



Public Defense Backup Center **REPORT**

VOLUME XIV NUMBER 9

November 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

League Announces "Balancing Justice" Project

The League of Women Voters (LWV) of New York State has announced a major new exercise in citizen democracy focusing on the criminal justice system. "Balancing Justice in New York State" is a non-partisan, educational project that will involve "weighing the crime and the punishment, the severity of the sentence and the cost and effectiveness of the program," according to Joyce Hickling, LWV Special Projects Director. NYSDA, which worked with the state LWV and several chapters in holding fact-finding hearings on public defense in the state of New York a year ago (see e.g. *Backup Center REPORT*, Vol. XIII, Nos. 8, 9, and 10), has agreed to be a project co-sponsor.

"Balancing Justice" discussion groups in communities around the state will convene this winter. A fact book on criminal justice in New York will serve as a starting point for participants. The booklet was prepared by Scott Christianson, senior editor of *Empire State Report* and author of the award-winning book, *With Liberty for Some: 500 Years of Imprisonment in America* (see *Backup Center REPORT*, Vol. XIV, No. 4).

Groups consisting of citizens, justice professionals, and legislators will hold three two-hour discussions led by trained facilitators. After reviewing the present system and various correctional approaches, participants will prioritize their goals for improving the system and focus on solutions.

Participants will then be invited to attend a community-wide Action Forum to interact with people from other groups in their area. This forum will provide an opportunity to collaborate on new or existing initiatives. Results from around the state will be compiled and published in a report to the state legislature next spring.

For more information, contact project coordinator Rob Marchiony at (518)465-4162 or e-mail justice@lwvny.org.

Nowak Appointed to Commission on Drugs and Courts

Association President Edward J. Nowak, Monroe County Public Defender, has been named to the Unified

Court System's Commission on Drugs and the Courts. The Commission reflects Chief Judge Judith S. Kaye's strong interest in an evolving role for the courts with regard to substance abuse. Patterned on The Jury Project, which Judge Kaye created six years ago, the Commission may undertake tasks such as documenting the cost, numbers and types of drug cases in the court system, studying and evaluating current drug treatment courts and other New York judicial system responses to the drug problem, and identifying problems and potential solutions, including innovative approaches taken outside New York State.

Capital Fee Reduction Survives First Challenge

Plaintiffs challenging a reduction in fees paid to assigned counsel in capital cases lost in the Supreme Court on Oct. 29. New York State Association of Criminal Defense Lawyers (NYSACDL) and four individual attorneys had asserted that the Court of Appeals violated key provisions of Judiciary Law 35-B when it reduced the fees effective Jan. 1, 1999. (See *Public Defense Backup Center REPORT*, Vol. XIV, #1 and #5.) Justice Daniel Lamont rejected the challenge. *Matter of New York State Association of Criminal Defense Lawyers v Kaye*, QDS: 04311160 (Supreme Ct, Albany Co, 10/29/99), *NYLJ* 11/3/99.

Justice Lamont did find, in a lengthy discussion, that the plaintiffs had standing to raise the issue of whether the fee reduction violated the statutory requirement that the capital fee schedule "shall be adequate to ensure that qualified attorneys are available to represent" eligible capital defendants. He also acknowledged the incongruity of a lower court reviewing the administrative decision of the state's high court, but announced himself "up to the task."

Contents

- 1 **Defender News**
- 2 **Conferences & Seminars**
- 3 **Job Opportunities**
- 4 **Immigration Practice Tips**
- 5 **Defense Automation Tips**
- 6 **Case Digest:**
- 6 **NY Court of Appeals**
- 6 **First Department**
- 8 **Second Department**
- 9 **Fourth Department**

With these preliminary matters decided, he found that the Court of Appeals did not violate the dictates of the death penalty statute that require it to approve (not promulgate) a fee schedule for each Appellate Division Department. He described as "arduous and somewhat contentious" the process followed by the statutorily created departmental Screening Panels leading up to the Court of Appeals' administrative decision. (A fuller explication of that process can be found in the comment on capital fees submitted by NYSDA, available from the Backup Center.) However, he did not find the ultimate decision arbitrary or irrational, nor made in violation of lawful procedure, nor affected by an error of law.

The plaintiffs are represented on a pro bono basis by Jay Cohen and Julia Tarver of Paul, Weiss, Rifkind, Wharton & Garrison.

Applications for BJA Grants Due Dec. 13

Innovative strategies to address emerging or chronic criminal justice issues are being solicited from state, local, and tribal governmental entities by the federal Bureau of

Justice Assistance (BJA). Non-government entities may collaborate with a governmental entity applying for a grant under this solicitation. Indigent defense is expressly included in the solicitation. One or more awards of no more than \$150,000 will be made in each of nine topic categories: 1) Alcohol and Crime; 2) Crime Prevention Among the Elderly; 3) Improving Access to Services in Rural and Tribal Settings; 4) Mental Health; 5) Police Partnerships; 6) Local Criminal Justice Planning; 7) Improving Front-End Decisionmaking; 8) Strategies to Strengthen the Adjudication Process; and 9) Innovations in Offender Supervision and Reentry.

Concept papers submitted under this solicitation must adhere to its administrative requirements, including a length limit of six pages. Six copies of each concept paper must be **received** at BJA no later than 5 p.m. Eastern time on December 13, 1999; no faxed submissions accepted.

To receive a copy of the solicitation (document number SL 312) from BJA: tel (800)688-4252; fax (301)519-5212; e-mail askncjrs@ncjrs.org; web site www.ojp.usdoj.gov/BJA. Or, call the Backup Center for a faxed copy. ⚡

Conferences & Seminars

Sponsor: National Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law Seminar
Dates: January 30, 2000-February 4, 2000
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x236; fax (202)872-8690; web site www.criminaljustice.org

Sponsor: New York State Defenders Association
Theme: 14th Annual New York Metropolitan Trainer
Dates: March 4, 2000
Place: New York City
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org

Sponsor: National Institute for Trial Advocacy
Theme: Basic Skills
Dates: March 10-18, 2000
Place: Newark, NJ
Contact: NITA: tel (800)225-6482; fax (219)282-1263; e-mail nita.1@nd.edu; web site www.nita.org

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance XII (Death Penalty Training)
Dates: March 25-28, 2000
Place: Washington, DC
Contact: Ron Gottlieb: tel (202)452-0620 x233; fax (202)872-1031; e-mail r.gottlieb@nlada.org

Sponsor: National Institute for Trial Advocacy
Theme: Pacific Advanced Advocates (Criminal Trial Skills)
Dates: April 6-11, 2000
Place: San Francisco, CA
Contact: NITA: tel (800)225-6482; fax (219)282-1263; e-mail nita.1@nd.edu; web site www.nita.org

Sponsor: National Association of Sentencing Advocates
Theme: NASA Conference 2000
Dates: April 12-15, 2000
Place: San Diego, CA
Contact: NASA, c/o The Sentencing Project: tel (202)628-0871; fax (202)628-1091; e-mail staff@sentencingproject.org

Sponsors: International Conference on Penal Abolition, Rittenhouse, and Ryerson Department of Social Work
Theme: ICOPA IX
Dates: May 10-13, 2000
Place: Toronto, Ontario, CANADA
Contact: ICOPA: tel (416)972-9992; fax (416)923-8742; web site www.interlog.com/~ritten/icopa.html

Sponsor: New York State Defenders Association
Theme: 33rd Annual Meeting & Conference
Dates: July 27-30, 2000
Place: Hudson Valley Spa & Resort, Kerhonkson, NY
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org ⚡

Job Opportunities

The CHEMUNG COUNTY PUBLIC DEFENDER'S OFFICE has an opening for an entry-level **Attorney** to represent criminal defendants in Elmira City Court and various Justice Courts in Chemung County. Training will be provided. Interest in criminal law and commitment to representing indigent criminal defendants a must. Ability to work independently and handle high-volume caseload required. Recent law grads awaiting Bar results will be considered. Salary \$26K+ full benefits package. Send resume and cover letter to: Richard W. Rich, Jr., Chemung County Public Defender, PO Box 588, Elmira NY 14902-0588. tel (607)737-2969; fax (607)737-2853.

The CAPITAL DEFENDER OFFICE, created by statute and charged with guaranteeing effective assistance of counsel in every capital and potentially capital case throughout New York State, seeks a **Capital Case Investigator** to work in its Central Region office in Albany. Capital Case investigators are responsible for examining, analyzing, and investigating all evidence relevant to guilt in the alleged capital offense, as well as evidence offered in aggravation. Duties include: locating and interviewing witnesses; conducting field investigations; evaluating physical evidence; working with mitigation specialists; interviewing forensic experts; taking still and video photographs; consulting with attorneys to develop case theories and strategies; identifying, locating, and interviewing potential exculpatory witnesses; and other aspects of capital trial preparation. Applicants must be committed to the representation of those unable to afford counsel. Individuals with expertise in specific areas of forensic analysis, as well as those with more general backgrounds but strong commitment to indigent defense are urged to apply. Excellent writing, oral communications, and word processing (WordPerfect) skills are necessary. Fluency in more than one language, especially Spanish, advantageous. Willingness to travel and work flexible hours essential. Valid New York State drivers license required. Bachelor's degree desirable. Backgrounds in investigation, social work, journalism, community organizing, or education will be considered. Salary CWE. EOE. Send a letter, resume, writing sample and references to: Mark B. Harris, First Deputy Capital Defender, Capital Defender Office, Central Region, PO Box 2113, Albany New York 12220. tel (518)473-9521; fax (518) 473-9438

PRISONERS' LEGAL SERVICES OF NEW YORK seeks experienced attorneys for the positions below. (Except as noted, the positions can be in any of PLS's five regional offices — Albany, Buffalo, Ithaca, Plattsburgh, and Poughkeepsie.)

Associate Director — create mechanisms for management staff to manage, monitor, and lead in conducting litigation; create vehicles to develop substantive exper-

tise of legal staff and identify issues for litigation; set litigation standards; create litigation tools; assist Executive Director in coordinating work with other organizations, in advocacy work with government agencies and the media, and in other administrative matters.

Senior Litigator—act as lead counsel in high impact class actions; work with other attorneys representing individual clients; assist Litigation Coordinator in developing training materials and conducting programs.

Managing Attorney, Poughkeepsie Office—manage the legal and administrative matters of a five-attorney, five-paralegal office.

Staff Attorneys, Poughkeepsie, Buffalo, and Plattsburgh Offices—handle a wide variety of individual and impact cases.

PLS, with a staff of 25 attorneys and 17 paralegals, provides services to people incarcerated in NYS prisons, handling a wide variety of matters including medical and mental health care, conditions of confinement, prison discipline, excessive force, sentence correction, and 1st Amendment issues. PLS has been extremely successful in providing high quality legal services in administrative matters and litigation. PLS places an emphasis on cooperative and collegial working relationships within and between PLS offices. Professional development is encouraged, and both in-house and outside training are provided. Individual initiative and innovation are encouraged. With a high percentage of clients who are people of color, PLS seeks to be a well-balanced, diverse organization. EOE. Spanish-speaking staff are especially needed. Benefits provided, including excellent health insurance, substantial leave time and flexible leave policies. Send resume, writing sample and 3 references to: Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect Street, Ithaca, NY 14850.

The CENTER FOR COMMUNITY ALTERNATIVES, INC, a not-for-profit agency serving

adults and juveniles involved with the criminal justice system, has the following positions in its HIV/AIDS services programs:

Clinical Supervisor, Women's CHOICES (harm reduction, recovery readiness, and relapse prevention program). MSW with 3 yrs post-graduate work, prior supervisory and program administration experience required. CASAC and extensive experience could substitute for degree. Salary range \$35-40,000.

HIV Service Specialist/Prevention Case Manager, PreCISE (drug relapse and HIV prevention program, adults). Bachelor's degree in social work, criminal justice, or related field, CASAC or related experience required. \$25-28,000.

HIV Service Specialist, CHOICES I (provides HIV prevention education and related services to youth enrolled in alternative to detention programs, and their peers). Bachelor's degree in counseling, social work, health education, criminal justice, or related field and/or experience working with HIV affected population and/or juvenile or criminal justice population required. Experience may substitute for academics. \$25-28,000.

All positions require good written, verbal, and word processing skills. Valid NYS drivers license a plus. Benefits included.

CCA is also seeking **Case Managers** for the newly funded TRANSACTIONS program (community-based drug intervention for youth 7-15 years old). CASAC or CASAC eligible, entry level MSW or Bachelor's degree in counseling, social work, or related field. Experience working with young offender population may substitute for academics. \$26,000+ benefits.

Send resume and cover letter indicating position of interest and salary history to: CCA 39 W. 19th St., 3rd Floor, New York NY 10011. No phone calls or faxes, please.

The BRONX DEFENDERS seek a dedicated, experienced, and creative **Public Defender/**

Criminal Defense Attorney to work in an innovative and energetic non-profit indigent criminal defense organization committed to the holistic representation of clients, including working with clients, their families, and the larger Bronx community. Applicants must recognize the importance of working with social workers and investigators to develop a strong legal defense, and be passionate about the work and clients, willing to participate in a host of community based activities such as mentoring programs and moot court competitions, and be inspired to employ innovative strategies to advance the interests of clients and the Bronx community. Salary DOE, excellent benefits, nurturing work environment. Send cover letter, resume and writing sample to: Robin Steinberg, Executive Director, The Bronx Defenders, 890 Grant Avenue, Bronx NY 10451. ☎

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The REPORT is printed on recycled paper.

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds TX Felony DWI is an Aggravated Felony, Triggering Mandatory Deportation

The Board of Immigration Appeals (BIA) has ruled that the felony offense of driving while intoxicated (DWI) under Texas law is a conviction of a crime of violence and therefore an aggravated felony for immigration law purposes. *Matter of Puente-Salazar*, Interim Decision #3412 (BIA 9/29/99). Reaffirming and clarifying its earlier holding in *Matter of Magallanes*, Interim Decision #3341 (BIA 1998), the Board found that operating a motor vehicle in a public place while under the influence involves a substantial risk that physical force against the person or property of another may be used in the commission of the offense. Therefore, the Board held that the Texas felony DWI offense meets the second prong of the 18 USC 16 definition of "crime of violence" referenced in the 8 USC 1101(a)(43)(F) definition of an aggravated felony in the immigration statute. See also *Camacho-Marroquin v. INS*, 1999 WL 714179 (5th Cir. 1999) (decided the same day as *Puente-Salazar*).

When deemed an aggravated felony under the "crime of violence" category, conviction of a DWI offense may trigger deportation without any possibility of relief. Other potential consequences include mandatory detention after release from criminal custody, limited judicial review, permanent inadmissibility as a legal resident after removal from the United States, and greatly enhanced federal prison time if later convicted of illegally reentering the United States.

Defense lawyers and their noncitizen clients should keep in mind that a noncitizen accused of a DWI offense may still avoid the consequences of an aggravated felony conviction. The client may plead only to a misdemeanor DWI offense, or bargain for a sentence of imprisonment less than one year, e.g. a prison sentence of 364 days. See 8 USC

* **Manuel D. Vargas** is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. Manny, who wrote the Project's manual, Representing Noncitizen Criminal Defendants in New York State, also provides training. He recently presented aspects of immigration law affecting criminal defense at NYSACDL's CLE trainer "Weapons for the Firefight," at the Federal Defender Clinic at NYU Law School, and at the Immigration Clinic and Battered Women's Clinics at CUNY School of Law. Upcoming events include a panel presentation on Dec. 10, 1999 at the American Immigration Lawyers Association Symposium in New York City.

Note: While Manny works on an update of the manual, the hours he is available by phone [(212) 367-9104] to take questions about immigration issues in a criminal case will be reduced to: **Thursdays only, from 9:30 a.m. to 4:30 p.m., November and December, 1999.**

For Immigration Info on the Internet

- Relevant Immigration News/Alerts/Practice Tips
- Notable Recent Immigration Decisions
- Project Resources
- Immigration Internet Links

See the Resources Section of NYSDA's Web Site

www.nysda.org

1101(a)(43)(F). See also *People v Cuaran*, 689 NYS2d 392 (1st Dept, 1999), noted in an earlier column (*Backup Center REPORT*, Vol. XIV, #5) and case digest (*Backup Center REPORT*, Vol. XIV, #6).

NYSDA to File Amicus Brief in Cases Challenging the Application of New Law to Lawful Permanent Residents Already Convicted

NYSDA plans to file an *amicus curiae* brief before the United States Court of Appeal for the 2nd Circuit in a consolidated group of cases challenging the federal government's retroactive application of a congressional repeal of deportation relief for lawful permanent residents convicted of crimes before the repeal took effect. *Calcano-Martinez v. Reno*, *Madrid v. Reno*, and *Khan v. Reno*. The brief is to be filed Nov. 12, 1999. The deportation relief at issue, known as the 212(c) waiver, was repealed effective April 1, 1997 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Many immigrant defendants relied on the availability of such relief from deportation when pleading guilty to deportable offenses. The brief will argue that the government's retroactive application of the IIRIRA 212(c) waiver repeal is impermissible under the traditional presumption against retroactivity of a new civil statute. The *amicus* brief may also be submitted on behalf of the New York State Association of Criminal Defense Lawyers and the Legal Aid Society of New York City; it will be available from the Backup Center.

NYSDA Comments on Proposed INS Rule on Early Release for Deportation

NYSDA filed comments on a proposed Immigration and Naturalization (INS) rule regulating early release for removal of noncitizens in state custody convicted of non-violent offenses. The proposed rule was published in the Federal Register on July 12, 1999 (Volume 64, Number 132, Page 37641-37465). NYSDA's comments, submitted on Sept. 10, 1999, express concerns that the proposed rule: 1) requires those who seek early release for removal to waive important legal rights to an extent inconsistent with domestic and international law; 2) requires individuals to waive these rights without the benefit of legal counsel; and 3) does not provide that the individual seeking early release for removal be fully advised of all the negative consequences of removal. Both the proposed rule and NYSDA's comments are available from the Backup Center. ♪

Defense Automation Tips

FROM YOUR DESKTOP...

New York Case Law on the Web

by Ken Strutin*

Ed. Note: Resources that appear in the text below with an underline will function, when viewed on our web site at www.nysda.org, as hyperlinks to the resource being discussed. The web addresses appear in endnotes for the convenience of print-copy readers.

Criminal defense lawyers constrained by time and economic considerations need a cost-effective method for quickly locating relevant New York case law. Web sites, including many that are free and open to any attorney with a computer and modem, are the latest entries into the legal publishing field to offer vital resources for the practice of law. While far from a substitute for the New York Supplement or Westlaw, case law published on the web is a convenient and current means to begin doing legal research.

Court of Appeals

All practitioners, whether or not they ever practice in the Court of Appeals, are interested in what happens in our state's highest court. From your desktop you can visit three web sites that cover the Court's activities:

[Legal Information Institute](#)¹

[New York Law Journal](#)²

[Office of Court Administration](#)³

Criminal defense practitioners need to know what cases the Court has decided and will decide. Full text decisions of New York Court of Appeals opinions are accessible through the [Legal Information Institute](#) site. It's very well organized, making it easy to find cases by title, date or keyword.

To see a list of upcoming cases, consult the court calendar provided on the [New York Law Journal](#) site. This is the only place on the web that has a calendar of Court of Appeals cases scheduled for the new term. It also contains a database of recent decisions, court rules, biographies and descriptive information about the court.

The Chief Judge, as the highest judicial official in the state, bears responsibility for reporting on the State of the Judiciary, issuing reports and announcing new rules of practice. The [Office of Court Administration](#) has the best collection of administrative information concerning the Court.

* **Ken Strutin** is a legal information consultant. The author of many articles on information management and criminal law, Ken has been a law librarian at Syracuse University School of Law, a criminal defense attorney for the Orange County and Nassau County Legal Aid Societies, and a staff attorney at NYSDA. His recent work on the NYSDA web site, and as a co-trainer with Managing Attorney Charlie O'Brien, has helped many New York public defense providers use the Internet in their clients' cases.

A unique feature in NYSDA's [Defense News](#)⁴ is the [Court of Appeals Update](#).⁵ Written by Robert Dean, Attorney-in-Charge of the Center for Appellate Litigation in New York City, this publication contains a "list of significant criminal cases pending in the New York Court of Appeals and the issues presented."

Other New York Courts

Scattered across the web is a hodgepodge of databases containing some New York appellate and lower court decisions. Recent cases from the four Appellate Division Judicial Departments are listed in [New York Courts on the Web](#)⁶ from the *New York Law Journal*. A searchable database of the last seven months for each Department is available, along with court calendars, rules, descriptive information and phone directories. The Appellate Division, Fourth Department has also posted its [Slip Opinions](#)⁷ in a single unindexed web document. The document can be searched by using the "Find" command in your browser.

Current trial court decisions can also be found in the [New York Courts on the Web](#), with the same complement of features mentioned above. On the front page of the Law Journal, there appears a daily list of [Decisions of Interest](#),⁸ which is a select summary of trial and appellate court decisions with links to the full text. An e-bulletin of these decisions is also available through the Law Journal's [Quick Decision Service](#)⁹ (e-bulletins will be discussed at length in a future article).

Local judges and law libraries have added their collections to the endless information highway:

[New York State Supreme Court Library Queens](#)¹⁰
(full text of selected opinions)

[Monroe County Supreme Court](#)¹¹ (calendar information for trial courts)

[Judge Raymond E. Cornelius, Monroe County Supreme Court](#)¹² (full text of selected opinions)

[Judge William C. Donnino, Bronx County Supreme Court](#)¹³ (calendar information and abstracts of opinions)

[Judge Andrew V. Siracuse, Monroe County Supreme Court](#)¹⁴ (full text of selected opinions)

Since local courts and law libraries are joining the Internet community at an increasing pace, it is worthwhile to monitor the activities of New York courts on the web. A few comprehensive sources of information about New York courts in cyberspace appear below:

[NY Law Web Directory: Courts & Decisions](#)¹⁵ (NYLJ)

[New York Courts on the Web](#)¹⁶ (OCA)

[New York Courts & Law Guide](#)¹⁷ (NYLJ)

[Findlaw: New York Courts](#)¹⁸

(Continued on page 11)

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

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

New York State Court of Appeals

Subpoenas and Subpoenas Duces Tecum (Enforcement) (General) SUB; 365(5) (7)

Matter of Grand Jury Subpoena Duces Tecum, People v Museum of Modern Art, No. 139, 9/21/99

Holding: Two paintings on loan to the Museum of Modern Art from the Leopold Foundation in Vienna, claimed by heirs of those who had owned the paintings at the time the Nazis annexed Austria, were the subject of a district attorney's grand jury subpoena duces tecum issued during an investigation into the theft of Jewish-owned artwork confiscated by the Nazis. Arts and Cultural Affairs Law 12.03, which "protects the artwork of nonresident lenders from 'any kind of seizure' while on exhibit in New York State," is not limited to civil proceedings. In the context of this case, the subpoenas duces tecum amounted to a "seizure" under the act. The subpoenas interfered significantly with the Leopold Foundation's possessory interests. The case presents profound and opposing interests, but the statute is clear and cannot be altered for policy reasons in the guise of legislative interpretation. Order reversed, motion to quash granted.

Dissent: [Smith, J] Arts and Cultural Affairs law 12.03 encompasses only civil processes. The subpoenas duces tecum were proper.

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

Instructions to Jury (Burden of Proof) (Cautionary Instructions) ISJ; 205(20) (25)

People v Greaves, No. 156, 10/14/99

Holding: The Appellate Division correctly held that the trial court's error in refusing to instruct the jury that the indictment was not evidence did not deprive the defendant of a fair trial. Such a charge was given during jury selection, and the final charge amply emphasized that the verdict had to be based on an assessment of evidence (summarized by the court) and that the presumption of innocence applied. This case is distinguishable from those relied on by the defense. In *People v Newman* (46 NY2d 126) the trial court

had refused to tell the jury that the prosecution had the burden of proving every element beyond a reasonable doubt. Order affirmed.

First Department

Alibi (General) ALI; 20(22)

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

People v Castro, 695 NYS2d 306, 1st Dept, 7/8/99

Almost a year after the defendant's arrest, defense counsel moved on the day of trial to file a late notice of alibi pursuant to CPL 250.20. The reasons given for this lateness were forgetfulness and an unexplained failure to have interviewed the perspective witness earlier.

Holding: The court properly exercised its discretion in denying the motion under the circumstances. *People v Bernard*, 210 AD2d 419 *lv den* 85 NY2d 906. In light of the uncertain value of the proposed alibi testimony and defense counsel's vigorous pursuit of the misidentification defense, trial counsel's failure to file a timely notice of alibi did not deprive the defendant of effective assistance of counsel. *People v Alvarez*, 223 AD2d 401. Where no sworn allegations of fact supported the defendant's vague claim as to potential alibi witnesses and their testimony, the court did not err in denying the CPL 440.10 motion without a hearing. Judgment affirmed. (Supreme Ct, New York Co [Williams, J])

Identification (Lineups) IDE; 190(30)

Counsel (Right to Counsel) (Waiver) COU; 95(30) (40)

People v Williams, 695 NYS2d 71, 1st Dept, 7/8/99

Holding: The defendant was assigned an attorney for a line-up scheduled by court order. An initial lineup was cancelled due to nonproduction of the incarcerated defendant. Defense counsel and the prosecutor had a telephone conversation on the date of the rescheduled line-up; defense counsel requested rescheduling because he was not feeling well. After discussing the situation and the difficulty of rescheduling, defense counsel consented to the line-up in his absence. Defense counsel did not speak with the defendant. On the way to the line-up the defendant was told that he had been assigned counsel but counsel would not be at the line-up and had requested photos of the line-up. The defendant replied, "Whatever. Let's just get it over with."

There was a valid waiver of defendant's right to counsel at the line-up. It would have been better for counsel to have talked to the defendant, but the defendant unequivocally agreed to the procedure, distinguishing this case from *People v Coleman*, 43 NY2d 222. Judgment affirmed. (Supreme Ct, New York Co [Cropper, J])

Counsel (Competence/Effective Assistance/Adequacy) **COU; 95(15)****Defenses (Agency)** **DEF; 105(3)****People v Logan, 695 NYS2d 4, 1st Dept, 7/15/99**

Holding: The defendant was charged with third-degree criminal possession of a controlled substance, under an intent to sell theory, and fifth-degree criminal possession of a controlled substance. The defendant admitted possession of the drugs, but denied that he intended to sell them. Defense counsel's trial theory, which relied on the defendant's admission to less serious felony possession counts while denying possession with intent to sell, was based upon counsel's erroneous belief (shared by the court) that an agency defense was unavailable as to possession with intent to sell. This was error. *See People v Sierra*, 45 NY2d 56. Together with defense counsel's misunderstanding of the statutory term "sell," which includes to "give," the error led to the defendant's essential admission of intent to sell, and amounted to ineffective assistance of counsel entitling defendant to a new trial. *See People v Baldi*, 54 NY2d 137. Contrary to the prosecution's contention, the ineffectiveness extended to counsel's representation on the lesser charge to which defendant admitted. Had counsel been aware of applicable law, she might not have counseled defendant to admit the lesser charge. Counsel's ignorance made her incapable of rendering informed plea advice. *See People v Butler*, 94 AD2d 726. Both counts being factually related, a new trial is required on both. Judgment reversed, new trial ordered. (Supreme Ct, New York Co [Scherer, J])

Speedy Trial (Cause for Delay) **SPX; 355(12) (25)**
(General)**People v Womack, 693 NYS2d 46, 1st Dept, 7/22/99**

Holding: Dismissal of the indictment was warranted for violation of the speedy trial law. In addition to 166 days of includable time conceded by the prosecution on defendant's original speedy trial motion, the prosecution was chargeable with at least four months of an eight-month period following an initial erroneous dismissal of the indictment on speedy trial grounds. The prosecution had opportunity during that time to reinstate their dismissed appeal. Failure to do so constituted unreasonable appellate delay. *See People v Cortes*, 80 NY2d 201, 211-212. Contrary to the prosecution's argument, the reasonableness of the period of appellate delay for CPL 30.30(4)(a) purposes was not ruled upon in prior motion practice before the Appellate Division. *See People v Grafton*, 73 NY2d 799. Order affirmed. (Supreme Ct, New York Co [Obus, J])

**Search and Seizure (Arrest/
Scene of the Crime Searches
[Probable Cause])****SEA; 335(10)(g)****People v Lopez, 695 NYS2d 76, 1st Dept, 7/29/99**

The defense unsuccessfully moved for a *Mapp* and *Dunaway* hearing, alleging in an affirmation that the arresting officer lacked reasonable suspicion or probable cause to make the arrest. The defendant then pled to an attempted drug sale.

Holding: The defendant alleged sufficient facts to warrant a hearing under the standards of *People v Mendoza* (82 NY2d 415). "While a defendant is required to raise a factual issue in order to obtain a suppression hearing (CPL 710.60 [3] [b]), he need not prove his entire case in the motion papers." The adequacy of the factual allegations must be considered in the context of the defendant's case and his accessibility to information at the time of the motion. *See People v Hightower*, 85 NY2d 988, 989-90. Here, the defendant specifically denied participating in the alleged drug sale and denied possessing heroin, and maintained that the arresting officers "possessed no description of the seller" and "were not acting on information received from any reliable informant." This was not the conclusory denial of illegal conduct found in cases such as *People v Dekle*, 192 AD2d 471 *lv den* 81 NY2d 1072. The prosecution earlier admitted that the defense did not have information which it later said should have been included in the motion. The defendant had standing to challenge his identification by the undercover officer as a result of his arrest. Appeal held in abeyance, remanded for the hearings requested. (Supreme Ct, Bronx Co [Sheindlin, J])

**Competency to Stand Trial
(General)****CST; 69.4(10)****People v Valdez, 695 NYS2d 542, 1st Dept, 8/5/99**

On the day scheduled for the defendant's trial there was an absence of available jurors. The trial was rescheduled for the following day and the defendant was informed that if he did not appear that the trial would go on without him. The defendant failed to appear, and he was found guilty *in absentia* a few days later. His subsequent motion to set aside the verdict was granted.

Holding: Psychiatric evidence indicating that the defendant was anxious and depressed on his scheduled trial date did not establish a basis for setting aside the guilty verdict. That evidence, along with evidence of his treatment during the prior decade, was not new, since it could have been produced at trial, and had no bearing on the verdict.

The test for determining a defendant's competency to stand trial is whether there is sufficient present ability to consult with counsel with a reasonable degree of rational understanding, and a rational and factual understanding of the proceedings. *People v Pena*, 251 AD2d 26 *lv den* 92 NY2d

First Department *continued*

929. Absent sound evidence of incompetency, the record provides no basis to conclude the defendant's absence was other than knowing and voluntary. Order reversed, remanded for sentencing. (Supreme Ct, New York Co [Allen, JJ])

Impeachment (General) **IMP; 192(15)**
Witnesses (Cross Examination) **WIT; 390(11)**
People v Williams, 695 NYS2d 544, 1st Dept, 8/19/99

Holding: The police went to the home of defendant's girlfriend where they arrested the defendant and searched for evidence of a robbery. The police obtained the girlfriend's written consent to search the home; the items found were later suppressed on a finding that the consent was not voluntarily given and the defendant had been illegally arrested under *Payton v New York* (445 US 573 [1980]). The written consent stated that defendant did not live on the searched premises, but the girlfriend testified at trial that defendant lived with her and had been sleeping with her on the night of the incident. Her statement giving consent to search was used to impeach her testimony in support of the alibi defense. The written consent, while inadequate to sustain the state's burden of proof as to voluntariness or legal sufficiency of the consent, was nevertheless admissible for impeachment. There was no finding that the statement in connection with the consent was "coerced." The prosecution needed a fair cross examination of the girlfriend to meet its burden of disproving the alibi defense. *People v Overlee*, 236 AD2d 133, 136 *lv den* 91 NY2d 976. Judgment affirmed. (Supreme Ct, Bronx Co [Duffy, JJ])

Grand Jury (General) **GRJ; 180(3)**
Prosecutors (Decisionmaking) **PSC; 310(10)**
People v Caban, Nos. 1160, 1161, 1st Dept, 8/19/99

The defendant is a police officer whose wife left her purse in a cab. A later passenger found the purse and gave it to the driver who returned it to the defendant's wife at her home. The driver was later called to the police station where defendant told him that \$100 dollars was missing from the purse. The driver denied taking it. Evidence before the grand jury showed that the defendant instilled fear in the driver by handcuffing him and putting him in a cell, taking away the driver's taxi and drivers licenses and threatening not to return them if the driver did not give the defendant money. The court dismissed a count charging the defendant with second-degree grand larceny.

Holding: Failure to instruct the grand jury on the affirmative defense of belief that a threatened criminal charge was

true, provided for Penal Law 155.15(2) (larceny by extortion), might have warranted dismissal had the prosecution chosen to charge defendant under that statute (based upon the alleged threat to cause charges to be brought against the driver). However, the prosecution instead chose to charge the defendant with grand larceny based upon the threatened use or abuse of his position as a public official. Penal Law 155.05(2)(e)(viii). Therefore, there was no concomitant obligation to instruct the grand jury on the affirmative defense which, on its face, is only applicable to "any prosecution for larceny by extortion committed by instilling in the victim a fear that he or another person would be charged with a crime." Penal Law 155.15(2). The prosecutor had the discretion to choose what crime to charge on these facts. Courts should not interfere with the District Attorney's discretionary power. *Matter of Holtzman v Goldman*, 71 NY2d 564, 573. Order reversed, count reinstated, matter remanded for further proceedings. (Supreme Ct, Bronx Co [Stadtmauer, JJ])

Arrest (Probable Cause) **ARR; 35(35)**
People v Rosario, 693 NYS2d 152, 1st Dept, 8/26/99

The defendant sought to suppress seven bags of heroin and pre-recorded bills seized from him upon arrest, as well as to suppress subsequent identifications as fruit of the poisonous tree. The trial court denied his motion for *Wade* and *Mapp* hearings.

Holding: The defendant claimed that he was not involved in any suspicious or criminal activity, that he was legitimately in the area of arrest standing around with friends, and that he had not engaged in any drug sales that day nor matched the description of anyone who had. The prosecution alleged no facts in support of his arrest, claiming only that his identity was confirmed post-arrest. He was entitled to a pretrial *Mapp/Dunaway* hearing (*People v Acevedo*, 176 AD2d 631) to determine whether his arrest, based on information from another officer, was lawful. Appeal held in abeyance, matter remanded. (Supreme Ct, Bronx Co [Hinkson, JJ])

Second Department

Lesser and Included Offenses (General) **LOF; 240(7)**
People v Drakes, Nos. 96-09658, 96-09860, 2nd Dept, 7/19/99

Holding: The defendant correctly contended that the court should have dismissed a count of second-degree tampering with a witness, because, under the facts of this case, it was a lesser-included offense of first-degree tampering with a witness. This issue need not be preserved for appeal in order to obtain relief. *See People v Manuel*, 237 AD2d 307. The second-degree witness tampering conviction must be

Second Department *continued*

reversed, the sentence thereon vacated, and that count of the indictment dismissed. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Leventhal, J])

Counsel (Right to Counsel) **COU; 95(30) (38)**
(Scope of Counsel)

Family Court (General) **FAM; 164(20)**
Matter of McNeill v Ressel, No. 97-07254,
2nd Dept, 7/19/99

The appellant is the father of an infant son, of whom the appellant, along with the child's mother and maternal grandmother, sought custody. Family Court gave custody of the child to the grandmother and granted the appellant father limited visitation. When his attorney failed to return after a short recess during the hearings, the appellant father was compelled to take the stand in the absence of his attorney. The court denied the appellant's motion for a mistrial, stating it was not influenced by the brief and limited testimony. Counsel for the appellant was permitted to make objections to the testimony elicited and to question the appellant about any issues that were raised.

Holding: It was error to compel the father to testify without his attorney's presence; expediency should not outweigh the interest of the parties. *Matter of Radjpaal v Patton*, 145 AD2d 494, 497. However, the right to counsel in a child custody case, although fundamental, is not subject to the same analysis as in a criminal case. Here, the brief period in which the appellant father was without his attorney did not impair his opportunity to appear and to present evidence and arguments, which is the standard that must be met. *See Matter of Ella B*, 30 NY2d 352. Nor were the court's custody and visitation decisions made without the benefit of a fully-developed record. Remitting the matter for a new hearing would affect all the other parties, including the child, and "the father would be entitled to no more than he has already been afforded." Order affirmed. (Family Ct, Suffolk Co [McElligott, J])

Probation and Conditional **PRO; 305(5) (18) (30)**
Discharge (Conditions and
Terms) (General) (Revocation)

Sentencing (Resentencing) **SEN; 345(70.5)**
People v Hudson, No. 97-05369, 2nd Dept, 7/26/99

Holding: Two specifications were filed against the defendant for probation violation, the first alleging a failure to report to his probation officer, and the second alleging he had committed a burglary and related crimes, for which he was indicted. The defendant was found to have violated his probation after admitting to the first specification. Before he was resentenced, the defendant went to trial under the in-

dictment. As the prosecution concedes, the court erred at the resentencing in adjudicating the defendant to be guilty of the second specification, concerning the crimes charged under the indictment. The defendant should have been sentenced solely on the first specification charging him with failing to report to his probation officer. Sentence vacated and matter remitted for resentencing. (Supreme Ct, Kings Co [Starkey, J])

Civil Practice (General) **CVP; 67.3(10)**
Vasquez v State of New York, 98-05987, 2nd Dept,
7/26/99

Holding: The respondent's criminal conviction was reversed by the Appellate Division. She then successfully sued the State pursuant to the Court of Claims Act, which allows for the recovery of damages by those who, having been convicted and imprisoned, prove by clear and convincing evidence that they "did not commit any of the acts charged in the accusatory instrument." Court of Claims Act 8-b(5)(c); *see Torres v State of New York*, 228 AD2d 579, 580. This section of the Court of Claims Act must be strictly construed. The mere reversal of a conviction did not, without more, establish the claimant's innocence of the crimes (*see Reed v State of New York*, 78 NY2d 1, 7-9), nor did her "conclusory and self-serving testimony" meet the heavy burden that is imposed on claimants. Interlocutory judgment reversed, complaint dismissed. (Court of Claims [Nadel, J])

Fourth Department

Counsel (Right to Self-Representation) **COU; 95(35)**
Pro Se Representation (General) **PSR; 304.5(10)**
Speedy Trial (Cause for Delay) **SPX; 355(12)**
People v D 'Antuono, No. KA 97-568, 4th Dept,
7/9/99

Holding: The defendant escaped from custody in New York and was held on other charges in Virginia. He subsequently moved to dismiss the New York indictment pursuant to CPL 30.30; the court denied the motion without conducting a hearing. On appeal, the matter was remitted for a hearing. The evidence adduced at that time supported the court's ruling that the state was "diligent" in its efforts to locate and bring defendant into New York. *See People v Wills*, 201 AD2d 519 *lv den* 83 NY2d 973. Thus, under CPL 30.30 (4) (c) and (e) (as it existed at the time), the period in question was excludable.

The court improperly denied the defendant's motion to proceed *pro se*. The court denied the motion in part on the ground that the defendant lacked the skills necessary for self-representation, which is not a proper basis. *See People v Ryan*, 82 NY2d 497, 507-508. There was no evidence that the defendant would act in a manner that would prevent a fair

Fourth Department *continued*

and orderly exposition of the issues. A new trial is required. See *People v Vivenzio*, 62 NY2d 775, 776. Judgment reversed, new trial granted. (County Ct, Niagara Co [Hannigan, J])

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

Sentencing (General) SEN; 345(37)

**People ex rel Kenneth Farren v Williams,
No. KAH 98-5277, 4th Dept, 7/9/99**

The relator's petition for a writ of *habeas corpus* was denied.

Holding: The relator's completion of an alcohol rehabilitation program prior to sentencing did not require that his sentence of incarceration be terminated under Vehicle and Traffic Law 1196(4). He was ineligible for the program due to his conviction of an alcohol-related offense within five years of this conviction. The respondent is not estopped from requiring the relator to continue serving his sentence; the doctrine of estoppel is not available against a governmental agency acting in the exercise of its governmental functions, absent unusual facts not found in this case. *Advanced Refractory Technologies v Power Auth. of State of N.Y.*, 81 NY2d 670, 677. Judgment affirmed. (Supreme Ct, Erie Co [Burns, J])

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

**People v Horning, No. KA 98-8058, 4th Dept,
7/9/99**

Holding: The defendant was convicted of second-degree depraved-mind murder (Penal Law 125.25[2]) and first-degree manslaughter (Penal Law 125.20[1]). He preserved the issue of whether these verdicts were repugnant, when he raised the issue before the jury was discharged. See *gen People v Alfaro*, 66 NY2d 985, 987. He was found to have acted intentionally and recklessly as to the same result—the death of the victim. *People v Trappier*, 87 NY2d 55, 59. Therefore, the verdict is repugnant. See *People v Robinson*, 145 AD2d 184 *affid* 75 NY2d 879. Judgment reversed, new trial granted. (County Ct, Wayne Co [Parenti, J])

Appeals & Writs (Time) APP; 25(95)

Parole (General) PRL; 276(10)

**Matter of Lord v New York Exec. Dept. Board/Div.
of Parole, No. TP 98-8204, 4th Dept, 7/9/99**

In August 1978, the petitioner was convicted of second-degree attempted murder and was sentenced to 20 years to

life. He was released on parole in July, 1996, and was subsequently charged with bank robbery. Due to this arrest, parole violation charges were filed. A 10-year parole hold was recommended by the Administrative Law Judge and affirmed on administrative appeal.

Holding: That the appeals unit of the Parole Board failed to decide the petitioner's administrative appeal within four months did not render the ultimate determination unconstitutional. The only consequence of the passage of four months is that the petitioner could deem his administrative remedy exhausted and seek immediate judicial review. See 9 NYCRR 8006.4(c). There was no showing that the Board did not meet and review the case pursuant to 9 NYCRR 8005.21. Given the petitioner's extensive criminal history, the penalty was not clearly disproportionate. *Kostika v Cuomo*, 41 NY2d 673, 676. Determination confirmed. (Supreme Ct, Cayuga Co [Corning, J])

**Homicide (Murder [Definition] HMC; 185(40[d] [g])
[Degrees and Lesser Offenses])**

People v Couser, No. KA 98-8316, 4th Dept, 7/9/99

The defendant successfully moved to dismiss the count of his indictment charging first-degree felony murder. The court found that the portion of the statute establishing liability for another's actions where the defendant "commanded" the other to cause death was unconstitutionally vague. *People v Couser*, 176 Misc2d 101.

Holding: The limitation on Penal Law 20.00 liability as to death-eligible murder charges is rooted in caselaw such as *Enmund v Florida* (458 US 782, 787 [1982]), holding that death is not a valid penalty for someone who did not take life, or attempt or intend to do so. But death penalty jurisprudence is different; here the death penalty was not sought, so only due process, not 8th Amendment, vagueness standards apply. Further, even statutes establishing the death penalty are presumed to be constitutional. See *Matter of Hynes v Tomei*, 92 NY2d 613, 626 *cert den* __ US __ (6/14/99). The court below said that it was the Legislature's duty to give "command" meaning, erroneously invalidating a provision in the guise of legislative deference. Statutory words should be given ordinary meaning absent some indication to the contrary. *People v Cruz*, 48 NY2d 419, 428 *app dsmsd* 446 US 901. The defense contended that "command" may be synonymous with actions for which death cannot be the penalty, such as "importune," so that the clause in question is susceptible to arbitrary enforcement. But a vagueness challenge should be addressed to the facts at hand, and here there was sufficient evidence to establish the defendant's authoritative position within a gang, his summoning of an accomplice to arrange to "take care of" the complainant's family to prevent testimony, and his hiring of an investigator to find the complainant. Order reversed, count reinstated, matter remitted. (County Ct, Onondaga Co [Fahey, J])

Fourth Department *continued*

Juries and Jury Trials **JRY; 225(10) (30) (55) (60)**
(Challenges) (Discharge)
(Selection) (Voir Dire)

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

People v Chavys, KA 99-116, 4th Dept, 7/9/99

Holding: The court did not err in failing to dismiss the jury panel after one member (who was then dismissed) said she knew the defendant's name because he had assaulted her corrections officer husband. A cautionary instruction, plus inquiry into whether any other prospective juror would be

influenced by the comment and whether there had been any other discussion with the dismissed juror, cured any potential prejudice and ensured the defendant's right to a fair trial. *See People v Sher*, 24 NY2d 454, 457 *mot to amend remittitur gntd* 24 NY2d 1031 *rearg dsmsd* 25 NY2d 682 *cert den* 396 US 837.

The defendant was convicted of third-degree criminal sale of a controlled substance and third-degree criminal possession of a controlled substance. The issue of an erroneous charge and jury sheet including third-degree criminal possession of a controlled substance as to both counts was not preserved for review. Further, when the error was brought to the court's attention, it was immediately corrected; any error was harmless. *See People v Brown*, 247 AD2d 926 *lv den* 91 NY2d 1005. Judgment affirmed. (County Ct, Cayuga Co [Corning, J]) ⚡

New York Case Law on the Web (cont'd. from page 5)

Finally, searches of New York newspapers¹⁹ and use of general search engines²⁰ may yield more information about individual cases or court activities. More useful web resources may be found by checking NYSDA's Research Links²¹—accessible from the NYSDA Resources²² page.

Public defense Internet research should be interactive in many ways. If you know of new New York case law web sites, please share them with your colleagues through NYSDA's Backup Center. Pass on such information, and any other comments or suggestions you have regarding this article, by clicking here if you are reading this on the web, by e-mailing kstrutin@nysda.org, or by calling the Backup Center. ⚡

Endnotes

1. Legal Information Institute <http://www.law.cornell.edu/ny/ctap/overview.html>
2. New York Law Journal <http://www.nycourts.com/scripts/csearch.exe/OPTIONS?CRT=5>
3. Office of Court Administration <http://www.courts.state.ny.us/ucsoa.html>
4. NYSDA's Defense News http://www.nysda.org/Defense_News/defense_news.html
5. Court of Appeals Update http://www.nysda.org/Defense_News/Ct_of_appeal_Update.pdf
6. New York Courts on the Web <http://www.nycourts.com/>
7. Slip Opinions <http://www.courts.state.ny.us/ad4/slips.html>
8. Decisions of Interest <http://www.nylj.com/decisions.html>
9. Quick Decision Service <http://www.nyqds.com/>
10. New York State Supreme Court Library Queens <http://www.courts.state.ny.us/queenslib/decisions.htm>
11. Monroe County Supreme Court <http://www.frontiernet.net/~monsc/>
12. Judge Raymond E. Cornelius, Monroe County Supreme Court <http://www.frontiernet.net/~derek/rec/rselect.htm>
13. Judge William C. Donnino, Bronx County Supreme Court http://ourworld.compuserve.com/homepages/w_c_d/
14. Judge Andrew V. Siracuse, Monroe County Supreme Court <http://www.netacc.net/~amsir/Framework/Cases.html>
15. NY Law Web Directory: Courts & Decisions (NYLJ) <http://www.nylj.com/sites/courts.html>
16. New York Courts on the Web <http://www.nycourts.com/>
17. New York Courts & Law Guide <http://www.nylj.com/guide/>
18. Findlaw: New York Courts <http://www.findlaw.com/11stategov/ny/courts.html>
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20. Search Engines http://www.nysda.org/NYSDA_Resources/Research_Links/research_links.html#GeneralSearchEngines
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