alves-Curras v Fasano, 98 CV 2295 (S.D. Cal. 2/2/99)
Reyes-Rodriguez v Fasano, 99 CV 0023 (S.D. Cal. 2/26/99)
Baltazar v Fasano, 99 CV 380 BTM (S.D. Cal. 3/25/99)
Alvarado-Ochoa v Reno, 99-0470-IEG(AJB) (S.D. Cal. 5/28/99)

236(c) Constitutional

Parra v. Perryman, 172 F.3d 954 (7th Cir. 3/24/99)
Diaz-Zaldierna v Fasano, 1999 WL 199110 (S. D. Cal. 3/16/99)
Aguirre-Garcia v Fasano, 99-0629-IEG (S.D. 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) (S.D. Cal. 5/25/99)
Edwards v Blackman, 1999 WL 350122 (M.D. Pa. 3/27/99)

To date, there are no reported decisions from the federal courts in New York. 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.

Federal Appellate Court Finds New York Misdemeanor May Serve as Aggravated Felony

In an example of the “Alice in Wonderland” quality of the current immigration laws relating to crimes, a federal court has expressly ruled that a misdemeanor may be considered an “aggravated felony” under the immigration statute. While noting that “it seems odd to hold that a misdemeanor . . . can be an aggravated felony, as it is not a felony,” the United States Court of Appeals for the Third Circuit held that New York petty larceny with a one year prison sentence falls within the aggravated felony definition category of “a theft offense . . . for which the term of imprisonment at least one year.” 8 U.S.C. 1101(a)(43)(G)(verb missing from sentence, as amended by Congress in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996). The ruling was in the context of the 16-point federal sentence enhancement for illegal reentry after deportation subsequent to conviction of an aggravated felony. *United States v Graham*, 169 F3d 787 (3d Cir. 3/ 5/99).

Other New York misdemeanors that might trigger the “aggravated felony” consequence of mandatory and permanent removal from the United States are*:

- Misdemeanor sexual abuse if the victim is a minor, regardless of sentence
- Misdemeanor sale of marijuana, regardless of sentence
- Misdemeanor possession of a controlled substance, if the defendant has a prior conviction of a drug offense
- Theft-related misdemeanors, such as petty larceny and criminal possession of stolen property, fifth degree, with one year prison sentence
- Misdemeanor assault with one year prison sentence

* For a detailed explanation of why and when such misdemeanor offenses might be deemed to be aggravated felonies, see Appendix G, Section 1 (“Aggravated felony”) in *Representing Noncitizen Criminal Defendants in New York State*, (Vargas, NYSDA 1998), available from the Backup Center for \$25.

There may be ways to avoid the immigration consequences of an aggravated felony conviction, as shown below.

First Department Reduces Robbery Sentence by One Day to Block Deportation

The Appellate Division, First Department, has reduced a noncitizen defendant’s one-year sentence for second-degree attempted robbery to 364 days in order to relieve the defendant of the “unanticipated effect on his immigration status” of the one-year sentence. *People v Cuaran*, No. 993 (5/11/99). The court unanimously modified the earlier sentence “in the interest of justice” in resolution of a late appeal in which the defendant pointed out that Congress retroactively rendered a robbery conviction with a one-year prison sentence an “aggravated felony” three months after his June 25, 1996 conviction. The court noted that the prosecutor in this case had conceded that the interest of justice would be served by the reduction. The defendant was represented by 18(b) panel member Jay L. Weiner.

NY Chapter of Citizens and Immigrants for Equal Justice Forms to Advocate for Those Impacted by 1996 Law Changes

Several families of New York State immigrants impacted by the harsh 1996 new immigration laws have formed a New York chapter of Citizens and Immigrants for Equal Justice (CIEJ). CIEJ is a national network of families being torn apart by the new immigration laws relating to immigrants with past criminal convictions. In addition to engaging in advocacy with lawmakers, CIEJ offers affected individuals and their families information, legal referrals, and a support system of other families. Defense lawyers and other advocates for immigrants affected by these laws may wish to refer affected immigrant clients and family members to the CIEJ New York chapter: (212) 946-5476 (voicemail). National CIEJ may be reached in Texas: (972) 279-4168. ☺

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Correction

Please note the following corrections (in **bold**) to the lesser included offense chart reprinted from the *NY Defender Digest* in the September 1998 (Vol. XII, No. 8) *Backup Center REPORT*:

GREATER OFFENSE	POTENTIAL LESSER	YES/NO	AUTHORITY
MURDER (2d), PL 125.25(2)	Manslaughter, (1st), PL 125.20(2)	no	<i>People v. Farden</i> , 82 NY2d 638
RAPE (1st), PL 130.35(1)	Coercion, (2d), PL 135.60	no	<i>People v. Catron</i> , 143 AD2d 468

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

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

Federal Law (Crimes) FDL; 166(10)

Jones v United States, No. 97-6203, 3/24/99

Holding: The federal carjacking statute under which the petitioner was convicted, 18 USC 2119, includes several numbered subsections regarding varied penalties to be imposed when certain facts, such as serious bodily harm, are present. None of these subsections was referenced in the petitioner's indictment, arraignment, or jury instructions. However, a 25-year sentence was imposed because one complainant suffered damage to his ear, rather than the 15-year sentence provided for when no listed additional facts are present. The lower courts found that the subsections did not set out elements that must be pled and proven at trial, but only sentence enhancements. While the fairest reading of the statute treats serious bodily harm as an element, the statute can be read the other way, and ambiguities are to be resolved so as to avoid constitutional questions when possible. Construing the added facts as sentencing factors would raise constitutional questions of due process and trial by jury. See *McMillan v Pennsylvania*, 477 US 79 (1986). Section 2119 is construed as establishing three separate offenses, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury. Judgment reversed.

Concurrence: [Stevens, J] It is unconstitutional for a legislature to remove from the jury the assessment of facts increasing a prescribed range of criminal penalties.

[Scalia, J] It is unconstitutional to take from the jury assessment of facts altering the range of criminal penalties.

Dissent: [Kennedy, J] Precedent allows serious bodily injury and death to be used as sentencing factors rather than offense elements. *Almendarez-Torres v US*, 523 US 224 (1998).

Federal Law (Procedure) FDL; 166(30)

Venue (Determination of) VEN; 380(10)

United States v Rodriguez-Moreno, No. 97-1139, 3/30/99

Holding: The respondent was convicted in a New Jersey federal court of multiple offenses including kidnapping and using and carrying a firearm in relation to the kidnapping.

18 USC 924(c)(1). The latter charge was reversed by the 3rd Circuit for lack of venue. However, it does not matter that the respondent only used the gun in Maryland where he did so "during and in relation to" a kidnapping that was begun in Texas and continued in New York, New Jersey, and Maryland." A crime consisting of distinct parts with different localities can be tried where any part can be proven to have occurred. *United States v Lombardo*, 241 US 73, 77 (1916). Judgment reversed.

Dissent: [Scalia, J] This respondent has been prosecuted for using a gun during a kidnapping in a state and district where all agree he did not use a gun during a kidnapping. This decision departs further from the meaning of language than should a government that rules, and is restrained by, the written word.

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

Misconduct (Prosecution) MIS; 250(15)

Conn v Gabbert, No. 97-1802, 4/5/99

Holding: A prosecutor who causes a lawyer to be searched (for a letter written by a criminal defendant to the lawyer's client) at the same time that the lawyer's client is being questioned by a grand jury does not violate any right under the 14th Amendment to practice law. The client in question was the former girlfriend of Lyle Menendez, who was charged, in a high profile case, with the murder of his parents. The girlfriend was subpoenaed to a grand jury in relation to possible letters from Menendez. After the challenged search, the lawyer sued under 42 USC 1983. The trial court granted summary judgment to the prosecutors on the basis of qualified immunity, and the 9th Circuit reversed in part. The liberty component of the 14th Amendment does include some general (but subject to regulation) right to choose a field of employment. See *eg Dent v West Virginia*, 129 US 114 (1889). But that precedent deals with a complete prohibition of engaging in a particular calling, not the brief interruption occurring here. A grand jury witness has no right to have a lawyer present during proceedings, and the question of whether such witness has a right to have an attorney outside the jury room need not be decided here, as the lawyer has no standing to raise his client's alleged right. *Warth v Seldin*, 422 US 490, 499 (1975). The lawyer would have standing to challenge the search as unreasonable under the 4th Amendment. Judgment reversed.

Concurrence: [Stevens, J] The majority's final suggestion that the existence of a potential 4th Amendment violation provides a reason for reversal as to the 14th Amendment argument is unpersuasive.

Admissions (Silence) ADM; 15(30)

Sentencing (General) (Hearing) SEN; 345(37) (42)

Mitchell v United States, No. 97-7541, 4/5/99

US Supreme Court *continued*

The petitioner pled guilty to four counts relating to distribution of cocaine and reserved the right to contest the quantity of drugs involved under the conspiracy count. At sentencing, the petitioner did not testify, and her attorney argued that the only reliable evidence of quantity was the testimony of one particular witness. The court held that the petitioner had no right to remain silent as to details of her crimes, and used her failure to come forward at sentencing as a factor against her. The 3rd Circuit affirmed.

Holding: While defendants may not testify voluntarily on a given subject and then in the same proceeding invoke the self-incrimination privilege, the narrow inquiry at a guilty plea colloquy does not involve relinquishment of all rights against compelled self-incrimination at sentencing. If prosecutors are allowed to indict without specifying the quantity of drugs involved, get pleas, then compel defendants to testify at sentencing to fill in the quantity, our long tradition of relying on government-proven accusations, not inquisitions, would be undermined. *Rogers v Richmond*, 365 US 534, 541 (1961). Compelling a defendant's testimony at sentencing contravenes the 5th Amendment. *Estelle v Smith*, 451 US 454, 463 (1981). The government's invitation to create a sentencing exception to the normal rule that no adverse inference may be drawn from a criminal defendant's failure to testify (*Griffin v California*, 380 US 609, 614 [1965]) is rejected. The rule against such inferences is vital to teaching that the government must prove its case. No view as to whether silence at sentencing bears on remorse is expressed here. Judgment reversed.

Dissent: [Scalia, J] The petitioner had a right to invoke the privilege at sentencing, but not to have the sentencer abstain from drawing an adverse inference from her silence. [Thomas, J] *Griffin* and its progeny should be reconsidered.

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

Wyoming v Houghton, No. 98-184, 4/5/99

After the driver of a car told an officer who stopped him for speeding and a faulty brake light that a hypodermic needle in the driver's pocket was used to take drugs, the officer searched the car and its contents, including a purse that the respondent, a passenger, claimed as hers. The state supreme court found that where police knew or should have known that a container belongs to a passenger not suspected of criminal activity, that container could not be searched unless someone had the opportunity to conceal contraband in it to avoid detection.

Holding: ". . . police officers with probable cause to search a car may inspect passenger's belongings found in the car that are capable of concealing the object of the search. The judgment of the Wyoming Supreme Court is reversed."

Concurrence: [Breyer, J] The rule announced here applies only to containers found within automobiles, and does

not extend to the person of someone in that automobile. If a purse were attached to a passenger's person, it might amount to a kind of "outer clothing" and be entitled to increased protection from search.

Dissent: [Stevens, J] Instead of adhering to a settled distinction between passengers and drivers, the majority distinguishes between clothing and a purse or briefcase. The automobile-centered analysis that thankfully limits the scope of the holding does not justify the outcome.

Federal Law (Crimes)

FDL; 166(10)

United States v Sun-Diamond Growers of Calif., No. 98-131, 4/27/99

Holding: The respondent, a trade association, was convicted of giving the US Secretary of Agriculture illegal gratuities. The jury was told that no link between a gratuity and a particular official act was required, and that it was enough that the gratuity was given because the recipient held public office. ". . . in order to establish a violation of 8 U.S.C. §201(c)(1)(A), the Government must prove a link between a thing of value conferred upon a public official and a specific 'official act' for or because of which it was given. We affirm the judgment of the Court of Appeals, which remanded the case to the District Court for a new trial on Count One."

Forfeiture (General)

FFT; 174(10)

Search and Seizure (Automobiles)

SEA; 335(15)

Florida v White, No. 98-223, 5/17/99

Police observed the respondent use his car to deliver cocaine on three occasions, providing probable cause to believe the car was subject to forfeiture under Florida law. The respondent was arrested at work on unrelated charges, and the car was seized from a public place without a warrant. The Florida Supreme Court found that, except in exigent circumstances, the 4th Amendment requires that a warrant be obtained before seizing potentially forfeitable property.

Holding: The principles underlying *Carroll v US* (267 US 132 [1925]) support the conclusion that a warrantless seizure of the car, based on probable cause, does not violate the constitution. Law enforcement officials have greater latitude in exercising their duties in public places. *See US v Watson*, 423 US 411 (1976). Judgment reversed.

Concurrence: [Souter, J] The opinion here should not be read as a general endorsement of warrantless seizures of items designated contraband, whether or not in a public place.

Dissent: [Stevens, J] Without a legitimate exception, the presumption that a warrant is required should prevail. No reason at all for failure to get a warrant was offered here.

Federal Law (Procedure)

FDL; 166(30)

Clinton v Goldsmith, 98-347, 5/17/99

US Supreme Court *continued*

Holding: The respondent, an Air Force major, was court-martialed for disobeying orders to disclose to his sex partners that he was HIV positive and to take protective measures to avoid the transfer of bodily fluids during sex. He was later dropped from the Air Force. The Court of Appeals for the Armed Forces lacked jurisdiction under 10 USC 867 to issue an injunction, premised on the All Writs Act (28 USC 1651[a]), prohibiting the petitioners from dropping the respondent. If the respondent is in fact dropped, he will have recourse to the Air Force Board of Correction for Military Records, and perhaps the federal trial courts.

New York State Court of Appeals

Informants (Production)

INF; 197(30)

People v Serrano, No. 41, 3/25/99

Evidence was seized pursuant to a warrant that was based on the testimony of a police officer and an unnamed confidential informant. After testimony by the prosecutor at an *ex parte in camera* hearing that the informant had been questioned by the magistrate issuing the warrant, the defendant's motion to suppress was denied and the prosecution's request to seal the warrant was granted. The Appellate Division affirmed.

Holding: A hearing pursuant to *People v Darden* (34 NY2d 177, 181), "where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer," is not always mandated where, as here, the informant had appeared before the issuing magistrate, who was able to establish the informant's existence and reliability. The defense reliance on *People v Castillo* (80 NY2d 578) is misplaced, as that opinion does acknowledge the possibility of deciding probable cause based on warrant papers and a transcript of the informant's testimony. The suppression court here erred, however, by failing to examine the transcript of the informant's testimony. The search warrant and supporting affidavit alone did not establish probable cause. The affidavit lacked factual averments that could have afforded a basis for the magistrate to determine the informant's reliability. See *People v Taylor*, 73 NY2d 683, 688. Without reference to the transcript, the suppression court could not determine that the informant was under oath, in compliance with CPL 690.40(1). Because the court denied suppression without the transcript before the prosecution had an opportunity to obtain the transcript despite the court reporter's illness or to reconstruct the testimony, the proper remedy is remittal for a new hearing. See *People v Crandall*, 69 NY2d 459. Remitted and, as modified, affirmed.

Judges (Disqualification)(General) Misconduct (Judicial)

JGS; 215(8) (9)
MIS; 250(10)

Matter of Romano, No. 46, 3/30/99

The State Commission on Judicial Conduct determined that the petitioner should be removed from his offices as Haverstraw Town Justice and acting West Haverstraw Village Justice in Rockland County.

Holding: The evidence in the record establishes that the petitioner violated several sections of the Rules Governing Judicial Conduct and canons of the Code of Judicial Conduct. Insensitive remarks from the bench concerning domestic violence and sexual abuse included saying, as to charges that a defendant had violated an order of protection and assaulted his wife, "What's wrong with that? You've got to keep them in line once in a while." In addition, he uttered profane remarks about and failed to recuse himself from a case involving a former client. Finally, he tried to use his position to influence the police chief to bring charges against a person in order to benefit a friend and client. The petitioner's misconduct shows a pattern of disregard for judicial conduct standards. Determined sanction accepted, and the petitioner removed.

Appeals and Writs (Record)

APP; 25(80)

Transcripts (General) (Procedure)

TSC; 373.5(20) (30)

People v Alomar, No. 56 and No. 57, 3/30/99

Defendant Alomar's motion in the Appellate Division for a reconstruction hearing was granted because the *voir dire* minutes of the trial had been lost. The defense counsel, the prosecutor, and many of the venirepersons testified at the resulting hearing. The original trial judge, who was presiding over the hearing, also placed his own detailed recollections on the record, over the defendant's objections. In an unrelated appeal, defendant Morales pointed to four places in his trial transcript where the judge told the jury that the prosecution need not prove guilt "beyond all reasonable doubt." The prosecution claimed that the transcript was in error and a reconstruction hearing was granted. The defendant unsuccessfully moved to recuse the judge because the sole issue pertained to the judge's conduct, making the judge a potential witness subject to cross-examination. The stenographer testified that the transcript references to the word "reasonable" resulted from her error. Based on this testimony and his own recollections, the judge settled the record by omitting the disputed references. The Appellate Division found no error in either reconstruction ruling.

Holding: Recusal is constitutionally required only where the judge has a "direct, personal, substantial or pecuniary" interest in a particular conclusion. See *Tumey v Ohio*, 273 US 510, 523 (1927). Where the accuracy of the record of proceedings was the only issue, no such interest existed. See *People v Moreno*, 70 NY2d 403. Fundamental fairness was not violated, nor was the defendants' right to confront witnesses. The judges were not acting as witnesses against the

NY Court of Appeals *continued*

defendants but were seeking to ensure that records were certified as true. Orders affirmed.

Identification (General) **IDE; 190(17)**
Witnesses (Confrontation of Witnesses) **WIT; 390(7)**
People v Patterson, No. 45, 4/1/99

The complainant identified the defendant in a lineup as one of three men who robbed him. Before trial, the complainant died. The court allowed a police officer who had been present at the lineup to testify. The Appellate Division affirmed.

Holding: While the prosecution argued that the complainant's death made him "unable at the proceeding to state, on the basis of personal recollection, whether or not the defendant is the person in question" (CPL 60.25[1][a]), the statute does not allow third party testimony confirming identification by a nontestifying witness. The officer's testimony confirming the complainant's unsworn identification was inadmissible without testimony from the complainant establishing his lack of recollection, forming a reliable chain of evidence. *See People v Nival*, 33 NY2d 391, 395-396 *app dismissed, cert den* 417 US 903. As to the admission of videotapes and audiotapes, although such evidence is ordinarily admissible, it still requires reliable authentication and foundation. The record shows an inadequate basis for admissibility, which the prosecution may seek to remedy at retrial. "Standard protections and prerequisites for the introduction of relevant, reliable evidence must be observed, not excused by short cuts and shortfalls." Order reversed and matter remitted for a new trial.

Sentencing (Persistent Violent Felony Offender) **SEN; 345 (59)**
People v Tolbert, No. 53, 4/1/99

The defendant pled guilty to attempted third-degree criminal possession of a weapon, with a bargained-for sentence of four years to life as a persistent violent felony offender. Because Penal Law 70.08(3) does not provide a statutory minimum sentence for a Class E persistent violent offender, the minimum sentence used was that provided under Penal Law 70.04(3)(d) for a second violent felony offender. The Appellate Division affirmed the legality of the sentence.

Holding: *People v Green* (68 NY2d 151) held that applying the statutory minimum sentence for second violent felony offenders (which was then two years) to class E persistent violent felony offenders was an appropriate construction of the Penal Law. Subsequent to *Green*, statutory changes occurred. Determinate sentences were established for second violent felony offenders, and minimum sentences were increased for persistent violent felony offenders. Second violent felony offenders are eligible for early release,

while the entire minimum sentence must be served by persistent violent felony offenders. These changes do not render *Green* inapposite. The amended determinate sentence for class E second violent felony offenders (three years) should be applied as the minimum for class E persistent violent offenders.

The defendant's ineligibility for a good behavior allowance is not part of the sentence itself, and the defendant had notice of this statutory (Corrections Law 803[1][a]) rule. Order affirmed.

Freedom of Information (General) **FOI; 177(20)**
Matter of Daily Gazette Co. v City of Schenectady, No. 47, 4/6/99

Two newspapers filed a Freedom of Information Law (FOIL) request for police disciplinary records after 18 off-duty officers pelted a car with eggs. Supreme Court upheld the City's decision to withhold the records under the exception for personnel records, Civil Rights Law 50-a. The Appellate Division reversed, holding that the exception is applicable only where the requested information is likely to be used in litigation, so that the petitioners' disclaimers of intent to bring a lawsuit were sufficient to allow them access.

Holding: The statute states that the personnel files of police and correction officers are immune from disclosure, and allows as an exception access by public officials seeking to further their official functions; access by newspapers is not mentioned. The statute was designed to prevent the abusive exploitation of personal information to discredit police witnesses and to harass or embarrass officers. The petitioners' claim that disclosure is mandated because the records are not the subject of litigation would undermine the purpose of the statute and is contrary to precedent. Even the case relied on by the petitioners notes that the "status or need" of someone seeking access should generally be of no consequence. *Matter of Capital Newspapers v Burns*, 67 NY2d 562, 567. Documents pertaining to misconduct by corrections officers are the very sort of record which legislative history reveals was intended to be kept confidential. *Matter of Prisoners' Legal Services v NYS Dept. of Correctional Services*, 73 NY2d 26, 31. Potential use of requested information, not the specific purpose of the particular individual making the request, is decisive. Order reversed and petitions dismissed.

Evidence (Hearsay) **EVI; 155(75)**
Witnesses (Confrontation of Witnesses) **WIT; 390(7)**
People v Blades, No. 58, 4/6/99

The defendant and the co-defendant were charged with multiple counts including first-degree burglary based on use or threatened immediate use of a dangerous instrument. Penal Law 140.30(3). The co-defendant pled to a lesser charge, conditioned on his naming the defendant as his accomplice, but then refused to testify at the defendant's trial. An excerpt from the co-defendant's guilty plea pro-

NY Court of Appeals *continued*

ceedings, in which phrases such as “second individual” were substituted for the defendant’s name, was admitted. The parties stipulated that the co-defendant had implicated the defendant to receive the lesser plea. The court cautioned the jury that the allocution should not be used for identification. The Appellate Division affirmed the resulting conviction.

Holding: A “sensitively calibrated, limited allowance” of the use of guilty plea allocution was created in *People v Thomas* (68 NY2d 194 *cert den* 480 US 948), where the co-defendant’s allocution was used to show his presence at the scene, meeting an “aided by another person actually present” element of the crime charged. Here, that element was not required for the first-degree burglary count; it was the defendant who was said to have possessed the pipe. The allocution served only to nail the defendant as “the other person.” Further, the co-defendant’s allocution was made in, not against, his own interest. *See People v Morgan*, 76 NY2d 493. *Thomas* and its progeny must not become a “blueprint for generalized admission of guilty plea colloquies into evidence in lieu of live, confronted, cross-examinable trial testimony.” The statements here were not demonstrably reliable; it was error to admit them. But this case “is an appropriate candidate for the application of the *deus ex machina*—harmless error . . .” Order affirmed.

Assault (Serious Physical Injury) **ASS; 45(60)**
Evidence (Sufficiency) **EVI; 155(130)**

People v Askerneese, No. 136, 4/6/99

Holding: The defendant’s contention that the evidence supporting his conviction of first-degree assault was insufficient to meet the standard of “serious physical injury” required under Penal Law 120.10(1) is without merit. Viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621) the evidence was sufficient to allow a rational trier of fact to find that the complainant suffered a “serious physical injury.” Order affirmed.

Evidence (Hearsay) (Missing Witnesses) **EVI; 155(75) (86)**

Witnesses (Confrontation of Witnesses) **WIT; 390(7)**

People v Johnson, No. 19, 5/4/99

The 12-year-old complainant gave detailed testimony before the grand jury about her sexual involvement with the defendant, a 52-year-old pastor. The complainant then testified at a suppression hearing for the defendant and refused to testify at trial. The prosecution moved for admission of her grand jury testimony, refusing the court’s offer of a hearing on the ground that the evidence at trial and the suppression hearing, as well as a letter by the complainant which was not admitted into evidence, showed that the defendant had procured the complainant’s silence. Over

defense objections, the court allowed the testimony. The Appellate Division reversed.

Holding: The evidence before the trial court did not so overwhelmingly prove witness-tampering as to satisfy the clear and convincing standard (*People v Geraci*, 85 NY2d 359, 367) required for admission of statements made by a witness later silenced by the defendant. Therefore, a *Sirois* (*Matter of Holtzman v Hellenbrand and Sirois*, 92 AD2d 405) hearing, which allows the defendant to challenge the prosecution’s theory that the defendant tampered with the witness, was not rendered superfluous. Although the evidence could support such a theory, it was subject to competing inferences. Taped telephone conversations in which the defendant pressured the complainant to lie so that he would not go to jail occurred before her grand jury testimony. Where there was no waiver by the defendant (*see gen Johnson v Zerbst*, 304 US 458, 464 [1938]) the constitutional rights to confront and cross-examine witnesses should not have been cast aside without a hearing. Order affirmed.

Bail and Recognizance (Bench Warrant) (Forfeiture and Failure to Appear) (General) **BAR; 55(17) (25) (27)**

People v Coppez, No. 80, 5/4/99

The defendant was released on bail on the condition that he appear for scheduled court dates. After appearing a number of times, he failed to appear on May 31, 1996. The court issued a bench warrant but stayed its execution and adjourned the case until June 11, when the defendant again failed to appear. On that date, the court issued a bench warrant. The defendant was returned to court on the warrant on July 5, and was then charged with second-degree bail jumping. The Appellate Division affirmed the trial court’s dismissal of the charge.

Holding: The grand jury evidence fails to support the indictment for second-degree bail jumping (Penal Law 215.56) because the element of failing to appear on a “required date” was not met. The “required date” in question was not May 31, when the court used its discretion to excuse the defendant’s non-appearance and stay the warrant, but June 11, when the warrant was issued. The statutory 30-day grace period began (again) on the later date. Since the defendant’s involuntary appearance on July 5 was within the 30-day period, his indictment was properly dismissed. Order affirmed.

Bail and Recognizance (Bench Warrant) (Forfeiture and Failure to Appear) (General) **BAR; 55(17) (25) (27)**

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

People v Wilder, No. 81, 5/4/99

The defendant was convicted of a third-degree drug sale in which he participated as a “steerer,” and of first-degree bail jumping. The Appellate Division affirmed.

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Holding: A detective’s testimony that a second suspect arrested on the day of the offense was not the person he had seen participate in that offense was evidence that “makes determination of the action more probable or less probable than it would be without the evidence” and so was relevant and admissible unless in violation of an exclusionary rule. *People v Scarola*, 71 NY2d 769, 777. The “negative identification” testimony enhanced the reliability of the officer’s in-court identification of the defendant, much as lineup evidence does. *See People v Bolden*, 58 NY2d 741, 744 (Gabrielli, J. concurring). There was sufficient similarity between the negatively identified person and the defendant to establish threshold relevancy. The trial court did not abuse its discretion in finding the evidence probative and granting admission.

The elements of first-degree bail jumping require that defendants have violated court orders releasing them on condition that they will appear in connection with a pending indictment for an A or B felony. Penal Law 215.57. Upon the defendant’s original release here, an indictment had not yet been returned. At no point did the court issue an order directing the defendant to appear in connection with such an indictment, but merely adjourned the proceeding, allowing the defendant to remain at liberty under the prior (pre-indictment) court order. The defendant’s failure to appear triggered only the lesser offense of second-degree bail jumping. *See* Penal Law 215.56. Order modified and remitted for resentencing as to the bail jumping conviction, and otherwise affirmed.

Larceny (Elements) **IAR; 236(17)**

Robbery (Elements) **ROB; 330(15)**

People v Wilson, No. 66, 5/6/99

The defendant and another man took a carton of boots from a delivery truck without being observed. They took the carton to a nearby mall’s loading dock to remove the boots to a bag. A security guard confronted the men and attempted to stop them from leaving. The defendant threatened the guard with a box cutter and ran. The defendant threatened two guards who pursued him, and was arrested by police. The Appellate Division reversed the robbery and larceny counts of the defendant’s conviction.

Holding: The first-degree robbery and petit larceny counts identified the security guard as the “owner” of the boots. The trial court concluded that because of the guard’s reasonable belief that the defendant stole the boots, the guard became a gratuitous bailee, acquiring a property right greater than the defendant’s. *See People v Phelps*, 72 NY 334, 357. However, there was no relationship between the owner of the boots and the purported bailee, as there was between a passenger and a common carrier in *Foulke v NY Consol. R.R. Co.*, 228 NY 269, 275. The fact that a thief does not have a right of possession in stolen goods does not define the rights of others as to that property. Furthermore, the boots were

never in the possession of the guard, so no bailment was created. Both robbery and larceny require that property be taken from its owner. *See* Penal Law 155.05, 160.00. Even under the broadest definition of ownership, the guard in this case cannot be considered an owner of the boots. Order affirmed.

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

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

People v Clarke, No. 76, 5/6/99

The defendant’s plea-based conviction was affirmed by the Appellate Division.

Holding: An ambiguous comment made by the court at the end of the plea proceeding did not constitute a “mode of proceedings” concern for which no preservation of error was required. The comment “was at most a ‘mere mistake’ of language by the court.” *Compare People v Minaya*, 54 NY2d 360, 365 *cert den sub nom Minaya v NY*, 455 US 1024. The record shows an understanding of the nature of the guilty plea proceedings by all the participants, including repeated assurances by the defendant of his desire to plead guilty. This case does not meet the narrow exception to the requirement that a challenge to the validity of a guilty plea must be preserved. *See People v Lopez*, 71 NY2d 662. Order affirmed.

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

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

People v Hernandez, No. 83, 5/6/99

The defendant’s sentence for attempted rape included certification that he was a sex offender under the Sex Offender Registration Act (SORA). He objected to the certification at sentencing on *ex post facto* grounds, because the crime was committed before the act took effect in January 1996. The Appellate Division held that a SORA determination is not reviewable on direct appeal from a judgment.

Holding: The defendant’s sex offender certification was an integral part of the final adjudication of the case (*see People v Lyday*, 241 AD2d 950). The SORA certification is procedurally parallel to the mandatory surcharge provision of Penal Law 60.35, a challenge to which this court has reviewed. *See People v Barnes*, 62 NY2d 702. Even if the SORA certification is not part of the sentence, it is part of the judgment, which, by its terms, is appealable. CPL 450.10. Certification under SORA is appealable as part of the judgment of conviction. Order modified by remitting to the Appellate Division for further proceedings, and as so modified, affirmed.

Licenses and Permits (General) **LAP; 241(10)**

Parole (Certificate of Relief from Disabilities) **PRL; 276(5)**

NY Court of Appeals *continued*

Matter of Arrocha v Board of Education of the City of New York, No. 87, 5/6/99

The defendant's application for a teaching license disclosed a 1987 conviction for selling cocaine, for which he served two years in prison. The petitioner submitted a certificate of relief from disabilities to remove any automatic bar to licensure, as well as five letters of recommendation attesting to his abilities and accomplishments. The Board rejected his application because of the seriousness of the crime and the potential risk to students, but was ordered to grant the license by the Supreme Court. That order was affirmed by the Appellate Division.

Holding: An administrative decision such as that of the Board cannot be changed by a court unless it is arbitrary and capricious. A criminal conviction is not normally a basis to deny a license, but exceptions can be made where an "unreasonable risk to property or to the safety or welfare of specific individuals or the general public" would result. Correction Law 752(2). The certificate of relief from disabilities does not establish a *prima facie* entitlement to a license or employment. The certificate of relief only establishes a rebuttable finding of rehabilitation. Rehabilitation is only one of eight factors to be considered under Correction Law 753(1). The record shows that the Board here considered all the factors, and found that the severity of the offense, the age of the petitioner at the time of the offense, and the nature of the license sought warranted denying the license. Order reversed and petition dismissed.

First Department

Sentence (Excessiveness) **SEN; 345(33)**
Trial (Public Trial) **TRI; 375(50)**

People v Sheppard, No. 3364, 1st Dept, 1/19/99

Holding: The courtroom was properly closed during an undercover officer's testimony, as the prosecution made a sufficient showing that the precise location of the defendant's arrest was targeted for future operations involving the officer. *People v Armond*, __AD2d __, 672 NYS2d 726 *lv den* __ NY2d __ (8/4/98). The defendant's family was not improperly excluded where, at the time of the *Hinton* hearing, the court was given no reason to know that the family wished to attend and so had no occasion to determine whether family members posed a threat. *See People v Collins*, __AD2d __ (10/20/98). The defense did not seek to reopen the *Hinton* hearing when the family arrived. The record does not show that the family was excluded on the second day after this issue was finally raised before the court.

The sentence of 12½ to 25 years for third-degree sale of drugs as a second felony offender was excessive and is reduced to 6 to 12 years. Judgment modified, and as modified, affirmed. (Supreme Ct, New York Co [Tompkins, JJ])

Counsel (Malpractice)

COU; 95(23)

Malpeso v Burstein & Fass, No. 3392, 1st Dept, 1/19/99

Holding: The plaintiff's legal malpractice claim based on the defendant's representation at a bail hearing is precluded as a matter of law by the plaintiff's guilty plea. *Carmel v Lunney*, 70 NY2d 169. *Carmel* is not made inapplicable just because no claim is made that the alleged malpractice induced or affected the ultimate conviction. Public policy bars a malpractice action arising from negligent representation in a criminal proceeding where the plaintiff cannot assert innocence; the effect of the alleged negligence on the conviction is irrelevant. *Bass & Ullman v Chanes* (185 AD2d 750) is distinguishable; the alleged malpractice there occurred not in the context of a criminal proceeding but in reviewing advertising copy that was the basis for a later conviction of customs and mail fraud. Order affirmed, with costs. (Supreme Ct, New York Co [Cohen, JJ])

Prior Convictions (Right to Challenge Generally) (Sentencing) **PRC; 295(21) (25)**

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

People v Levine, No. 3397, 1st Dept, 1/21/99

Holding: The defendant was precluded from challenging his 1983 conviction as a predicate to sentence enhancement where he had been adjudicated a second violent felony offender on the basis of that conviction in 1988 and did not seek review by appeal or post-judgment motion. *People v Loughlin*, 66 NY2d 633, 635-636; CPL 400.15(8), 400.16(2). An express waiver at the 1988 proceedings of the right to challenge the 1983 conviction was not required. As to the later conviction, the defendant was not entitled to a hearing where his challenge to it was based on alleged coercion that consisted of nothing more than a warning of the risks of going to trial. *See People v Spinks*, 227 AD2d 310 *lv den* 88 NY2d 995. Judgment affirmed. (Supreme Ct, New York Co [Weissberg, JJ])

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

Plea Bargaining (General) **PLE; 284(10)**

People v Torres, No. 3438, 1st Dept, 1/21/99

Holding: No promise was made at the defendant's plea proceeding in the Bronx as to a Queens County violation of probation. There was no mention of the Queens County case until the end of the plea proceedings, after the defendant had already agreed to plead guilty in exchange for an agreed-upon sentence. The Queens matter was never transferred to Bronx Supreme Court so it could not be covered by the sentence there. Judgment affirmed. (Supreme Ct, Bronx Co [Cohen, JJ])

First Department *continued*

Sentencing (General) **SEN; 345(37) (70.5)**
(Resentencing)

People v Guzman, No. 106, 1st Dept, 2/2/99

The defendant was sentenced following his guilty plea to 3½ to 7 years as a second felony offender for third-degree possession of a weapon.

Holding: “The sentencing court’s decision to commit defendant to the Department of Correctional Services pending a determination of defendant’s parole status was proper (see, CPL 430.20[4][b]). In any event, a remand for resentencing would be futile under the circumstances.” Judgment affirmed. (Supreme Ct, Bronx Co [Torres, J])

Misconduct (Judicial) **MIS; 250(10)**
Sentencing (Concurrent/Consecutive) **SEN; 345(10)**

People v Lebron, No. 119, 1st Dept, 2/2/99

Holding: The defendant has not established the display of any bias or the cause of any prejudice by the court’s indicating, as part of its general address to prospective jurors, that the court had been the victim of crimes on several occasions. Consecutive terms of sentence for each of four first-degree robbery convictions was proper because “each count pertained to the separate and distinct act of taking property from each of four separate victims, notwithstanding that the time and place of occurrence of each robbery was the same (*People v Braithwaite*, 63 NY2d 839, 843 . . .).” Judgment affirmed. (Supreme Ct, New York Co [McMahon, J])

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

People v Rodriguez, No. 120, 1st Dept, 2/2/99

Holding: As there was a substantially greater number of female venirepersons available, the exercise of a disproportionate number of prosecution peremptory challenges against females did not reflect a discriminatory motive. *People v Childress*, 81 NY2d 263, 267. Nor did the remaining circumstances, including the characteristics of the challenged venirepersons, support a *prima facie* case of discrimination, which the defense had the burden of presenting.

Introduction of a videotaped statement made by the defendant after her arrest would have been cumulative to other state of mind evidence presented by the defense, so the court’s precluding admission of the tape did not prevent presentation of such a defense. Further, there was no reasonable possibility that the tape could have affected the verdict. *People v Rivera*, 101 AD2d 981 *aff’d* 65 NY2d 661. Any probative value the tape had was outweighed by the strong likelihood that its introduction would be unduly prejudicial to the prosecution. See *People v Davis*, 43 NY2d 17, 27 *cert den* 435 US 998. Judgment affirmed. (Supreme Ct, Bronx Co [Straus, J])

Juveniles (Delinquency) **JUV; 230(15) (30)**
(Designated Felonies)

In re Jason B., No. 168, 1st Dept, 2/9/99

Holding: Family Court’s finding that the juvenile appellant had committed a “designated felony act” on the basis of multiple recidivism under Family Court Act 301.2(8)(vi) was erroneous. The appellant “had only one prior finding that he had committed two prior felonies, rather than two prior findings that he had committed a prior felony, as is required by the statute.” The statute does not permit separate counts of the same petition, based on the same incident, to be used as the necessary predicate for enhancement. See *Matter of Manuel R*, 89 NY2d 1043. The finding of a designated felony act is vacated and the matter remanded for a new dispositional hearing, and otherwise affirmed. (Family Ct, New York Co [Richardson, J])

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

People v Rodriguez, No. 172, 1st Dept, 2/9/99

Holding: The evidence adduced at the suppression hearing amply supported the denial of suppression of the defendant’s statements. “Although the hearing court failed to make findings of fact and conclusions of law, this Court has an adequate record on which to make its own findings (*People v Denti*, 44 AD2d 44, 47).”

As to the motion to dismiss the indictment because the prosecution failed to disclose a purported showup identification, this issue was forfeited by the defendant’s guilty plea. *People v Di Raffaele*, 55 NY2d 234. Dismissal would not have been warranted in any event, as the court provided adequate remedies for the nondisclosure. Judgments affirmed. (Supreme Ct, New York Co [Brandveen, J at motion hearings, Beeler, J and Rubin, J at pleas, Beeler, J at sentencing])

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

People v Ocasio, No. 180, 1st Dept, 2/9/99

Holding: The defendant did not object to the sufficiency of the court’s inquiry of a sworn juror who indicated she was unable to continue due to extreme nervousness from recognizing people in the courtroom, nor request further inquiry. The claim that more was required before replacing the juror is unpreserved for review. Additionally, the court’s inquiry was sufficient, and its determination that the juror’s state of mind (rational or not) rendered her unqualified is entitled to great weight. See *People v Santana*, 221 AD2d 175 *lv den* 87 NY2d 925. Judgment affirmed. (Supreme Ct, Bronx Co [Tonetti, J])

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

Confessions (Interrogation) **CNF; 70(42)**

First Department *continued*

People v Oquendo, No. 3304, 1st Dept, 2/9/99

The defendant successfully moved to suppress statements made before and after receiving his *Miranda* warnings.

Holding: Police apprehended the defendant based on a radio description of a man with a gun after reports of shots fired. The defendant was asked when detained if he had the gun, and he said that he had dropped a BB gun at a certain location on the street. After another officer arrived and identified the defendant as having pointed a gun at him, police retraced the defendant's steps but found no gun in the nearly foot-deep snow. Even with additional direction from the defendant, no gun was found. While additional police personnel continued to search, the defendant was taken to the station and questioned, primarily about the gun's location, from 9:40 pm to 12:05 am, when *Miranda* warnings were given. He talked about why he was running and whether he knew he had pointed the gun at police officers. Whenever he was asked about where the gun might be, police would fruitlessly search that location. At 2:40 am, the defendant was told his codefendant had said the weapon was a 9 mm handgun, and was also told that he would be responsible if the gun injured anyone. He then described a new location, where a gun was found. The court erred in suppressing the defendant's statements. These facts present the same basic public safety concerns as were present in *NY v Quarles* (467 US 649, 652-653 [1984]), and police must have flexibility to respond to such true emergency situations. Order reversed. (Supreme Ct, New York Co [Allen, JJ])

Identification (Show-ups)

IDE; 190(40)

Trial (Verdicts [Repugnant Verdicts])

TRI; 375(70[c])

Witnesses (Interpreters)

WIT; 390(35)

People v O'Sullivan, No. 224, 1st Dept, 2/11/99

Holding: The showup at which the defendant was identified was close in geographic and temporal proximity to the offense, and was not unduly suggestive despite the defendant being handcuffed and in the presence of police officers. That the police may have had independent probable cause to arrest the defendant before the showup did not render evidence from it inadmissible. *People v Duuvon*, 77 NY2d 541, 545.

Where the complainant indicated that his limited command of English would hinder clarity in developing proof, the court did not err in allowing him to testify through an interpreter at trial. See *People v Wilson*, 188 AD2d 405 *lv den* 81 NY2d 849. The record shows no prejudice to the defendant. Nor was there error in the prosecutor's providing no interpreter for the complainant at the grand jury. See *People v Gonzalez*, 201 AD2d 667 *lv den* 83 NY2d 872.

The record does not support the defense assertion that the trial court prevented the defendant from timely raising a repugnant verdict claim, so that issue is unpreserved. Additionally, the court's unobjected-to instructions that the jury

consider each charge separately, as if in separate indictments, sanctioned the allegedly inconsistent verdict. See *People v Hankinson*, 119 AD2d 506. Judgment affirmed. (Supreme Ct, Bronx Co [Massaro, JJ])

Civil Rights (General)

CVR; 67.5(10)

Misconduct (Prosecution)

MIS; 250(15)

Hirschfeld v City of New York, No. 2653, 1st Dept, 2/11/99

The District Attorney began to look into alleged criminality in the plaintiff's transactions at the behest of the State Department of Taxation and Finance, and issued four grand jury subpoenas *duces tecum*, using a "John Doe" caption to protect the plaintiff's identity, directing Citibank to produce to the grand jury records of certain transactions.

Holding: That the grand jury was not impaneled until after the subpoena was issued was not unlawful. See *People ex rel Van Der Beek v McCloskey*, 18 AD2d 205. The grand jury had been impaneled by the return date, as is required. See *Virag v Hynes*, 54 NY2d 437, 441. That the subpoenas gave Citibank the option of delivering the documents to the prosecutor's office, and that the prosecutor agreed to send someone to Citibank to narrow the scope of the subpoenas, was not shown to constitute efforts to conduct an investigation outside the grand jury's auspices, as in *Rodrigues v City of New York* (193 AD2d 79, 82). The prosecutor was acting in the quasi-judicial role of legal advisor to the grand jury and is entitled to absolute immunity from civil claims relating to the prosecution. *Schanbarger v Kellogg*, 35 AD2d 902 *app dsmsd* 29 NY2d 649 *lv den* 29 NY2d 485 *cert den* 405 US 919. The plaintiff has not shown that his 1st Amendment right to engage in political speech was violated when an indictment was filed, with an arraignment date leaked to the press and set to correspond with his scheduled press conference to announce his candidacy for Borough President. The portion of the order denying summary judgment to the defendants is reversed and complaint dismissed. (Supreme Ct, New York Co [Gangel-Jacob, JJ])

Parole (Revocation) (Revocation Hearings [Counsel] [Timeliness])

People v Russi, No. 257, 1st Dept, 2/18/99

The court dismissed a petition for a writ of habeas corpus initially and after reargument.

Holding: The petitioner expressly waived a preliminary parole revocation hearing, to which he would not have been entitled anyway, having been convicted of a new crime while on parole or under supervision. See Executive Law 259-i(3)(c)(I); *People ex rel Courtney V NYS Division of Parole*, 208 AD2d 352 *lv den* 84 NY2d 811. His *ex post facto* claims as to 1997 amendments to 9 NYCRR 8005.20(c) were prematurely raised and without merit. The regulations are not laws but guideposts to assist in making discretionary assessments. See *Ruip v United States*, 555 F2d 1331, 1335 (6th Cir 1977). The

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regulations allow deviation from the prescribed time limit when the subdivision regarding exceptional circumstances applies, and give the hearing officer discretion to recommend a disposition other than reincarceration. 9 NYCRR 8005.20(c) (g). While the petitioner was entitled to 14 days notice of the final revocation hearing, assignment of a new attorney did not provide the right to 14 additional days. *People ex rel Bush v Stenzel*, 195 AD2d 495. While the final hearing was held beyond the 90 days provided by statute, only 68 days of the delay were attributable to the respondent; the hearing was timely. Executive Law 259-i(3)(f)(I). Order affirmed. (Supreme Ct, New York Co [Bradley, J])

Grand Jury (General) **GRJ; 180(3)**
Identification (Eyewitnesses) **IDE; 190(10) (45)**
(Sufficiency of Evidence)

People v Cedeno, Nos. 2871-2872, 1st Dept, 2/18/99

The court dismissed an indictment because there was insufficient evidence in the grand jury minutes identifying the defendant as a participant in the crimes charged.

Holding: Where the complaining witnesses who were at the scene of a robbery testified at the grand jury that they “now” knew the name of one of their attackers—the defendant—whom they had not known previously, the evidence was sufficient to support the indictment. On consideration of a CPL 210.20(1)(b) motion to dismiss, a reviewing court may not examine the adequacy of proof to establish reasonable cause, which is the province of the grand jury, but is limited to the legal sufficiency of the evidence. *People v Colon*, 137 AD2d 440, 441. The eyewitnesses’ reference to the defendant by name constituted legally sufficient evidence. A corporeal identification of a defendant is unavailable in the grand jury setting. Furthermore, the source of the complainant’s identification of the defendant can be inferred, where the witness said he had struggled with the defendant, and then police came. *See People v Ganett*, 68 AD2d 81 *affd* 51 NY2d 991. The statement that he subsequently learned the defendant’s name was not inadmissible hearsay. *People v O’Connor*, 245 AD2d 573 *lv den* 91 NY2d 943. Order reversed. (Supreme Ct, Bronx Co [Price, J])

Conspiracy (Acts of Co-conspirator) **CNS; 80(10) (23)**
(General)

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

In Re Robinson v Snyder, No. 3418, 1st Dept, 3/4/99

Holding: The court properly denied the petitioner’s claim of double jeopardy. A proceeding under CPLR article 78 was the proper mechanism for raising the claim, but the defendant’s substantive claim lacked merit. The current conspiracy charges are comprised of different elements than the

possession charges on which the defendant was convicted. The defendant’s “possession of illicit drugs is not essential to his conviction for conspiracy, even though it is an act in furtherance thereof, because conviction may rest on the overt act committed by another.” *People v McGee*, 49 NY2d 48, 58. Conspiracy statutes seek to deter concerted activity in furtherance of a criminal purpose. Conspiracy embraces all overt acts and crimes in the persisting enterprise (*People v Abbamonte*, 43 NY2d 74, 85) but the exceptions of CPL 40.20(2)(b) allow successive prosecution based on the same act or criminal transaction. *People v Bryant*, 92 NY2d 216, 230. Application denied, petition dismissed.

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

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

People v Demchenko, No. 474, 1st Dept, 3/999

Holding: The defendant’s conviction of first-degree criminal contempt was based on legally sufficient evidence and was not, despite the defendant’s “masked repugnancy” argument, affected by the jury’s inability to reach a verdict on the assault count. *See People v West*, 233 AD2d 277 *lv den* 89 NY2d 947. Prior acts of domestic violence that led to the protective order violated here were properly placed before the jury with suitable limiting instructions to provide necessary background. *See People v Till*, 87 NY2d 835. “The announcement of the verdict by a juror other than the foreperson was a ‘ceremonial irregularity’ rendered harmless by the restatement of the verdict when the entire jury was polled.” *See People v Brown*, 214 AD2d 579, 580 *lv den* 86 NY2d 732. Judgment affirmed. (Supreme Ct, New York Co [Fried, J])

Identification (Photographs) **IDE; 190(35)**

Witnesses (Police) **WIT; 390(40)**

People v Rivera, No. 492, 1st Dept, 3/11/99

Holding: The court properly admitted a detective’s lay opinion testimony about the defendant’s presence in a surveillance videotape and in photographs made from the tape. An adequate foundation was laid, and the testimony was relevant to the basis of the defendant’s arrest and aided the jury in its independent evaluation of the photographic evidence. *See People v Russell*, 79 NY2d 1024. The court extensively instructed the jury as to this testimony, stating that the witness was giving his view of who appeared in pictures and that the jury was to make the factual determination of who was pictured. Even if admission of the testimony was error, it would be harmless given the overwhelming evidence of guilt. Judgment affirmed. (Supreme Ct, Bronx Co [Bamberger, J])

Second Department

Statute of Limitations (Computation of Period) SOL; 360(10)

People v Knobel, No. 98-08408, 2nd Dept, 3/1/99

The court granted the defendant's motion to dismiss the indictment.

Holding: The defendant was indicted on Feb. 24, 1998. Two non-class-A felony counts of the indictment alleged crimes occurring over ten years earlier, on July 4, 1988. The defendant provided an affidavit saying that he had moved from New York State in late 1991 and still resides outside the state, but has returned often to visit family and on business. However, the visits to this state were brief and sporadic and he always went back to his out-of-state home. His absence was "continuous" within the meaning of CPL 30.10(4)(a)(i), so that the Statute of Limitations (CPL 30.10[4]) was tolled as of the defendant's move in late 1991. Order reversed. (County Ct, Nassau Co [Boklan, J])

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

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause] [Relevance]) SEA; 335(10[a][g][j])

People v Branch, No. 95-10839, 2nd Dept, 3/8/99

Holding: The defendant was never told at the plea allocation that his plea was conditioned on waiving his statutory right to seek review of the court's ruling denying the branch of his omnibus motion to suppress physical evidence; he did not waive his right to appeal that issue. See CPL 710.70(2); *People v Woody*, 240 AD2d 770. The search of the defendant's jacket, taken from inside his car after he was arrested while waxing the car's exterior, was not justified. The police had neither probable cause to believe that evidence, contraband, or a weapon would be found (see *People v Galak*, 81 NY2d 463) nor the excuse of search incident to arrest, as they admitted they had searched the jacket for identification [despite knowing the defendant, who had also identified himself] rather than for a weapon or evidence. See *People v Gokey*, 60 NY2d 309, 313. The conviction for seventh-degree possession of drugs is reversed. Judgment modified, and as modified, affirmed. (County Ct, Nassau Co [Cotter, J])

Evidence (Hearsay) EVI; 155(75)

Sentencing (Resentencing) SEN; 345(70.5)

People v Bridges, No. 96-04311, 2nd Dept, 3/8/99

Holding: The defendant was convicted of multiple counts of sex offenses. The complainant to whom counts three through nine of the indictment related recanted her allegations against the defendant at trial. While the defendant consented to admission of that complainant's prior

statements for impeachment purposes, such statements were not admissible as part of the prosecution's case-in-chief. See CPL 60.35(2). There was no showing that the exception made for instances where the defendant has procured a witness's unavailability should apply here, as there was no evidence that the defendant caused the witness to recant by use of violence, threats, or chicanery. See *People v Hamilton*, 70 NY2d 987. There being no competent proof of sexual contact between the defendant and that complainant, all those counts must be dismissed. Given the seriousness of the dismissed charges, all sentences are vacated and remitted for resentencing on the remaining counts. Judgment modified, and as modified, affirmed. (County Ct, Suffolk Co [Pitts, J])

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

People v Waters, No. 97-04571, 2nd Dept, 3/15/99

Holding: The trial court erred in denying the defendant's motion to suppress physical evidence and statements obtained by the police as a result of his arrest. The defendant and co-defendant were first seen 45 minutes after a very vague description of two black men wearing dark clothing was broadcast following a burglary. The defendants were encountered walking along the railroad track. They ran as the officer approached them with a flashlight. This rather innocuous conduct and the vague description did not sufficiently indicate criminal activity to justify immediate arrest. See *People v Dossantos*, 137 AD2d 763. Judgment reversed, new trial ordered. (County Ct, Suffolk Co [Weber, J])

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

Misconduct (Judicial) MIS; 250(10)

People v Hernandez, No. 90-02880, 2nd Dept, 3/22/99

An application for a writ of error *coram nobis* was held in abeyance while briefs were filed concerning the absence of the trial justice during read-back of testimony to the jury.

Holding: "A trial Justice's absence from the courtroom while testimony is being read back to the jury, with or without consent, is improper; it does not comport with the Justice's supervisory role, or with the established expectations and conventions that underlie the Justice's functions (see, *People v Rawlings*, 178 AD2d 619 . . .)." Had the absence of the justice in this case during read-back of testimony been presented on appeal, it is likely that the defendant's conviction would have been reversed. The unexplained failure of counsel to raise this issue supports a finding of ineffective assistance of counsel. See *People v Rutter*, 202 AD2d 123. Application for writ of error *coram nobis* granted, prior decision and order vacated, judgment reversed, and new trial ordered. (Supreme Ct, Queens Co).

Second Department *continued*

Identification (Voice)

IDE; 190(55)

People v Van Wallendael, No. 98-06590, 2nd Dept, 3/22/99

Holding: “Contrary to the defendant’s contention, the trial court properly denied his motion to preclude voice identification testimony based on the People’s failure to serve him with notice pursuant to CPL 710.30. Notice is not required where, as here, the witnesses and the defendant know one another because, in such a case, there is little or no risk that any suggestiveness in the procedure could lead to misidentification (see, *People v Rodriguez*, 79 NY2d 445 . . .).” The failure of the court to give full circumstantial evidence instructions was harmless, given the overwhelming evidence of guilt. Judgment affirmed. (County Ct, Nassau Co [Kowtna, J])

Third Department

Evidence (Prejudicial) (Relevancy)

EVI; 155(106) (125)

Juveniles (Abuse) (Contributing to Delinquency of) (Molestation)

JUV; 230(3) (7) (75)

People v Himmel, No. 78593, 3rd Dept, 2/18/99

Holding: There was no error in admitting, at the defendant’s trial for various sex- and alcohol-related offenses involving minors, a pornographic videotape found at his home. The tape did not bear only upon the sexual climate of the household, but was an integral part of the sequence of events on one of the evenings in question, where one complaining witness said that the defendant jokingly referred to the video in a conversation leading up to the witness’s visit to the defendant’s home. See *People v Mercado*, 188 AD2d 941, 943. The evidence was sufficient to submit a charge of first-degree sodomy based on physical helplessness of the complaining witness (Penal Law 130.50[2]) where the complaining witness said he was very intoxicated and unable to speak. See *People v Cirina*, 143 AD2d 763 *lv den* 73 NY2d 854. The conviction for unlawfully dealing with a child (Penal Law 260.20) was not prohibited by *People v Martell*, 16 NY2d 245. That case found former Penal Law 484(3) inapplicable to incidents at a defendant’s home because the statutory scheme as a whole related to commercial activities with children. The current statute is not subject to *Martell* analysis. Judgment affirmed. (County Ct, Saratoga Co [Scarano, Jr., J])

Appeals and Writs (Judgments and Orders Appealable) (Time)

APP; 25(45) (95)

Prosecutors (Special Prosecutors)

PSC; 310(45)

People v Dellavalle, No. 10910, 3rd Dept, 3/4/99

The defendant was prosecuted for incurring charges on his former wife’s calling card. The wife’s attorney accepted a temporary appointment as a special Assistant District Attorney while continuing to represent the wife in the matrimonial action. The court dismissed the indictment due to, *inter alia*, the appearance of impropriety, and appointed a Special Prosecutor. Nearly one year later the District Attorney’s office appealed the court’s order.

Holding: The appeal was not untimely. The defendant never served the prosecution with the subject order or notice of entry thereof, and “prevailing party service [is required] in order to commence the time for filing a notice of appeal.” *People v Washington*, 86 NY2d 853, 854. However, the appeal must be dismissed because there is no right of direct appeal from an order of disqualification. See *Matter of Kavanagh v Vogt*, 88 AD2d 1049 *affd* 58 NY2d 678. There is no statutory basis for the prosecution’s challenge, pursuant to CPL 450.20[1] (authorizing the prosecution’s appeal from an order dismissing an indictment), because the order dismissing the indictment did not terminate the prosecution. See *People v Coppa*, 45 NY2d 244, 249. The appointment of a Special Prosecutor to replace the District Attorney in a specific matter terminates the latter’s authority as to any further proceedings in the case, including a substantive appeal. See *People v Sadler*, 149 AD2d 986. Appeal dismissed. (County Ct, Essex Co [Hallowan, J])

Homicide (Negligent Homicide)

HMC; 185(45)

Sentencing (Concurrent/Consecutive)

SEN; 345(10)

People v Lacy, No. 79252, 3rd Dept, 3/4/99

The defendant was convicted of criminally negligent homicide, multiple counts of hindering prosecution and evidence tampering, and criminal solicitation for the planned murder of her husband and subsequent cover-up.

Holding: There was sufficient evidence to support the verdict of criminally negligent homicide. Presented with the opportunity to choose among numerous different homicide counts, the jury, after hearing the testimony of an accomplice, the defendant, and numerous other witnesses, focused upon the defendant’s state of mind in order to determine whether she acted intentionally, with depravity, recklessly or with criminal negligence. There was a valid line of reasoning and permissible inferences leading the jury to the conclusion it reached. See *People v Bleakley*, 69 NY2d 490.

The court did not err in amending the hindering prosecution counts during its charge to the jury, because the court neither changed the theory of the prosecution’s case nor added any facts that were not already contained in the indictment.

The charged acts were distinct, and supported by identifiable facts so as to support the imposition of consecutive sentences for the hindering prosecution counts. See *People v Ramirez*, 89 NY2d 444, 451. The defendant rendered criminal assistance to persons who committed a class A felony, knowing that those individuals were engaged in such conduct, and with the specific intent to prevent, hinder or delay the

Third Department *continued*

discovery or apprehension of the others. *See People v Chico*, 90 NY2d 585, 588. Judgment affirmed. (County Ct, Schenectady Co [Eidens, J])

Robbery (Elements)

ROB; 330(15)

People v Gage, No. 79287, 3rd Dept, 3/11/99

Evidence established that the defendant and an accomplice robbed four separate convenience stores. During each robbery, the defendant waited outside in the vehicle while his accomplice went in and forcibly stole money. The defendant admitted knowing the accomplice was robbing the stores, but denied participating or sharing the requisite intent.

Holding: The defendant's awareness that his accomplice displayed what appeared to be a firearm does not matter, so long as he knew the accomplice would be forcibly taking something. The prosecution's burden as to proof of intent does not change with the degree of robbery; it is the presence of statutorily designated aggravating factors which elevates the crime's severity. *People v Miller*, 87 NY2d 211, 217. This jury could have reasonably found that the defendant shared a community of purpose (*People v Allah*, 71 NY2d 830, 832) with his accomplice and that the elements of the charged crimes had been proven beyond a reasonable doubt.

The defendant's acknowledgement that he drove the accomplice to the robbery sites was sufficient corroboration of the accomplice's testimony. The jury was free to believe that part of the defendant's testimony that connected him with the crimes and reject the exculpatory part. *See People v Rose*, 215 AD2d 875 *lvs den* 86 NY2d 793, 801. Judgment affirmed. (County Ct, Schenectady Co [Lamont, J])

Fourth Department

Dismissal (General) (In the Interest of Justice)

DSM; 113(17) (20)

Grand Jury (Procedure)

GRJ; 180(5)

People v Dexter, No. 0107, 4th Dept, 3/19/99

A first indictment was dismissed without stated grounds in 1996 on a prosecution motion joined by the defense. The record shows that critical evidence had been suppressed and the court was concerned about the length of time the case, arising from a 1995 incident, had been pending. In early 1997, the prosecution successfully sought permission to submit the charges to a new grand jury. An indictment identical to the first except for the deletion of one count of use of a firearm and the addition of two robbery and one conspiracy count was filed. The court denied the defense motion to dismiss, reinstated the first indictment, and joined the two after excising duplicative counts.

Holding: Dismissal of the first indictment was a nullity because the court lacked authority to dismiss it based on the inability of the prosecution to proceed. *People v Douglass*, 60 NY2d 194, 200. The indictment had not been dismissed in the interest of justice, which would have allowed the prosecution to seek leave to re-present. *See CPL 210.20(1)(i); 210.40; People v Strudwick*, 178 AD2d 947 *lv den* 80 NY2d 839. The first indictment remained effective, and authorization for a superseding indictment was not required. *See CPL 200.80*. Any error from the consolidation of the two indictments, to which the defense did not object, was harmless. Other claims of error are also rejected.

Judgment affirmed. (Supreme Ct, Onondaga Co [Brunetti, J])

Dissent: [Pine, JP] The Supreme Court that reinstated the first indictment acted in excess of its authority as the dismissal was the law of the case. The parties agreed to the dismissal so neither can argue prejudice. The new counts of the second indictment are valid. ☞

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