



# Public Defense Backup Center REPORT

VOLUME XIV NUMBER 3

March 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

### Defense Funding Caught in State Budget Quagmire

Those public defense services that have been funded in whole or in part by state appropriations must await resolution of the budget impasse that has made the New York state budget late, as it has been for the past 15 years. The Assembly has passed a budget that includes, in a lump sum, public defense monies that were cut in the Executive Budget. The Senate restored \$400,000 of the money needed for the Indigent Parolee Representation Program (IPP), which received \$1.6 million in FY 98/99.

Defender Institute  
Basic Trial Skills Program

June 6-12, 1999

**Application Deadline: April 26.**  
**Details inside.**

As was reported in the last issue of the *REPORT*, the governor's proposed budget eliminated several programs: NYSDA's Backup Center; Neighborhood Defender Service; Prisoners' Legal Services, and IPP. Aid to Defense was included in the proposed Executive Budget at \$13.8 (cuts from the 1990 high of \$20 have never been restored). The Capital Defender office was cut from \$6.3 million to \$6.1 million, while funds to pay assigned capital counsel were increased from \$7.2 million to nearly \$8.6 million in the governor's proposal.

### Gideon Coalition Advocates For Public Defense

The Assembly's move to restore funding for public defense programs, noted above, came on March 16, the same day that members of the Gideon Coalition were in Albany. This coalition is committed to improving the quality of public defense representation in New York State, and annually—on the anniversary of the Supreme Court's decision in *Gideon v. Wainwright*—advocates for important reforms in public

defense services. The Coalition is composed of not only public defense programs including NYSDA, but bar organizations such as the Minority Bar Association of Western New York, the New York State Association of Criminal Defense Lawyers, and Lawyers Coalition for Criminal Justice, as well as the League of Women Voters of New York. This year, 40 member organizations of the Coalition sent 45 participants to the capital to hold a press conference, set up an educational display, and meet with legislators. The group also produced a pamphlet succinctly describing the need for improvement in the provision of counsel in New York State. A copy of the pamphlet is available from the Backup Center.

The scheduled press conference included an unscheduled "participant"—the torn remnants of a large mural, painted by Joanne Pollara, that had been installed the night before at the site in the Empire State Plaza concourse reserved for the Coalition's display, and then been torn down without notice by Office of Governmental Services personnel. The mural depicted a multiracial line of people of all ages, waiting in front of closed public defense offices to see the one remaining lawyer, with the message "Preserve the Right to Counsel—Now More Than Ever" above them. A panel on one side announced, "Executive Budget Threatens the Right to Counsel." The mural, similar in size to work by Pollara displayed for previous Gideon Day observances, was claimed by OGS to be a hazard in the concourse. OGS's destructive dismantling of the mural became a metaphor for the Coalition's message that the right to counsel is under attack.

### Defense Role in Drug Courts Considered at Convening

About two dozen chief defenders—public defenders, heads of legal aid offices, and administrators of assigned counsel programs—spent the morning of February 26 hearing about new and well-established drug courts across New York, and discussing the

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defense role in the establishment and running of such courts. Valerie Raine, Project Director of the Brooklyn Treatment Court, attended a portion of this most recent NYSDA Chief Convening, and spoke from the perspective of a former defense lawyer now administering a drug court. Monroe County Public Defender Edwark Nowak described the Rochester Drug Court, the oldest in the state, while Genesee County Public Defender Gary Horton told the group about the Batavia City Court Drug Court, which accepted its first participant just three days before the Convening. Many other chiefs also shared drug court experiences, suggestions, and problems.

Drug courts, as defined in a publication of the federal Drug Court Program Office, "combine intensive judicial supervision, mandatory drug testing, escalating sanctions, and treatment to help substance-abusing offenders break the cycle of addiction—and the crime that often accompanies it." They are a fast-growing phenomenon. According to a national survey, 49 states, the District of Columbia, Puerto Rico, Guam and two federal districts have implemented or are planning drug courts. New York was said to have seven drug courts that have been operating at least two years, another 10 that have been recently implemented, and 12 more being planned. And that survey is not complete—the Batavia court and perhaps others that have not received federal money were not listed.

Drug treatment courts may vary in a number of ways, including: what populations are targeted (for example, felony or misdemeanor defendants); the stage of legal proceedings at which participants are accepted into the drug court (pre-plea or post-plea); the sources of funding (private grants, state funds, federal start-up money, or existing budgets of the partners [including court, prosecution, defense, treatment and police]), and amount and type of community involvement. The hallmark of drug courts is that they are "nonadversarial," leaving defense counsel to discern or devise their appropriate role.

That public defense providers should have a place at the table during drug court planning sessions was a repeated theme during the Convening. Many of the chief defenders from established drug courts were open to talking with colleagues whose jurisdictions are contemplating drug courts. The Backup Center will be working with John Parker, Onondaga County Assigned Counsel Program Administrator, and others to establish an advisory group. For more information, contact Mardi Crawford at the Backup Center.

## **Prosecutorial Misconduct Appears Widespread**

A number of prosecutorial misconduct cases in the Case Digest for this month, a new federal statute disallowing the policy of letting federal prosecutors ignore state ethical strictures, disclosures in major national newspapers of prosecutorial misconduct, and challenges to the long-standing

prosecutorial practice of obtaining testimony by promising witnesses leniency in their own cases, as well as public concern about claimed excesses by a particularly prominent special prosecutor, all illustrate a continuing problem that many public defense teams have faced—intemperate prosecutorial practices that threaten individual clients and justice.

## ■ **Citizen's Protection Act May Become Effective in April**

April 19, 1999 is the scheduled effective date of a federal law intended to override the U.S. Department of Justice's 1989 "Thornburgh Memo" that purported to allow U.S. Attorneys to engage in *ex parte* communications with represented persons in spite of established state ethic rules prohibiting such contact. The DOJ's position has long been controversial—it was unanimously condemned by the fifty state chief judges of the Conference of Chief Justices in 1994. (See *Backup Center REPORT*, Vol. IX, No. 9.) In 1998 the Conference released a proposed rule on communications with represented persons that would allow government lawyers to speak directly with represented persons in certain circumstances (62 CrL 2043), but put off voting on it (63 CrL 655). Late last year, Congress passed a measure declaring that a lawyer for the federal government is "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." However, the measure, which is codified at 28 USC 530B, was not to take effect for 180 days. (64 CrL 70.)

The National Association of Criminal Defense Lawyers (NACDL), which has targeted the Thornburgh memo for years, is concerned that the new law will never take effect. Sen. Orrin Hatch (R-UT) has introduced a bill to repeal it, and has been lobbying his colleagues to delay implementation of

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the law another six months while he works for its demise. (<http://www.criminaljustice.org/PUBLIC/legis.htm>.)

Even Hatch had to acknowledge, when introducing the bill, that prosecutorial misconduct exists: "No one condones prosecutorial excesses. There have been instances where law enforcement, and even some federal prosecutors, have gone overboard," he noted before saying that federal prosecutors should not have to be subject to the differing rules of several states during sweeping investigations. Hatch's bill, S.250, reads, in part, "A Federal prosecutor shall not be subject to a State law or rule governing ethical conduct of attorneys, to the extent that the State law or rule is inconsistent with Federal law or interferes with the effectuation of Federal law or policy, including the investigation of violations of Federal law." It would also establish a commission to review questions about the incompatibility of federal prosecution work and local regulations. The bill can be found on the Internet at <http://thomas.loc.gov>. A copy is available from the Backup Center.

### ■ **Journalists Uncover Prosecutorial Misconduct**

The Thornburgh memo was discussed in a segment of Bill Moushey's 1998 10-part series in the *Pittsburgh Post-Gazette* entitled "Win at all costs: government misconduct in the name of expedient justice." (See "Sighted" and "Automation Tips" sections of *Backup Center REPORT* Vol XIV, No. 1). Moushey detailed myriad incidents of misconduct by federal agents and prosecutors, including promises of leniency and money for testimony by informants known to be lying. In case after case, the evidence of prosecutorial misconduct remained hidden until defendants had been sentenced to and served substantial amounts of time in prison. Moushey also noted that the prosecutors in these instances were rarely punished once wrongdoing did come to light. In one case in which a prosecutor failed to turn over to the defense a key statement, Moushey noted that a defense attorney similarly ignoring a discovery order might have been disbarred or at least sanctioned. The assistant U.S. Attorney in question was unscathed.

Among the topics covered in Moushey's series was the failure of DOJ to effectively regulate its attorneys. A 1993 General Accounting Office report revealed that the Office of Professional Responsibility within DOJ sometimes closed cases about allegations of government attorney misconduct without doing basic investigation. The legislation passed by Congress last year concerning government attorney ethics, discussed above, originally also provided for an independent oversight board to monitor federal prosecutors, but those portions of the measure were killed in conference committee.

Federal prosecutors are not the only ones whose misconduct has been highlighted by the media within the last few months. The *Chicago Tribune* ran a five-day series in January about Illinois prosecutions run amok. Entitled "Break rules, be promoted," the series recounted many instances of prosecutorial misconduct, including the stories of three state

prosecutors who "drew scathing rebukes from the Illinois Appellate Court for failing to abide by the rules designed to keep prosecutors honest and trials fair," and who subsequently became judges. *Tribune* writers Ken Armstrong and Maurice Possley described systemic complicity in downplaying misconduct—appellate opinions excoriating the prosecutors' actions often either failed to name the offending lawyer or were unpublished, and the rare referrals to the disciplinary commission did not yield sanctions. The chief justice of the Illinois Supreme Court has since proposed significant changes in how prosecutorial misconduct is addressed. The series is available (for a fee) in the *Tribune* archives on the Internet at <http://www.chicagotribune.com/news>.

The series had an immediate effect on at least one trial—former DuPage County (IL) prosecutors facing trial for framing former death row inmate Rolondo Cruz successfully moved for a delay and a change of venue, claiming the series would prejudice their right to a fair trial. (*Chicago Tribune*, 1/14/99 and 1/15/99.) [DuPage county has been ordered to pay nearly \$700,000 in legal fees for the three former prosecutors and four sheriff's officers charged in the case. (*Sun-Times* 8/1/98).]

### ■ **Prosecutorial Misconduct Often "Harmless Error"**

Not only do prosecutors seldom receive individual punishment for their transgressions, they often do not even see the cases in which they misbehaved sent back by a higher court. A Florida appellate court, condemning improper closing argument by a prosecutor but not reversing the resulting conviction, did note that "[a]t times it seems that certain counsel consider the harmless and fundamental error rules to be a license to violate both the substantive law and the ethical rules that prohibit argument." One judge suggested that videotapes of prohibited arguments be made and shown to new lawyers, and that if after three viewings of the tape the attorney cannot argue within the rules, more serious sanctions be imposed. *Bell v State*, No. 97-01141 (Ct. App. Fla, 2nd Dist., 12/30/98), 64 CrL 292.

Not all improper prosecutorial argument is found to be harmless error. A number of December, 1998 cases from the 2nd Department here in New York reversed on this issue. Among the excesses: arguing the absence of evidence that existed but had been ruled inadmissible; commenting on a defendant's post-arrest silence; inflaming the jury's fears of drugs by arguments that included reference to irrelevant evidence elicited about the location of the nearest school and church, and commenting on the defendant's failure to testify and misstating of the evidence. (See digests pp. 13-14.)

### ■ **Anti-Gratuity Statute No Brake on Prosecutors**

While divided on the reasons, nine of the 12 judges on the 10th Circuit Court of Appeals agreed in January that the federal anti-gratuity statute, 18 USC 201(c)(2), does not prohibit a prosecutor's offer of leniency in a criminal matter to

a potential witness in return for testimony against another person. Finding it “patently absurd” that the government itself could be subject to prosecution under the statute, the court *en banc* overturned a famous but short-lived panel ruling to the contrary. Seven judges focused on the word “whoever” in the statute’s formulation: “Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . shall be fined . . . or imprisoned . . . or both.” “Whoever” does not include a prosecutor making the “traditional” offer of leniency for truthful testimony, the majority found. Two judges concurring relied on statutes regarding immunity, witness relocation and other incentives. The three judges on the original panel dissented, referring to the earlier opinion for a full explanation of their view. *U.S. v Singleton*, \_\_ F3d \_\_, No. 97-3178 (10th Cir. *en banc* 1/8/99), rehearing and overturning 144 F3d 1343 (10th Cir. 1998), 64 CrL 261.

The panel opinion in *Singleton* was vacated shortly after it was issued. However, a federal court in Florida followed the panel’s reasoning last August. *United States v Lowery*, 15 FSupp2d 1348 (So. Dist. Fla. 1998). North Carolina defense attorneys David Rudolf and Gordon Widenhouse noted shortly after the *Singleton* panel decision was vacated that “[d]espite this, all of us should use the reasoning in *Singleton* to challenge the admissibility of purchased testimony, on both statutory and due process grounds. The reliability of such testimony becomes more suspect as the penalties, and the concomitant benefits of ‘cooperating,’ increase. At least some judges seem ready to recognize this reality.” “Court Giveth and Taketh Away,” (column, “In Open Court”), *The Champion* [publication of NACDL], Sept/Oct 98.

### **Car Confiscation Policy Spreads**

Much publicity has accompanied the New York City decision to begin confiscating the vehicles of drivers arrested for driving while intoxicated. Initial reactions were mixed. While the policy allegedly drew “public praise,” the New York Civil Liberties Union immediately began looking into its legality, and editorials from Albany to Genesee County opined that the new policy goes too far. *Times Union* columnist Dan Lynch decried the forfeiture policy because it allows police to act as judge and jury—and called instead for longer sentences for those who are convicted.

Of the first three cars seized, one belonged to a librarian from Staten Island with no arrest record and one to a man from Queens with a long DWI record. While over 20 other states reportedly have forfeiture policies regarding the vehicles of accused drunk drivers, most apply the policy only to those who have at least two prior arrests; no such limitation has been included in the New York City crackdown.

Some other New York jurisdictions have announced similar plans. Two weeks after the New York City policy was announced, Suffolk County began seizing vehicles as well,

where the DWI suspect has a conviction within the last five years. The Nassau County Executive said at the time the New York City policy was announced that he planned to authorize police seizure of vehicles that would be sold if the driver was convicted. Mayor Giuliani was less restrained, saying that in the City, cars might be forfeited even following an acquittal, if the owner was guilty but “there is just not quite enough evidence” to establish proof beyond a reasonable doubt. Even where the drunk driver does not own the car, forfeiture may proceed where, for example, the owner is a passenger at the time of the offense, or can otherwise be shown to have knowingly allowed the driver to operate the vehicle while intoxicated. (*New York Times* 2/23/99, *Times Union* 2/23/99, 2/27/99, 3/2/99; *The Daily News* (Batavia) 2/24/99).

Rensselaer County is beginning to seize vehicles in cases of alleged misdemeanor drug offenses. The policy was inaugurated in a sting entitled “Operation April Fool.” Five vehicles were confiscated; 17 people were arrested. The cars will be held pending final disposition of the cases, as a conviction is required by the county’s law before the vehicles can be permanently forfeited. This law is modeled on neighboring Columbia County’s forfeiture law. The Albany County Legislature is reportedly considering something similar. (*Times Union* 4/3/99.)

### **Judge Bellacosa to Retire**

Court of Appeals Judge Joseph W. Bellacosa will step down from the bench in 2000, before his term expires on Jan. 4, 2001. He has been at the Court in administrative and judicial capacities for a quarter of a century—he began as the Court’s chief clerk—and has been on the high court’s bench for the last 12 years. (*New York Law Journal* 4/1/99.)

### **2nd Circuit Directs District Court to Abstain in State Harassment Case**

A federal district court ruling that found Penal Law 240.30(1) unconstitutional under the 1st Amendment has been reversed by the 2nd Circuit Court of Appeals. The district court has been directed to abstain from interfering with the Orange County prosecution of Andrew Schlagler for aggravated second-degree harassment based on his public placement of stickers saying “Skinheads Kick Ass” and depicting a swastika-wearing white man choking a black man. The district court had found the statute facially invalid. *Schlagler v Phillips*, 985 FSupp 419 (So Dist NY 1997). The law at issue prohibits communication done, with the intent to harass, annoy, threaten or alarm someone, in a manner likely to cause annoyance or alarm. The appellate court said that the abstention doctrine of *Younger v Harris*, 401 US 37 (1971) barred federal intervention in the case. Where neither the New York Court of Appeals or the U.S. Supreme Court have held the statute to be unconstitutional, the prosecution’s invocation of it could not be said to be in bad faith, the 2nd Circuit concluded. *Schlagler v Phillips*, \_\_F3d\_\_ (No. 98-7062, 2nd Cir., 1/28/99) ☞

# Conferences & Seminars

**Sponsor:** New York State Bar Association  
**Theme:** 9th Annual Lawyer Assistance Program Spring Conference  
**Date:** April 30-May 2, 1999  
**Place:** Cooperstown, NY  
**Contact:** Linda McMahon at NYSBA: tel: (800) 255-0569 or (518) 487-5685; fax: (518) 487-5618; fax-on-demand: (800) 828-5472; e-mail: [lap@nysba.org](mailto:lap@nysba.org)

**Sponsor:** New York State Bar Association  
**Theme:** A Primer on Evidence for the Criminal Practitioner  
**Dates & Places:**  
April 30, 1999 Buffalo  
May 21, 1999 New York City  
**Contact:** NYSBA: tel: (800) 582-2452 or in Albany area (518) 463-3724; fax: (518) 487-5618; fax-on-demand: (800) 828-5472; e-mail: [dyork@nysba.org](mailto:dyork@nysba.org); web site: <http://www.nysba.org>

**Sponsor:** New York State Bar Association  
**Theme:** Special Issues in Criminal Practice in New York City  
**Date:** May 7, 1999  
**Place:** New York City  
**Contact:** NYSBA: tel: (800) 582-2452 or in Albany area (518) 463-3724; fax: (518) 487-5618; fax-on-demand: (800) 828-5472; web site: <http://www.nysba.org>

**Sponsor:** New York State Bar Association Criminal Justice Section  
**Theme:** CLE during spring meeting: Ethical Concerns For Criminal Law Practitioners  
**Date:** May 15, 1999  
**Place:** Lake George, NY  
**Contact:** For logistics and registration, Kim McHargue, NYSBA: tel: (518) 487-5630; fax: (518) 487-5564; for substantive info.: Vincent E. Doyle III: tel: (716) 852-5533; fax: (716) 852-5649

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

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Cross to Kill  
**Date:** May 22, 1999  
**Places:** New York City  
**Contact:** Patricia Marcus: (tel) (212) 532-4434; (fax) (212) 532-4668; e-mail [nysacdl@aol.com](mailto:nysacdl@aol.com); web site: <http://www.nysacdl.org>

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

**Sponsor:** National Criminal Defense College  
**Theme:** Trial Practice Institutes 1999  
**Dates:** June 13-26, 1999  
July 18-31, 1999  
**Place:** Macon, GA  
**Contact:** NCDC: c/o Mercer Law School, Macon GA 31207. tel: (912) 746-4151; fax:(912) 743-0160; e-mail [Rosie@ncdc.net](mailto:Rosie@ncdc.net)

**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Juvenile Defender Training/TeamChild  
**Dates:** June 17-19, 1999  
**Place:** Seattle, WA  
**Contact:** NLADA: (202) 452-0620 (Aiyana Bullock [logistics] ext 40; LaJuana Davis [substantive questions] ext. 14) ; e-mail: [training@nlada.org](mailto:training@nlada.org); web site: <http://www.nlada.org>

**Sponsor:** National Network for Women in Prison  
**Theme:** 9th Annual Roundtable for Women in Prison  
**Dates:** June 17-20, 1999  
**Place:** Ann Arbor, MI  
**Contact:** 9th Annual National Roundtable for Women in Prison, c/o Institute for Research on Women and Gender, University of Michigan, 460 West Hall, Ann Arbor, MI 48109-1092. (734) 764-9537

**Sponsor:** Gerry Spence  
**Theme:** 6th Annual Trial Lawyer's College  
**Dates:** July 7-August 6, 1999  
**Place:** Jackson, WY  
**Contact:** For applications: (307) 739-1870

**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](mailto:info@nysda.org); web site: [www.nysda.org](http://www.nysda.org)

**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** CLE  
**Dates and Places:**  
Sep. 18, 1999 New York City (Criminal Trial Skills Seminar)  
Sep. 25, 1999 Rochester  
Oct. 2, 1999 Buffalo  
Oct. 16, 1999 New York City (Weapons for the Firefight)  
Nov. 5, 1999 Poughkeepsie (Mid-Hudson Trainer)  
Dec. 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](mailto: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 ☎

# Immigration Practice Tips

## Defense-Relevant Immigration News

by Manuel D. Vargas\*

### Youthful Offender Adjudication Likely to Equal Conviction for Deportation Purposes

A new precedent decision of the Board of Immigration Appeals includes language strongly indicating that New York youthful offender adjudications will now be considered convictions for immigration law purposes. See *Matter of Roldan-Santoyo*, Int. Dec.#3377 (BIA 3/3/99).

In *Roldan-Santoyo*, the Board found that a noncitizen who had had his guilty plea to the offense of possession of a controlled substance vacated and his case dismissed upon termination of his probation under the criminal laws of the State of Idaho was nevertheless deemed to have a conviction for immigration purposes. The Board held that such a disposition counted as a conviction for immigration purposes under the new federal statutory definition of conviction in the Immigration and Nationality Act, 8 USC 1101(a)(48)(A) (Supp. II 1996).

#### CORRECTION

##### *Immigration Practice Tips*

The Immigration Practice Tips column that appeared in the February *REPORT* contains a misprint.

##### The correct citation is:

*Henderson v INS*, 157 F3d 106 (1998)

Going further than it needed to decide the case at hand, the Board stated: "We find that the language of the statutory definition and its legislative history provide clear direction that this Board and the federal courts are not to look to the various state rehabilitative statutes to determine whether a conviction exists for immigration purposes . . . We therefore interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of

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

the original determination of guilt through a rehabilitative procedure." *Id.* at pp. 12 and 14-15.

Defense attorneys should be aware that precedent decisions of the Board of Immigration Appeals are binding on immigration judges in deportation or removal proceedings throughout the country. Nevertheless, through submission of *amicus curiae* briefs, the New York State Defenders Association is continuing its efforts to persuade the Board that the new definition of conviction does not cover New York youthful offender adjudications. In addition, application of the Board's decision to different state rehabilitative procedures, such as New York youthful offender adjudications, is subject to challenge in the federal courts.

A copy of the *Roldan-Santoyo* decision, as well as a copy of the most recent *amicus* brief submitted by the Association on the immigration consequence of a New York youthful offender adjudication (post-*Roldan* brief filed March 8, 1999 in *Matter of Pereira*), are available from the Backup Center.

### Supreme Court Denies Cert.—Government Sought to Overturn 2nd Circuit Decision Finding AEDPA Restriction Not Retroactive

The U.S. Supreme Court has let stand rulings of two lower federal courts holding that 1996 federal amendments restricting relief from deportation for criminally convicted lawful permanent resident (LPR) noncitizens could not be applied retroactively to LPRs already in deportation proceedings when the new laws were enacted. See Supreme Court orders denying U.S. Attorney General petitions for writ of certiorari in *Reno, et al., v Navas, et al.*, No. 98-996, and *Reno, et al., v. Goncalves*, No. 98-835 (U.S. S.Ct., 3/8/99), 64 CrL 2182, 2183. The Attorney General had asked the Court to overturn a decision of the United States Court of Appeals for the 2nd Circuit, as well as a similar decision of the 1st Circuit. See *Henderson v INS*, 157 F3d 106 (2nd Cir. 1998); *Goncalves v Reno*, 144 F3d 106 (1st Cir. 1998).

In the 2nd Circuit's decision in *Henderson*, which is now binding legal precedent for still pending deportation proceedings in New York, the Court of Appeals held that the federal government was wrong to apply retroactively the restriction on relief in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) to individuals who were in deportation proceedings on April 24, 1996, AEDPA's enactment date. For a more detailed discussion of the 2nd Circuit's decision, see the *Backup Center REPORT* Vol. XIV, #2, at pg. 9.

### Checklist of Defenses in Removal Proceedings Now Available

The NYSDA Criminal Defense Immigration Project has prepared a checklist of removal defense arguments and strategies for lawyers counseling or representing noncitizens in removal proceedings based on criminal charges. For a copy of "Removal Defense Checklist in Criminal Charge Cases," contact the Backup Center. ☺

# Case Digest

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

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

## United States Supreme Court

**Due Process (Notice)** **DUP; 135(20)**

**Search and Seizure (General)** **SEA; 335(42) (65[f])**  
**(Search Warrants [Execution])**

**West Covina, Calif. v Perkins, No. 97-1230, 1/13/99**

Items were seized from the respondents' home during execution of a search warrant issued in a homicide investigation focusing on a former boarder. City police left the respondents a form telling them that the search had occurred and named certain members of the police force that they could contact for further information. A list of property seized was attached. After initial inquiries, during which one of the respondents was told that he needed a court order to regain his property, the respondents filed suit in federal court. The district court found that the procedures satisfied due process. The 9th Circuit Court of Appeals reversed the grant of summary judgment for the city, saying that the police had to give notice of state procedures for return of seized property.

**Holding:** Once property owners have been notified that their property has been seized, they can turn to public sources to find available remedial measures. The 9th Circuit's notice requirement lacks precedential support and conflicts with well-established practice. Judgment reversed.

**Concurrence:** [Thomas, J] The suggestion in *dicta* that procedural due process requires police to take reasonable steps to notify owners that their property has been taken is an unwarranted extension of due process; the 4th Amendment governs criminal matters.

## New York Court of Appeals

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

**People v Thompson, No. 167, 11/18/98**

**Holding:** The defendant's violation of the terms and conditions of his weapons license by transporting weapons in an unlocked container did not constitute a violation under Penal Law 400.00. The statute does not expressly address the manner and circumstances under which a person licensed to carry a target pistol may carry it. The licensing authority has the power to impose conditions and restrictions (*see Matter of O'Connor v Scarpino*, 83 NY2d 919, 921), but violations of

those conditions may not carry a penal sanction. As the legislature has not prescribed penal consequences for violations, available sanctions are confined to the administrative apparatus. *See People v Parker*, 52 NY2d 935 *rvsing on dissent of Birns, J*, 70 AD2d 387, 391-394.

**Religious Freedom (General)**

**RLG; 328(10)**

**People ex rel DeMauro v Gavin, No. 163, 11/20/98**

**Holding:** The defendant's request that the town court charge the jury in a zoning ordinance violation case as to the language of the Free Exercise of Religion clause of the state constitution (NY Const art I §3) was properly refused. County Court erred in reversing. The question of whether state action has unconstitutionally abridged a defendant's religious freedom is a question of law for the court. The individual right of religious worship may be properly balanced against the interest of the state in the law to be enforced. *People v Woodruff*, 26 AD2d 236, 238 *affd no opn* 21 NY2d 848. Order reversed, matter remitted for determination of the facts. CPL 470.25(2)(d).

**Counsel (Conflict of Interest)**

**COU; 95(10) (15)**

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

**Ethics (Defense)**

**ETH; 150(5)**

**People v Longtin, No. 193, 12/17/98**

Defense counsel did not learn until *voir dire* had begun that a prosecution witness, Investigator Lishansky, who obtained fingerprint evidence in this case, had been suspended for alleged evidence tampering. Lishansky was not called to testify, nor was the fingerprint evidence offered at trial. Defense counsel had interviewed as a potential client Investigator Harding, who had served in the same unit as Lishansky and had recently plead guilty to charges of evidence tampering. The Appellate Division upheld the defendant's conviction.

**Holding:** The defendant's motion for a mistrial or dismissal due to untimely production of *Brady* material was properly denied where the prosecutor learned of Lishansky's conduct when defense counsel did. The defendant made no showing that "the conduct of his defense was in fact affected by the operation of the conflict of interest," or that the conflict "operated on" counsel's representation, and so was unable to make out a valid claim of ineffective assistance of counsel. *People v Alicea*, 61 NY2d 23, 31. Harding did not handle any of the evidence in this case, nor was he listed as a witness for either side. When the prosecution withdrew all fingerprint evidence, Harding's general knowledge of fingerprint processing became irrelevant. Harding's only connection to the defendant's case was that he served in the same unit as Lishansky, but neither Lishansky nor the fingerprint evidence obtained by him appeared at trial. Lishansky was not involved with any other evidence. Order affirmed.

**NY Court of Appeals** *continued*

**Homicide (Murder [Defenses])** HMC; 185(40[a])

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

**People v Cox, No. 195, 12/17/98**

The defendant was assaulted and forced out of the house of a woman he was visiting by her boyfriend. After both men had gone, the defendant returned to retrieve property he left behind, this time bringing a handgun. The boyfriend subsequently returned, forced his way into the apartment, argued with his girlfriend, then forced his way into her bedroom, where he found the defendant. A lengthy argument ensued and the defendant fatally shot the boyfriend. The Appellate Division affirmed the defendant's second-degree murder conviction.

**Holding:** The court refused to charge the jury with the defense of justification to terminate a burglary (Penal Law 35.20[3]), which is properly given "if on reasonable view of the evidence, the fact finder might have decided that the defendant's actions were justified." See *People v Padgett*, 60 NY2d 142, 145; CPL 300.10(2). Even assuming that the boyfriend committed a burglary by entering his girlfriend's apartment, the evidence, viewed in a light most favorable to the defendant, did not support the defendant's argument that he reasonably believed deadly force was necessary to prevent the boyfriend from committing an assault. A substantial period of time elapsed between the time of forced entry and the shooting, during which the defendant had ample opportunity to terminate the alleged burglary by means other than deadly force. Order affirmed.

**Dissent:** There was evidence supporting a reasonable belief on behalf of the defendant that deadly force was necessary to end the burglary. See *People v Goetz*, 68 NY2d 96, 111-113.

**Counsel (Waiver)** COU; 95(40)

**People v Smith, No. 196, 12/17/98**

The defendant expressed dissatisfaction with his attorney and requested new assigned counsel numerous times. Defense counsel requested to be relieved of assignment during trial because of an alleged threat made by the defendant. After a dialogue between the trial judge and the defendant, the judge relieved defense counsel. The defendant completed the trial pro se with former counsel serving as legal advisor. The Appellate Division reversed the conviction, finding that the implied waiver of the defendant's right to counsel was ineffective, and ordered a new trial.

**Holding:** A defendant may forego the right to counsel and proceed pro se, provided that the trial court is satisfied that the waiver is unequivocal, voluntary and intelligent. See *People v Slaughter*, 78 NY2d 485. The fact that the defendant indicated that he was not willing or able to represent himself is not a satisfactory substitute for the court conducting a

"searching inquiry" to be reasonably certain that a defendant appreciates the dangers and disadvantages of giving up the fundamental right to counsel as required by *eg People v Sawyer* (57 NY2d 12, 21 rearg dmsd 57 NY2d 776 cert den 459 US 1178). Neither is the "searching inquiry" protocol met by a court reassuring a defendant that a relieved attorney will remain nearby to offer side-bar legal advice. The concept of forfeiture of the right to counsel by egregious conduct (see *People v Gilchrist*, 329 AD2d 306 lv den 91 NY2d 834) was not relied on below. Order affirmed.

**Death Penalty (States[New York])** DEP; 100(155[gg])

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

**Matter of Hynes v Tomei, Nos. 146 and 176, 12/22/98**

Plea provisions under a capital punishment statute that allows defendants to be sentenced to death only after a jury trial were held unconstitutional by both trial courts. The Appellate Division of the Second and Fourth Departments reversed.

**Holding:** The need for a defendant to obtain approval of the court or consent of the prosecutor before entering a guilty plea can not save plea provisions that otherwise violate *United States v Jackson* (390 US 570 [1968]). See *People v Michael A.C.*, 27 NY2d 79. *Jackson* prohibited statutes that "needlessly" encourage guilty pleas, which are not constitutionally protected, by impermissibly burdening constitutional rights. The plea provisions of New York's death penalty statute barring death sentences upon guilty pleas (See CPL 220.10[5][e]; 220.30[3][b][vii]; 220.60[2][a]) cannot be justified by an ostensible purpose such as facilitating pleas, given the availability of alternatives that do not impermissibly burden defendants' constitutional rights. See *Jackson, supra* at 582-583. The bifurcated capital trial does not alleviate the *Jackson* problem because capital defendants awaiting trial and offered a plea are still faced with the choice *Jackson* declared unconstitutional: exercise constitutional rights and risk death, or abandon them and avoid the possibility of death.

The statute's severability clause indicates that the lawmakers do not want the entire statute to fail if any particular provisions are declared unconstitutional. Excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by *Jackson*, so the entire statute need not be invalidated. Order reversed.

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

**Weapons (Possession)** WEA; 385(30)

**People v Salcedo, No. 185, 12/22/98**

Defendant cornered and fatally shot his former girlfriend in a grocery store after her repeated refusal to get into his car so they could talk. The Appellate Division affirmed

## NY Court of Appeals *continued*

the trial court's imposition of consecutive sentences for murder and weapons possession charges.

**Holding:** Concurrent sentences are possible regardless of whether the statutory elements of the offenses overlap, where the crimes are committed through separate and distinct acts, even though part of a single transaction. *People v Ramirez*, 89 NY2d 444, 451; Penal Law 70.25(2). The fact that possession of the weapon here was continuous is distinct for consecutive sentencing purposes from the act of shooting the victim. See *People v Brown*, 80 NY2d 361. Because it was not until the decedent continuously refused the defendant's repeated demands that the defendant used the gun to kill her, it can be found that the subsequently-formed intent while possessing the weapon resulted in the commission of a second crime. See *People v Okafore*, 72 NY2d 81, 83. Order affirmed.

**Accusatory Instruments (Sufficiency)** ACI; 11(15)  
**Narcotics (Sale)** NAR; 265(59)

### **People v Bello, No. 194, 12/22/98**

An undercover narcotics officer approached the defendant and a codefendant, inquiring about purchasing drugs. The defendant asked the officer how much she wanted and whether she was a cop, after which the codefendant sold the officer crack cocaine. The Appellate Division reinstated the dismissed indictment charging the defendant with the sale of drugs, finding that legally sufficient evidence existed to sustain the charges.

**Holding:** The grand jury could have found the evidence sufficient to establish that the defendant's participation in the drug transaction intentionally and directly assisted the codefendant in consummating the sale (see *People v Kaplan*, 76 NY2d 140; Penal Law 20.00) and that the defendant knew the object of the sale was a narcotic drug. The evidence showed that the defendant assisted in an essential portion of the negotiation by screening the potential purchaser for identity and interest, conduct analogous to that of individuals who "steer" buyers to purveyors of narcotics. See *People v Flocker*, 223 AD2d 451. The defendant's conduct and questions were the threads that tied him directly to the drug sale; he was not merely acting as a source of general information as to where drugs could be purchased. See *People v Lopez*, 213 AD2d 255. Order affirmed.

## First Department

**Ethics (Defense)** ETH; 150(5)  
**Misconduct (Defense)** MIS; 250(5)

### **Matter of Stewart, No. M-5876, 1st Dept, 12/3/98**

**Holding:** The Departmental Disciplinary Committee brought proceedings to confirm a Hearing Panel's Findings

of Fact and Conclusion of Law and to publicly censure the respondent. The panel, although finding that the respondent could have been more diligent, found that the alleged neglect of a criminal appeal for five years set out in the fourth charge did not constitute a disciplinary violation. The charge of failing to notify promptly the Appellant Division about her substitution as counsel for another client was sustained as a court rule violation but not a violation of DR 1-102(A)(5) and DR 1-102(A)(8). The respondent's failure to comply promptly with the Committee's request that she provide an answer to her client's complaint constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5), and her failure to return promptly the client's legal file and personal property despite numerous requests from the client and committee was a violation of DR 9-102(C)(4). Findings of Fact and Conclusions of Law confirmed; the respondent should be publicly censured.

**Trial (Public Trial)** TRI; 375(50)  
**Appeals and Writs (Preservation of Error for Review)** APP; 25(63)

### **People v Glover, No. 1281, 1st Dept, 12/03/98**

**Holding:** Since the defendant failed to specifically identify his brother and sister in seeking to limit the court's order closing the courtroom during the testimony of an undercover officer, the defendant's present *Hinton* claim is unpreserved. The court closed the courtroom during the officer's testimony and defense counsel asserted that the defendant's family should be allowed to attend. The trial court stated no family had thus far attended the trial and ruled that it would allow the mother to attend. Defense counsel asked if that meant only the mother could attend and the court said yes. No further objections were made. The request that defendant's "family" be allowed to attend the trial constituted at best a vague request and did not sufficiently raise the issue in order to preserve for review. See *People v Ford*, 235 AD2d 285. It was the defense responsibility to suggest reasonable alternatives to closure. *People v Ramos*, 90 NY2d 490, 504. If the prosecution must prove a threat is posed by those whose admission the defense seeks, the defendant should have to specify exactly which individuals, by name and relationship, for whom admission is sought. Judgment affirmed. (Supreme Ct, New York Co [Hornblass, J])

**Dissent:** [Wallach, J] Defendant's request that his family be allowed to attend the closed testimony was not vague and did not preclude the issue from review.

**Appeals and Writs (Preservation of Error for Review) (Record)** APP; 25(63)(80)

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

### **People v Degondea, No. 1972, 1st Dept, 12/3/98**

The trial court denied the defendant's challenges for cause as to two jurors who the defense claimed had stated

**First Department** *continued*

they could not be fair because of their relationships with police officers. The voir dire questioning of the two jurors at issue was not recorded, but the portion that contained the parties' challenges and the court's rulings was. After the court initially denied the challenges for cause, defense counsel made repeated, unsuccessful requests for the court to question the jurors as to whether they could be fair.

**Holding:** The burden of providing an adequate record to review appellate claims rests on the appealing defendant. *See People v Kinchen*, 60 NY2d 772, 773-774. The defendant here was effectively thwarted from creating an adequate record for appellate review by the court's refusal to question the jurors. *See People v Harrison*, 85 NY2d 794. The case is remanded for a reconstruction hearing. Even though the trial judge is deceased, there was no showing that the prosecutor, both defense counsel, court personnel and the defendant himself would be unavailable to assist in the reconstruction of the record. *See People v Glass*, 43 NY2d 283. Appeal held in abeyance, matter remanded for a reconstruction hearing. (Supreme Ct, New York Co [Leff, J])

**Assault (Evidence) (Serious Physical Injury)** **ASS; 45(25)(60)**

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

**People v Askerneese, No. 2080, 1st Dept, 12/3/98**

**Holding:** The proofs with respect to serious physical injury (Penal Law 10.00[10]) and defendant's intent to cause such injury showed that the complainant received deep puncture wounds in his upper lip that went completely through to the inside of his mouth causing nerve damage to his upper lip; that during the two months following the incident he was unable to work because his face was so disfigured that it was difficult for people to look at him without revulsion; and that he required "reconstructive surgery." The jury could infer intent from the defendant's repeated thrusts of a knife in the direction of the complainant's face. *See People v Steven S.*, 160 AD2d 743, 744 *lv den* 75 NY2d 969. The evidence was sufficient to support the verdict of first-degree assault. Review, in the interest of justice, because the issue was not preserved for review, of defendant's challenge to the court's failure to reiterate the justification instruction in its supplemental charge to the jury is not warranted. (Supreme Ct, New York Co [Davis, J])

**Dissent:** [Lerner, P.J.] The complainant's injuries fell short of the objective standard required. The trial court's failure to note the prosecution's additional burden to disprove justification when the jury requested re-instruction on intentional assault operated to deny defendant a fair trial.

**Accomplices (Accessories)** **ACC; 10(5)**

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

**People v Hollis, No. 2954, 1st Dept, 12/8/98**

**Holding:** The defendant received fair notice of the prosecution's intention to proceed on a theory of accessorial liability, and a defendant may be properly convicted as an accomplice where the indictment accusation is as a principal. *People v Rivera*, 84 NY2d 766. The prosecutor's conversation with a discharged juror prior to summation was not misconduct. *See Code of Professional Responsibility DR 7-108[D]* [22 NYCRR 1200.39(d)]. The jurors are presumed to have followed the court's instruction not to discuss the case, so there is no showing that the prosecutor could have gained any knowledge of the remaining jurors' attitudes toward the case. Judgment affirmed. (Supreme Ct, New York Co [Bell, J])

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

**People v Huang, No. 1050, 1st Dept, 12/8/98**

The defendant sought to suppress intercepted phone conversations. The prosecution admitted failure to comply with the wiretap sealing requirements of CPL 700.65(3).

**Holding:** When the prosecution violates the sealing requirements, it is barred from offering into evidence not only the substance of the intercepted communication, but also testimony about the conversation's very existence (*see People v Melillo*, 112 Misc2d 1004, 1006), as well as any evidence derived therefrom. *People v Winograd*, 68 NY2d 383, 395. Having decided to entertain the defense motion despite its untimeliness, and having found that the prosecution violated CPL 700.65(3), the motion court was bound by the statute's language to suppress both the "contents" of the communication and all "evidence derived therefrom." The defense's later motion to suppress evidence of how phone conversations were used to locate the place where the kidnapped complainant was being held was not a new motion, but an effort to give effect to the court's earlier ruling suppressing the phone conversations. Judgment reversed, motion to suppress all evidence derived from the wiretap granted, new trial ordered. (Supreme Ct, New York Co [Goodman, J on omnibus and suppression motions, Rothwax, J at suppression hearing, trial and sentence])

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

**People v Calise, No. 2202, 1st Dept, 12/8/98**

The trial court found that the prosecution had not demonstrated probable cause for the issuance of a search warrant because the reliability of the undisclosed informant had not been established.

**Holding:** The informant's past track record of providing accurate information, established by a police officer's sworn statement, was one factor showing the informant's requisite reliability. *See People v Johnson*, 66 NY2d 398, 403. The informant's statements to the officer that the informant had participated in several crimes with the defendant constituted

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**First Department** *continued*

declarations against penal interest, another factor indicating reliability. See *People v Hanlon*, 36 NY2d 549, 557-558. Additionally, police corroboration of some of the informant's information (see *People v DiFalco*, 80 NY2d 693, 698), such as the defendant's criminal history relating to the type of crimes described, and the existence of a committed crime corresponding to the informant's description joined the other factors to overwhelmingly establish the informant's reliability. Probable cause existed for issuance of the warrant. Order reversed, matter remanded for further proceedings. (Supreme Ct, Bronx Co [Bamberger, J])

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

**Trial (General)** **TRI; 375(15)**

**People v Hanson, No. 2963, 1st Dept, 12/8/98**

**Holding:** The defendant did not receive ineffective assistance of counsel when counsel consented to a combined suppression hearing and non-jury trial. *People v Yousef*, 236 AD2d 868 *lv den* 90 NY2d 866. Defense counsel's strategy was reasonable under the circumstances as shown by the existing record, which the defendant did not seek to expand by means of a CPL 440 motion. See *People v Rivera*, 71 NY2d 705, 709. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J])

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**Identification (Show-ups) (Suggestive Procedures)** **IDE; 190(40)(50)**

**Guilty Pleas (Withdrawal)** **GYP; 181(65)**

**People v Prekuli, No. 2968, 1st Dept, 12/8/98**

**Holding:** The defendant's suppression motion was properly denied. Contrasting with identification procedures conducted after brief contacts, the trained undercover officer's identification of the defendant at a show up three weeks after two major narcotics purchases followed an ongoing investigation into the defendant's criminal activities, including numerous conversations. The show up was confirmatory in nature and not subject to irreparable misidentification. See *People v Gissendanner*, 48 NY2d 543, 552. The identification by other officers of the defendant's picture from a non-suggestive photo array 20 months later was not rendered suggestive by the fact that the officer who called the others to view the array may have mentioned the defendant by name as the investigation's target. See *People v Hernandez*, 70 NY2d 833. The defendant's motion to withdraw his guilty plea was properly denied, as his claims that he was innocent and unable to understand the English language were not supported by the record where the defendant used the English language without any request for an interpreter. Judgment affirmed. (Supreme Ct, Bronx Co [Globerman, J])

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**Search and Seizure (Warrantless Searches [Abandoned])** **SEA; 335(80)(a)**

**People v Murray, No. 2880, 1st Dept, 12/10/98**

When the defendant saw the police car he became "fidgety" and kept looking at the police, who were circling an area following a radio report of a man with a gun in a schoolyard. The defendant stopped at a small building, entered the glass vestibule and attempted to gain entrance. The door was locked; the defendant left the building, leaving the bag he was carrying in the vestibule. The officer approached him and asked him about his bag and the defendant responded "what bag?" The police searched the bag, found drugs, and arrested the defendant. The court suppressed the evidence.

**Holding:** The defendant's actions herein where he seemingly picked the building at random, did not linger outside the building but walked away, and responded "what bag?" to the officer's inquiry, constituted abandonment of the bag and a waiver of any expectation of privacy with regard to its contents. See *People v Ramires-Portoreal*, 88 NY2d 99, 110. Order reversed, suppression denied, case remanded. (Supreme Ct, Bronx Co [Globerman, J])

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

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

**Instructions to Jury (Missing Witness)** **ISJ; 205(46)**

**People v Tamayo, No. 3029, 1st Dept, 12/10/98**

**Holding:** The defendant was not denied effective assistance of counsel by his trial counsel's failed strategy of deliberately deferring a *Rosario* issue until the end of trial in order to obtain a new trial. See *People v Tamayo* 222 AD2d 321, 322 *lv den* 88 NY2d 886. Once the defendant elicited from the police officer the fact that the civilian buyer stated that he purchased the drugs for \$70, and attempted to use that statement to prove that the defendant was not the seller, the defense opened the door to the admission into evidence of that portion of the hearsay statement wherein the civilian buyer identified defendant as the seller. See *People v King* 197 AD2d 440, *lv den* 83 NY2d 855. No missing witness charge was necessary because there was no evidence that the witness was under the prosecution's control or that the prosecution would be expected to call him as a witness. Order affirmed. (Supreme Ct, New York Co [Cropper, J])

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

**People v Crawford, No. 2249, 1st Dept, 12/15/98**

The defendant's alibi witness was questioned during cross examination about acts of prostitution and aliases that she had used. The witness denied everything pertaining to the rap sheet. The defendant requested an offer of proof that the rap sheet was related to the witness. The prosecution could not show a good faith basis for the questioning. The

**First Department** *continued*

trial judge refused to instruct the jury to disregard the questions to the rap sheet.

**Holding:** The prosecutor’s questioning lacked a good faith basis and had no reasonable basis in fact, therefore it was error for the trial court to have permitted such questions or to refuse to strike it from the jury’s consideration. *See People v Liriano*, 173 AD2d 489. Order reversed, remanded for new trial. (Supreme Ct, New York Co [Tompkins, JJ])

**Dissent:** [Tom, JJ] Any error in the improper questioning and failure to give curative instruction was harmless, however, the sentence was harsh and excessive.

**Search and Seizure (Arrest/  
Scene of the Crime)** **SEA; 335(10)**

**Juries and Jury (Alternate Jurors)** **JRY; 225(5)**

**People v Andino, No. 3063, 1st Dept, 12/15/98**

**Holding:** The arrest of the defendant in the doorway of his apartment based on probable cause did not implicate 4th Amendment protections. The trial court appropriately exercised its discretion in discharging an absent sitting juror and replacing him with an alternate juror, following inquiry into the circumstances surrounding the juror’s absence that warranted a finding that the juror was no longer available for continued service. The sentence was harsh and excessive under the circumstances and should be reduced. *See People v Hastings*, 192 AD2d 476 *lv den* 82 NY2d 754. Order modified, and as modified, affirmed. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

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

**People v Williams, No. 3104, 1st Dept, 12/15/98**

**Holding:** The defendant’s motion to sever counts relating to the three rapes for which he was initially charged was properly denied. The transactions were joinable pursuant to CPL 200.20(2)(c) and there were insufficient grounds for a discretionary severance pursuant to CPL 200.20(3). Any error in denying the defendant’s severance motion would be harmless in view of the overwhelming evidence of guilt with respect to each of the criminal transactions. Order affirmed. (Supreme Ct, New York Co (Uviller, JJ))

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

**People v Davis, No. 3118, 1st Dept, 12/17/98**

**Holding:** The defendant knowingly, intelligently and voluntarily waived his right to be present at sidebar conferences during voir dire. The defendant’s waiver was valid despite the fact that the court placed the waiver on the record

during a sidebar from which the defendant was absent, in light of the reasonable inference to be drawn from the record that the court had advised the defendant of his rights preliminarily, which inference is confirmed by defense counsel’s failure to refute the court’s pronouncement that the defendant had waived his rights. *See People v Diaz*, 666 NYS2d 428, *lv den* 92 NY2d 851. The prosecutor’s improper comment in summation regarding the defendant’s failure to provide the police with information upon his arrest was harmless error. Order affirmed. (Supreme Ct, New York Co [Leff, JJ])

**Article 78 Proceedings (General)** **ART; 41(10)**

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

**Washington v Rudin, No. 3130, 1st Dept, 12/17/98**

**Holding:** The petition under CPLR article 78 was properly dismissed as untimely having been filed 14 months after the petitioner was denied his Freedom of Information Law request. That the petitioner made two additional requests for the information is of no significance. *See Edwards v NYS Employees’ Retirement Sys.*, 190 AD2d 545. Order affirmed. (Supreme Ct, New York Co [Lebedeff, JJ])

**Counsel (Duties)** **COU; 95(20)**

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

**In re Gurwitch, No. 3133N, 1st Dept, 12/17/98**

**Holding:** The attorney was properly sanctioned for failing to appear at a scheduled court hearing after being given reasonable opportunity to explain why he did not call the court or arrange for another attorney to appear. There was no need for a formal hearing on the matter. *See Matter of Marcus v Bamberger*, 180 AD2d 533. Order affirmed. (Criminal Ct, Bronx Co [Tallmer, JJ])

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

**Juries and Jury Trials (Deliberation)  
(Hung Jury)** **JRY; 225(25)(40)**

**People v Nunez, No. 2603, 1st Dept, 12/22/98**

The communications between the deliberating jury and the court reflect an almost immediate difficulty in reaching consensus. After several notes were responded to during the second day of deliberation requesting recharges on the law and indications that they could not reach a unanimous verdict, the jury finally sent out a note that they were hopelessly deadlocked. The court directed them back into deliberations urging them to reach a verdict and suggesting that someone was not acting in accordance with the court’s instruction.

**Holding:** A fair reading of the charge supports the defendant’s contention that the final *Allen* charge was improperly coercive and failed to stress the importance of reaching a verdict without requiring that any juror surrender a consci-

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## First Department *continued*

entious belief. The jurors could only have interpreted the court's instructions as a directive to render a verdict, and it is apparent that the court's comments were improperly directed at the holdout juror. *People v Diaz*, 66 NY2d 744. Order reversed, remanded for new trial. (Supreme Ct, Bronx Co [Tonetti, J])

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### Juries and Jury Trials (Alternate Jurors)

JRY; 225(5)

#### **People v Litwa, No. 56745, 1st Dept, 12/29/98**

**Holding:** Following a reconstruction hearing upon remittal, the lower court concluded that any conversations between the alternate and deliberating jurors were of a "casual, non-specific nature." There was no evidence that the jurors discussed the case. As the hearing court noted, "substantial evidence to overcome the presumption of regularity herein did not exist." *See People v Moore*, 227 AD2d 227. Judgment affirmed, case remanded for disposition of stay. (Supreme Ct, Bronx Co [Eggert, J])

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## Second Department

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### Sentencing (Excessiveness)

SEN; 345(33)

#### **People v Rossakis, No. 96-06894, 2nd Dept, 12/7/98**

The defendant shot and killed her husband in bed. After denying knowledge of the crime, she confessed, and asserted at trial that the shooting was justified because her husband had subjected her to a long course of physical and emotional abuse. She was convicted and sentenced to concurrent terms of 23 years to life for murder and five to 15 years for criminal possession of a weapon.

**Holding:** An alleged threat against the defendant by her husband was not admissible as proof of the defendant's state of mind where it was not asserted that the proffered statement, made by the husband months before the killing, was known to the defendant. *See People v Miller*, 39 NY2d 543. The court did not incorrectly exercise its discretion in determining that the statement lacked probative value as to whether the husband was the aggressor. *See Stokes v People*, 53 NY 164. The defendant's sentence for murder was excessive and is modified from 23 years to life to 15 years to life, as a matter of discretion in the interest of justice. Judgment affirmed as modified. (Supreme Ct, Queens Co [Fisher, J])

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### Confessions (Evidence) (Huntley Hearing)

CNF; 70(30)(33)

### Evidence (Hearsay)

EVI; 155(75)

#### **People v Boyd, No. 96-09768, 2nd Dept, 12/7/98**

The defendant was convicted of criminal possession of stolen property and unauthorized use of a vehicle.

**Holding:** The defendant was deprived of a fair trial by the court's exclusion, after a hearing, of the defendant's testimony concerning the circumstances surrounding his alleged purchase of the subject stolen vehicle. The defendant attempted to testify to a conversation that he had with an individual at the time of the alleged purchase but the court found it to be hearsay. This evidence was not elicited for the purpose of establishing the truth thereof but to establish the defendant's state of mind, and should not have been excluded. *See People v Goodman*, 59 AD2d 896. The evidence was admissible to show that under the circumstances presented, the defendant reasonably believed that he had rightfully purchased the vehicle and was thus not in knowing possession of a stolen vehicle. *See People v Minor*, 69 NY2d 779.

At the defendant's *Huntley* hearing (*see People v Huntley*, 15 NY2d 72), the evidence established that the defendant was not in custody at the time he made the statements. At trial, *Rosario* material was turned over to the defense (*see People v Rosario*, 9 NY2d 286 *cert den* 368 US 866) which suggested that the defendant was arrested at an earlier time. As a new trial is warranted, a new *Huntley* hearing should be held to inquire into the impact of this new evidence on the court's suppression ruling. Judgment reversed. (Supreme Ct, Queens Co [Spires, J])

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### Confessions (Advice of Rights) (Counsel) (Miranda Advice)

CNF; 70(10) (23) (45)

### Counsel (Advice of Right to)

COU; 95(5)

#### **People v Dallio, No. 95-11574, 2nd Dept, 12/14/98**

**Holding:** The defendant's confession was not obtained in violation of his right to counsel where he initially refused to answer directly detectives' questions as to whether he wanted an attorney, then subsequently agreed to speak to them without one. A detective began the tape by stating that the defendant had been advised of his rights and had indicated that he did not want to make a recorded statement without an attorney present. The detective then asked the defendant if the defendant wanted an attorney present for the statement, to which the defendant responded that he would make the statement. The defendant did not unequivocally request the assistance of counsel, and so his statement to the police should not be suppressed. *See People v Glover*, 87 NY2d 838. Judgment affirmed. (Supreme Ct, Queens Co [Finnegan, J])

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### Admissions (Evidence) (General)

ADM; 15(15) (17)

### Misconduct (Prosecution)

MIS; 250(15)

#### **People v Anderson, Nos. 96-06375; 98-03210, 2nd Dept, 12/14/98**

**Second Department** *continued*

After arrest, the defendant gave the police a statement that was partly inculpatory and partly exculpatory.

**Holding:** The court erred in allowing the prosecutor to block the defendant’s attempt to bring out the exculpatory portion of his statement after the prosecution had brought out only the inculpatory portion. *See People v Dlugash*, 41 NY2d 725. Because the prosecutor then misled the jury in summation by arguing the absence of evidence he knew existed, reversal was warranted and a new trial was ordered. *See People v Whalen*, 59 NY2d 273. Judgment reversed. (Supreme Ct, Queens Co [Thomas, JJ])

**Arrest (Probable Cause) ARR; 35(35)**  
**Misconduct (Prosecution) MIS; 250(15)**

**People v Brown, No. 96-08871, 2nd Dept, 12/14/98**

**Holding:** The police lacked probable cause to arrest the defendant where the basis for the arrest was hearsay information from an anonymous caller. Although hearsay information may provide probable cause for an arrest (*see People v Parris*, 83 NY2d 342, 345), in the present case the police could not demonstrate a basis of knowledge or establish the reliability of the anonymous caller. *See People v DiFalco*, 80 NY2d 693. Information that a victim observed one of the robbers in a gray car days after the robbery was also insufficient to establish probable cause where the victim failed to supply the license plate number of the car and did not give a description of the person she had seen in the gray car. The lineup identification was the fruit of an illegal arrest and must be suppressed. The defendant was entitled to a new trial and a hearing to determine whether an independent source existed for the victims’ ability to identify him. *See People v Dodt*, 61 NY2d 408, 417-418.

The defendant is also entitled to a new trial because the prosecutor’s comment during summation on the defendant’s failure to testify, as well as misstatements concerning the evidence and references made to matters not in evidence, denied the defendant a fair trial. *See People v Whalen*, 59 NY2d 273. Judgment reversed. (Supreme Ct, Queens Co [Rios, JJ])

**Harmless and Reversible Error HRE; 183.5(30)**  
**(Reversible Error)**  
**Misconduct (Prosecution) MIS; 250(15)**

**People v Mejia, Nos. 97-08964, 97-09106, 2nd Dept, 12/14/98**

**Holding:** The prosecutor’s violation of the rule that a defendant’s post-arrest silence is inadmissible for impeachment purposes in the absence of unusual circumstances, which were not present in the instant case, prejudiced the defendants. *See People v Conyers*, 52 NY2d 454. The prosecutor was improperly allowed to ask the defendant whether

she had reiterated her exculpatory story to the police after she was arrested and was also improperly allowed to recall the arresting officer to testify as to that fact. *See People v Dyer*, 201 AD2d 498. As it is possible for the jury to have construed the defendant’s silence as an admission of guilt, there was a substantial risk that the defendants, who did not testify at trial, were prejudiced by the prosecutor’s questions. *See People v De George*, 73 NY2d 614, 618-619. The error cannot be deemed harmless since the evidence of the defendants’ guilt is less than overwhelming. *See People v Crimmins*, 36 NY2d 230, 241-242. Judgments reversed. (County Ct, Westchester Co [Dillon, JJ])

**Harmless and Reversible Error HRE; 183.5(30)**  
**(Reversible Error)**  
**Misconduct (Prosecution) MIS; 250(15)**

**People v Davis, No. 96-09986, 2nd Dept, 12/28/98**

The defendant was tried and convicted based upon a single drug sale to an undercover police officer for which she apparently earned five dollars.

**Holding:** During his opening statement and summation, the prosecutor improperly appealed to the jury’s fears and passions with regard to drug dealing. This improper tactic was exacerbated when the prosecutor suggested during summation, without any evidentiary basis, that the defendant was a major drug dealer who was “paid handsomely” for her crimes. *See People v Hill*, 193 AD2d 619. Such appeals improperly deflect the jurors’ attention from the issues of fact on the question of guilt or innocence to achieving vengeance and protection of the community. *See People v Kurtz*, 51 NY2d 380 *cert den* 451 US 911.

The prosecutor also repeatedly elicited irrelevant and prejudicial testimony concerning the neighborhood in which the sale occurred, including *inter alia*, the location of the nearest church and school. This testimony was emphasized during summation, served no legitimate purpose in advancing the prosecution of the case, and diverted the jury from objective deliberation upon the guilt or innocence of the defendant. *See People v Bowie*, 200 AD2d 511. The errors were not harmless in light of, *inter alia*, certain inconsistencies in the testimony of the police officers involved. *See People v Crimmins*, 36 NY2d 230. Judgment reversed. (Supreme Ct, Richmond Co [Leone, JJ])

**Trial (Public Trial) TRI; 375(50)**  
**People v Gomez, No. 95-02693, 2nd Dept, 12/28/98**

**Holding:** Under the circumstances of this case, the court erred by excluding two non-disruptive children from the courtroom, one of whom was apparently the defendant’s, only because it was the court’s policy to exclude children. This exclusion denied the defendant his right to a public trial. *See People v Miller*, 224 AD2d 639. Judgment

## Second Department *continued*

reversed and a new trial ordered. (Supreme Ct, Queens Co [Sampson, J])

**Homicide (Manslaughter [Defenses])** HMC; 185(30[g])  
**Self-Incrimination (Waiver)** SLF; 340(25)  
**Witnesses (Experts)** WIT; 390(20)

**People v Kruglik, No. 96-09145, 2nd Dept,  
12/28/98**

**Holding:** Upon the defendant's service of notice pursuant to CPL 250.10 of his intention to use psychiatric evidence "about how some people behave as if on 'automatic pilot' under extremely stressful situations," the court properly ordered him to submit to a psychiatric examination. Although the expert that provided testimony did not examine the defendant, notice pursuant to CPL 250.10 was required and the court thereupon had the authority to direct a psychiatric examination. *See People v Berk*, 88 NY2d 257 *cert den* \_\_US\_\_, 117 SCt 160. The defendant waived his 5th Amendment right against self-incrimination when he placed his mental state in issue by offering expert psychiatric evidence in support of his justification defense. *See People v Cruicksank*, 105 AD2d 325, 331 *affd sub nom People v Dawn Maria C.*, 67 NY2d 625.

The court properly excluded expert testimony regarding "steroid rage," a behavioral state of hostility and rage resulting from prolonged use of steroids, where there was no evidence that the decedent, from whom the defendant was allegedly defending himself, was under the influence of steroids at the time of the incident. Absent such information, there was no foundation upon which the expert could base his opinion. *See Cassano v Hagstrom*, 5 NY2d 643, 646. Judgment affirmed. (Supreme Ct, Kings Co [Demarest, JJ])

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

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

**People v Sierra, Nos. 97-00113; 97-00114,  
2nd Dept, 12/28/98**

**Holding:** The defendant's contention that his plea of guilty to second-degree murder was not voluntary because the court failed to inquire into a possible intoxication defense was unpreserved for appellate review. The defendant did not move to withdraw his plea or to vacate the judgment on this ground. *See People v Lopez*, 71 NY2d 662. The defendant's recitation of the facts of the crime during the plea proceeding established that his actions were intentional. Further, neither he nor his attorney suggested that he was unable to form the requisite criminal intent due to intoxication. The "rare case" exception to the preservation doctrine is therefore inapplicable. *See People v Ryan*, 243 AD2d 869. The defendant's statements to the police and in the presentence report do not cast

significant doubt on his guilt or the voluntariness of his plea. *See People v Toxey*, 86 NY2d 725. The defendant's recitation of the facts of the crime did not warrant an inquiry by the court as to a possible justification defense. Accordingly, the exception to the preservation rule does not apply. *See People v Bennett*, 223 AD2d 431.

When the defendant denied he intended to kill the decedent, the court made the requisite, obligatory inquiry to determine if the defendant knowingly and voluntarily entered a guilty plea with full understanding of the consequences, even though the defendant was only willing to admit to an intent to inflict serious physical injury. Judgments affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

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

**People v Garrett, Nos. 97-07540, 97-07541,  
2nd Dept, 12/28/98**

The Kings County Society for the Prevention of Cruelty to Children (SPCC) received an anonymous complaint that there were two children screaming in a Brooklyn apartment. The next evening, SPCC agents went to the apartment to check the welfare of the children, but were refused entry. The agents called the police, who were refused entry without a warrant. The police called the Emergency Services Unit, who threatened to use force if the woman at the door did not open it. The ensuing search revealed numerous firearms and ammunition behind a false wall in a closet. At the suppression hearing, no one testified that anyone heard any children screaming that night.

**Holding:** The warrantless search of the defendants' apartment was not justified by the emergency exception to the warrant requirement. *See People v Mitchell*, 39 NY2d 173, 177-178 *cert den* 426 US 953. The prosecution failed to satisfy the first prong of the *Mitchell* test, that the police must have reasonable grounds to believe that there is an emergency at hand and that there is an immediate need for their assistance for the protection of life or property. The police entry and ensuing search were triggered by ambiguous and uncorroborated information relayed by the members of a volunteer organization, who were responding to a day-old anonymous complaint. The minimal police investigation—some neighbors were interviewed and said that they had seen two children enter the apartment on prior occasions—failed to establish that any children were in imminent danger. Judgments reversed and indictments dismissed. (Supreme Ct, Kings Co [Juviler, JJ])

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

**People v Blackford, No. 96-04898,  
2nd Dept, 12/31/98**

**Holding:** The court properly denied the defendant's *Batson* motion since he failed to make a *prima facie* showing

**Second Department** *continued*

of discrimination. See *Batson v Kentucky*, 476 US 79 (1986). The defendant failed to articulate and develop the necessary factual and legal grounds during the colloquy in which the objection was raised and discussed. See *People v Childress*, 81 NY2d 263. Defense counsel's bare assertion that the prosecutor exercised a peremptory challenge against the only minority venireperson, without more, failed to establish a pattern of purposeful exclusion sufficient to raise an inference of racial discrimination. See *People v Bolling*, 79 NY2d 317. Defense counsel's argument that the number of African-Americans in Dutchess County is so small so as to make statistical evidence inherently unreliable did not lessen his burden. Judgment affirmed. (County Ct, Dutchess Co [Dolan, J])

**Confessions (Interrogation)** **CNF; 70(42)(50)**  
**(Voluntariness)**

**People v Kourani, No. 97-09800,**  
**2nd Dept, 12/31/98**

The defendant voluntarily went to the police precinct with two detectives to assist in the investigation of the robbery of the defendant's brother and his family. After almost eight hours of questioning at the police station, the defendant was read his 5th Amendment rights, in Spanish. The defendant, who could scarcely speak and could not read English, then confessed to participating in the robbery. The confession was written in English and contained no acknowledgment by the defendant that the contents were read to him.

**Holding:** The court found that the defendant, who agreed to go to the station to assist in the investigation, was not in custody at the time he made his statement to the police, and that the statement was made knowingly and voluntarily after the defendant was read his 5th Amendment rights. Based upon these findings, the court properly refused to suppress the statement made to the police. See *People v Thomas*, 223 AD2d 612.

The court properly denied the defendant's objection to the prosecutor's exercise of a peremptory challenge. The defendant failed to demonstrate a *prima facie* case that the prosecution exercised its challenges with a discriminatory purpose. See *Batson v Kentucky*, 476 US 79, 96 (1986). The defendant also failed to object to the prosecution's cross-examination of his alibi witnesses regarding their failure to come forward with information favorable to the defendant. See *People v Miller*, 89 NY2d 1077. Judgment affirmed. (Supreme Ct, Queens Co [Lewis, J])

**Dissent:** [Friedmann, J] The defendant's statement was involuntarily made and should have been suppressed. Several additional trial errors contributed to the defendant's conviction and provided independent grounds for reversal.

**Third Department**

**Impeachment** **(General) IMP; 192(15)**  
**Informants** **(General) INF; 197(20)**

**People v Coleman, No. 10098, 3rd Dept, 12/3/98**

The defendant appealed his conviction of selling cocaine to undercover officers on three occasions, contending the court erred in refusing to allow him to examine a witness to two of the sales as a hostile witness, to identify that witness as a confidential informant, or to impeach the witness' credibility with his prior criminal record.

**Holding:** The defense has shown no persuasive authority that a defendant is entitled to ask leading questions of or impeach a confidential informant called as their own witness merely because the informant's testimony does not further the defense theory of the case. It was apparent to the jury that the witness was a confidential informant, and the testimony was not evasive, obstructionist, or openly hostile. Finally, the identity of the defendant was not at issue, and the informant acted only as a passive observer to the drug transactions after introducing the parties. The defendant presented no plausible theory of innocence to which the witness could have testified. Judgment affirmed. (County Ct, Schoharie Co [Bartlett III, J])

**Sentencing (Appellate Review)** **SEN; 345(8)(33)(55)**  
**(Excessiveness) (Modification)**

**People v Meredith, Nos. 10398, 10399,**  
**3rd Dept, 12/3/98**

The defendants were sentenced to intermittent sentences but the court did not indicate specific dates and times, stating only that they would be released for work or other acceptable reasons. Before beginning the service of her sentence, defendant Meredith showed the court proof of employment whereupon the court directed the sentence to be served on three-day weekends. Defendant Loring, unemployed at the time service of the sentence was to begin, was ordered to begin serving his sentence the same first three-day weekend as Meredith. Loring was thereafter released to search for work. Later, when Loring was still unemployed, the court ordered him to serve his time on five-day weekends. The defendants appeal their sentences as harsh and excessive and assert that the modification of Loring's sentence was improper.

**Holding:** The legality of a sentence survives a waiver of appeal. Penal Law 85.00(4)(a)(iii) mandates that a court must set forth the specific days and times on which an intermittent sentence will be served. Since this was not done prior to the commencement date, Loring's sentence is invalid. Although several factors support a more lenient sentence for Meredith, the record shows the court considered all relevant factors and did not abuse its discretion. Judgment in 10398 affirmed, judgment in 10399 reversed and remitted for re-sentencing (County Ct, Columbia Co [Leaman, J])

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## Third Department *continued*

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

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

**Search and Seizure (Appellate Review)  
(Motions to Suppress)**      **SEA; 335 (5)(45)**

**People v Wright, Nos. 10417, 77649, 3rd Dept,  
12/3/98**

The defendant moved for a *Mapp* hearing supported only by counsel's affidavit contending lack of probable cause and unlawful search, without the sworn allegations of fact required by CPL 710.60 (1) and (2). The motion and subsequent applications were denied. Counsel admitted responsibility for the defective motion papers, saying she did not possess the necessary facts because she had not met with the defendant. On direct and collateral appeal, the defendant alleged ineffective assistance of counsel.

**Holding:** Although a hearing to determine the legality of the arrest may have been warranted, the refusal to grant a hearing was not error, given the defects in pleading. Review of the denials were waived by the defendant's guilty plea, by which the right to appeal on procedural matters, as opposed to their underlying constitutional claims, are forfeited [*People v Taylor*, 65 NY2d 1], as was the right to review based on ineffective assistance of counsel. In any event, the cocaine was discovered hidden in the patrol car, making a successful challenge unlikely despite any irregularity in the arrest. The denial of the defendant's CPL 440.10 motion was likewise not error. Notwithstanding the pleading defects, the defendant received meaningful representation of counsel demonstrated by the advantageous plea agreement and lenient sentence. Judgment and order affirmed. (County Ct, Rensselaer Co [Sheridan, J])

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

**Harassment (Elements)**      **HRS; 184(10)**

**People v Taylor, No. 10579, 3rd Dept, 12/3/98**

The defendant moved to dismiss an indictment for several counts of criminal contempt and aggravated harassment, claiming it was legally insufficient. The court held that one count, that of first-degree contempt, was insufficient, because the indictment failed to allege that the defendant's telephone calls were made "with no purpose of legitimate communication," PL 215.51[b][iv]. The prosecution appealed.

**Holding:** Because the violated statute was specifically cited, all its elements were incorporated by reference into the indictment. *People v Cohen*, 52 NY2d 584, 586. The defendant's contention that the excluded element was an exception within the defining statute, mandating an allegation that the crime does not fall within that exception (*People v*

*Kohut*, 30 NY2d 183, 187) is not applicable in this instance where the court found that the determination of whether the calls were made for a legitimate purpose is, rather, a proviso which can be used as a defense. Therefore, there was no error in the indictment. Order modified, reinstating count one, and as modified, affirmed. (County Ct, Essex Co [Halloran, J])

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

**People v Gipson, No. 10103, 3rd Dept, 12/10/98**

The defendant's sentence of five years probation was revoked and he was sentenced to prison upon failing to submit to a substance abuse evaluation. The defendant claimed the prosecution failed to prove his violation by a preponderance of the evidence.

**Holding:** The defendant's admission that he did not report for the required evaluation, and the probation officer's testimony that the defendant repeatedly failed to report, provide ample evidence that the terms of probation were violated. The defendant's claim that he was unable to afford the \$30 fee at any time between Dec. 1995 and May 1997, even after finding employment, is too frivolous to merit discussion. Nor was the sentence harsh or excessive. Judgment affirmed. (County Ct, Rensselaer Co [McGrath, J])

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**Search and Seizure  
(Warrantless Searches  
[Abandoned Objects])**      **SEA; 335(80 [a])**

**People v Vega, No. 10466, 3rd Dept, 12/10/98**

The injured defendant, using a pay phone after his car skidded off the road, was invited by a police officer to sit in the police car to await an ambulance. He asked the officer to retrieve a duffel bag he had left by the pay phone, but was told they would do so after seeing to his injuries. A deputy sheriff arrived and, based on his belief the defendant was under the influence of drugs and the defendant's refusal to take a field test, arrested him for driving while ability impaired. When asked if the duffel bag was his and if he objected to a search, the defendant did not respond. The search revealed a loaded pistol and 14 packets of heroin, which the defendant unsuccessfully moved to suppress.

**Holding:** We find merit in the defendant's contention that the search of the bag was illegal and its contents should have been suppressed. The prosecution did not prove the defendant abandoned the bag. He had previously requested that the bag be brought to him, and when questioned later he was being treated for injuries and was upset. His failure to explicitly assert ownership at that time was not necessarily a knowing, voluntary relinquishment of his expectation of privacy. The search of the bag after the defendant was placed in the ambulance some 25 yards away cannot reasonably have been prompted by any concern that the defendant

**Third Department** *continued*

would attempt to destroy evidence or grab a weapon. Nor is the prosecution's claim that the doctrine of "inevitable discovery" applicable here, since that rule applies only to secondary evidence, not to the items uncovered in an illegal search. Judgment reversed, motion to suppress granted, and indictment dismissed. (County Ct, Sullivan Co [Ledina, J])

**Conflict of Interest (General)** COI; 75(10)  
**Counsel (Conflict of Interest)** COU; 95(10)

**People v Jenkins, No. 74361, 3rd Dept, 12/10/98**

The defendant was represented by a public defender whose office had previously represented a prosecution witness. The attorney examined the witness's file and found confidential information relating to substance abuse treatment. He advised the court of the conflict, stating that the conflict would preclude him from using the information to impeach the witness. The court initially held that Mental Hygiene Law 23.05 precluded the use of such information for impeachment purposes, however, the witness waived her right to confidentiality on the issue. There was no further assertion of a conflict of interest by the defendant or counsel.

**Holding:** The defendant was not denied effective assistance of counsel. The sole basis for the asserted conflict was resolved in the defendant's favor, allowing impeachment that would otherwise have been precluded. The record does not support any claims of prejudice that affected the outcome at trial. The imposition of consecutive sentences was appropriate where the crimes were separate and distinct and involved different victims and the defendant's claim that the crimes were induced by drug abuse do not justify reducing the sentence since that factor was noted by the sentencing court. Judgment affirmed. (County Ct, Schenectady Co [Reilly Jr., J])

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

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

**People v Burdo, No. 75440, 3rd Dept, 12/10/98**

**Holding:** The defendant rightfully objected to audio-visual coverage of his arraignment, which was allowed despite defense objections that the small population of Clinton County made it likely that prospective jurors would be exposed to material prejudicial to the defendant. Judiciary Law 218(5)(a), (b) and (7)(h) and 22 NYCRR 131.8 prohibit audio-visual coverage of arraignments without the express consent of all parties. Since there is no evidence that the defendant sought review of the order, or that the jury pool was in fact tainted, the violation does not mandate reversal. However, the court's error in denying certain challenges for cause in jury selection does require a new trial. Two jurors failed to

state unequivocally that they could render a verdict solely on the evidence despite their admissions of bias and prejudice. See *People v Walton*, 220 AD2d 286. Judgment reversed and new trial ordered. (County Ct, Clinton Co [McGill, J])

**Narcotics (Marijuana)(Sale)** NAR; 265(40)(59)

**People v Leonidow, No. 10280, 3rd Dept, 12/24/98**

The defendant and his companion were arrested after a witness saw them exiting a hair salon in the late evening. Police followed their footprints in the snow, arresting both for burglary. The defendant was also charged with criminal sale of marijuana after a search. In a jury trial he was convicted and sentenced as a second felony offender.

**Holding:** Although it is unclear whether the defendant disputes the verdict as legally insufficient or as against the weight of the evidence, both standards are met. The evidence that the defendant shared a joint with his friend was sufficient to establish sale. Penal Law 220.00[1]. The court's order that restitution must be paid to the hair salon was supported by evidence in the presentence report and victim impact statement as to the damage incurred, and was not in error. Judgment affirmed. (County Ct, Otsego Co [Coccoma, J])

**Accusatory Instruments (Amendment)** ACI; 11(5)

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

**People v Green, No. 10331, 3rd Dept, 12/24/98**

Two counts of a multi-count indictment charged the defendant with course of sexual conduct against a child under Penal Law 130.80 alleging overt acts in 1993 and 1994 respectively. The defendant moved to dismiss those counts because the section charged did not become effective until Aug. 1, 1996 and was not retroactive. The prosecution's cross-motion to amend the counts to sexual abuse was granted by the court.

**Holding:** CPL 220.70 does not allow such an amendment, because the indictment would be substantively changed to charge new counts which the grand jury did not consider. See *People v Perez*, 83 NY2d 269, 274. The sexual abuse convictions must be vacated. However, it was not error to permit the amendment as to the dates alleged in the sodomy counts. The prosecution did not act in bad faith or without due diligence in ascertaining the dates of those offenses under the circumstances. See *People v Fish*, 240 AD2d 866 *lv den* 90 NY2d 1011. Finally, the preclusion of the defense's proffered expert witness, a psychologist who was to testify about the defendant's suggestibility and propensity to offer a false confession, was not an abuse of discretion. Judgment modified and reversed in part. (County Ct, Sullivan Co [La Buda, J])

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## Third Department *continued*

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**Alibi (General)** **ALI; 20 (22)**

**Witnesses(Defendant as Witness)** **WIT; 390(12)**

**People v Peace, No. 10051, 3rd Dept, 12/30/98**

At his trial for renting a hotel room with a stolen credit card, the defendant testified as to his activities on or about the date in question. The court granted the prosecution's motion to strike that testimony because the defendant had not filed and served a notice of alibi in compliance with CPL 250.20.

**Holding:** The court's ruling was reversible error. While a trial court may properly exclude the testimony of alibi witnesses where a defendant has failed to provide advance notice of the identity of such witnesses, these provisions apply only to witnesses and not to the defendant. Defendants have the absolute right to testify on their own behalf in their own defense. CPL 60.15(2), *People v Rakiec*, 289 NY 306. Judgment reversed and remitted. (County Ct, Montgomery Co [Sise, J])

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**Witnesses(Immunity)** **WIT;390(25)**

**People v McKenna, No. 10769, 3rd Dept, 12/30/98**

The defendants were police officers accused of brutality after arresting Jermaine Henderson while off-duty. They were indicted on assault charges after a Special Prosecutor presented evidence to a grand jury. They subsequently testified at the presentation of Henderson's case before a different grand jury without a waiver of immunity. The defendants moved to dismiss their indictment claiming transactional immunity because of that testimony. The court dismissed the indictment and the special prosecutor appealed.

**Holding:** The court erred in finding that the defendants' testimony would tend toward a conviction because it was probative as to their motive to later brutalize Henderson. Motive is not an element of either crime charged in the indictment. See *People v Ryan*, 240 AD2d 775, 776 *lv den* 90 NY2d 910. Moreover, the specific testimony cited is not probative of motive, or incriminatory (See *People v Weisman*, 231 AD2d 131, 135 *lv den* 90 NY2d 1015) but rather exculpatory. The bar fight and the alleged assault were distinct events, therefore the defendants' testimony as to the fight does not encompass the same matter for which they were indicted. Order reversed, motion denied, and indictment reinstated. (County Ct, Albany Co [Rosen, J])

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

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

**People v Tucker, No. 77384, 3rd Dept, 12/30/98**

The defendant asserts on appeal that the prosecution failed to offer a race-neutral reason to strike prospective jurors in response to a *Batson* challenge which showed that the prosecutor had used four peremptory challenges against African-American prospective jurors, leaving only one as an alternate juror. The defendant also argues that his right to be present at material stages of trial was violated when a sworn juror was discharged in his absence.

**Holding:** Once a defendant alleges sufficient facts to infer a discriminatory purpose, the burden shifts to the prosecution to offer a neutral explanation for excluding the jurors, at which point the court must decide whether those reasons are valid or a mere pretext. In the instant case, the prosecution offered an explanation that was race-neutral, but the record does not reflect that the court considered pretext (*People v Payne*, 88 NY2d 172, 181), nor does it reflect the basis of its ruling. The matter would be remitted for a proper step-three determination on this basis but for the finding that the defendant's second argument warrants reversal. The defendant's right to be present at the juror disqualification hearing was clearly violated requiring a new trial. CPL 260.20; *People v Antommarchi*, 80 NY2d 247. Judgment reversed and remitted for a new trial. (County Ct, Albany Co [Rosen, J])

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**Admissions(Co-Defendants)** **ADM; 15(5)(30)**  
**(Silence)**

**People v Campney, No. 10152, 3rd Dept, 12/31/98**

The defendant's brother gave a detailed statement to the police inculcating both of them in a burglary. When asked to sign the written statement, his brother spoke to the defendant in private, after which the defendant told his brother to sign the statement since he had already told them everything. At trial the brother's statement was introduced over objection as an adoptive admission.

**Holding:** An inculpatory statement by another, if not denied, may be used as an admission of guilt if fully known and understood by a defendant (*People v Lourido*, 70 NY2d 428). The court and jury herein could reasonably infer the defendant had read the statement. The fact that the defendant and his brother were left alone for 10-15 minutes, that the defendant was holding the written statement when the police returned, combined with the defendant's comment, all support such an inference. Judgment affirmed. (County Ct, Warren Co [Moynihan Jr., J])

**Dissent:** (Mikoll, J) The court should have made a threshold determination of admissibility. Its failure to do so, leaving the matter entirely to the jury, is error requiring reversal. There is insufficient proof that the defendant knew and understood that the statement implicated him and that he had the opportunity to reply. Nor is there an explicit or implicit acknowledgment of the statement's truth, which would be incongruous with his refusal to answer questions, and in violation of his right to counsel, which had indelibly attached. See *People v West*, 81 NY2d 370, 373. ☞

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