



# Public Defense Backup Center REPORT

VOLUME XIV NUMBER 8

October 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

### 1999 Legislation Reviewed

Amendments to Megan's Law (the Sex Offender Registration/Community Notification Act), a dramatic increase in the number of offenders who must provide DNA samples for a databank, and new crimes of stalking and interfering with health care services or religious worship are just some of the legislation summarized by NYSDA Staff Attorney ALO'Connor in this issue of the *REPORT* (p. 4). Other new crimes established by the Legislature this year include aggravated cruelty to animals, "canned shoots" of non-native big game animals, and criminal possession of a taximeter accelerating device.

*Pro se* state prisoners are now subject to mandatory filing fees for civil lawsuits, as was mentioned in the last issue of the *REPORT*. State-ready prisoners convicted of violent felonies may now be held in local correctional facilities for six months under contract provisions formerly limited to non-violent offenders, while more offenders have been made eligible for Shock programs by an amendment raising the upper age limit from 35 to 40.

A wide variety of other technical and minor legislative changes of importance or interest to those engaged in criminal defense have also occurred. Some bills were still awaiting the Governor's signature as the issue went to press.

### DNA is a "Hot Topic" at [www.nysda.org](http://www.nysda.org)

The legislative action on databanking in New York noted above is only one piece of DNA news of interest to defense teams. For other topical DNA stories, check NYSDA's website regularly. Recent DNA items in the "Hot Topics" section of the site included:

- DNA test of clothing may offer hope to Texas death row inmate scheduled to be executed. *Dallas Morning News*, 10/9/99
- Prosecutors in Wisconsin have developed a novel approach to forestalling the statute of limitations, by filing

charges based on a sample of DNA until a real person matching that sample can be found. MSNBC, 10/7/99

- A challenge to a Connecticut statute requiring blood samples from convicted sex offenders for DNA databank was unsuccessful. *New York Law Journal*, 9/21/99. (*Cobb v. Marcotte*, (2nd Cir. 9/16/99))

### Early Brain Damage Linked to Bad Behavior

Research reported in the November issue of the journal *Nature Neuroscience* indicates that in rare cases, injuries to the brain in infancy can stop individuals from learning normal rules of social and moral behavior. Two people who had a specific type of brain damage in infancy showed no guilt or remorse for bad behavior as adults, and seemed destined never to get along in social situations, according to press accounts of the research. Unlike patients whose similar injuries occurred in adulthood, these two patients had defective social and moral reasoning, suggesting that their ability to learn complex social conventions and moral rules had been impaired. The result was a syndrome resembling psychopathy. While the people studied were more likely to hurt their own prospects than harm anyone else, the research could have wider implications, experts said. (*New York Times*, 10/19/99 and <http://neurosci.nature.com>)

Criminal defense practitioners may want to follow this and earlier lines of research concerning other kinds of brain damage that suggest brain injury can alter moral judgments. Such information could lead to the discovery of evidence useful as mitigation.

### Injury Could Not Be Offered as Mitigation If Unknown

Without a detailed life history, information about a client's head injury in infancy or early childhood that could be very relevant

(Continued on page 23)

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### Revised Table of Lesser Included Offenses

Courtesy of the NY Defender Digest • Inside at Center Insert

(Available in Printed Copies Only, not on the Web Site)

# CONFERENCES & SEMINARS

**Sponsors:** Canadian Society of Forensic Science, Canadian Bar Association, and Criminal Trial Lawyers Association  
**Theme:** Where Law and Science Meet  
**Dates:** November 16-21, 1999  
**Place:** Edmonton, Alberta CANADA  
**Contact:** CSFS: 2660 Southvale Crescent, Suite 215, Ottawa, Ontario K1B 4W5 CANADA. tel/fax (613)738-0001; web site [www.csfs.ca](http://www.csfs.ca)

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**Sponsor:** New York State Defenders Association  
**Theme:** Creative Defense Lawyering: New Strategies and Techniques to Win  
**Date:** November 20, 1999  
**Place:** Rochester, 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)

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**Sponsor:** New York State Bar Association  
**Theme:** Computers and the Practice of Law  
**Date:** November 18, 1999  
**Place:** East Elmhurst, NY  
**Contact:** NYSBA CLE: tel (800)582-2452 or (518)463-3724; fax (518)487-5618; fax on demand (800)828-5472; web site [www.nysba.org](http://www.nysba.org)

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**Sponsor:** New York State Association of Criminal Defense Lawyers  
**Theme:** Last Chance '99 Seminar  
**Dates:** December 3-4, 1999  
**Place:** 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 [www.nysacdl.org](http://www.nysacdl.org)

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**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Appellate Defender Training  
**Dates:** December 4-7, 1999  
**Place:** New Orleans, LA  
**Contact:** NLADA Defender Legal Services: 1625 K Street, NW, Suite 800, Washington, DC 20006-1604. tel (202)452-0620; fax (202)872-1031, e-mail [info@nlada.org](mailto:info@nlada.org)

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**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](http://www.criminaljustice.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](mailto:nita.1@nd.edu); web site [www.nita.org](http://www.nita.org)

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**Sponsor:** National Legal Aid and Defender Association  
**Theme:** Life in the Balance Meets the Cherry Blossoms (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](mailto:r.gottlieb@nlada.org)

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**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](mailto:staff@sentencingproject.org)

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

## *Public Defense Backup Center* **REPORT**

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The *REPORT* is printed on recycled paper.

# 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 SULLIVAN COUNTY LEGAL AID BUREAU, INC. seeks a **Staff Attorney** to represent low-income clients in criminal defense and Family Court matters. Entry-level position, includes medical benefits and pension. Required: eligibility for the NY bar. Contact: Stephan Schick, Attorney-Manager, Sullivan Legal Aid Bureau, Inc., PO Box 979, Monticello NY 12701. (914) 794-4094.

The CAPITAL DEFENDER OFFICE (CDO), created by statute and charged with guaranteeing effective assistance of counsel in every capital and potentially capital case throughout New York State, seeks a **Mitigation Specialist** experienced at the trial or post-conviction levels of capital litigation to work in its Central Region office in Albany. Working with attorneys, mitigation specialists' duties include: conducting thorough social history investigations; including locating and interviewing all potential penalty phase witnesses and documenting all life history events; identifying factors in clients' backgrounds that require expert evaluations; assisting in locating experts; providing background materials and information to experts to enable them to perform competent and reliable evaluations; consulting with attorneys to develop guilt and penalty phase theories of the case and case strategy; working with the client and the client's family while the case is pending. Commitment to representation of those unable to afford counsel essential. Applicants who are intimately familiar with the demands of capital trial work or have the functional equivalent of such experience will be considered. Individuals with expertise in specific areas of mitigation work as well as those with a general background are

urged to apply. Experience as a witness in penalty phase hearings offering testimony regarding the results of social history investigations a plus. The CDO aims to create a highly skilled, diversified team of mitigation specialists. EOE. Excellent writing and oral communication skills necessary. Fluency in another language helpful. Salary CWE. Send 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

The CDO also 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 (Word-Perfect) 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 address above.

PRISONERS' LEGAL SERVICES OF NEW YORK (PLS) seeks experienced attorneys for the following positions. 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 expertise 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.

**Litigation Coordinator**—monitor litigation in five offices; review proposed litigation; develop training materials and conduct programs, and co-counsel impact litigation.

**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 Office**—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 three references to: Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect Street, Ithaca, NY 14850.

FEDERAL PUBLIC DEFENDER FOR THE WESTERN DISTRICT OF PA seeks experienced **Criminal Trial Attorney** for Erie Office. Minimum three years criminal trial experience, Federal Sentencing Guidelines experience, and supervisory experience required. EOE. Send resume to: Federal Public Defender, Attn.: AFPD, 960 Penn Avenue, Suite 415, Pittsburgh, PA 15222-3811. ☞

# 1999 Legislative Review

by Al O'Connor\*

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## Introduction

The 1999 Regular Session of the New York Legislature dragged on into the month of August, nearly breaking the record set in 1997 for the all-time latest budget agreement. The budget logjam in Albany this year was less issue-oriented, and more the result of legislative uncertainty about how to avoid a repeat of 1998, when the Governor unexpectedly vetoed nearly \$1 billion in appropriations. For criminal justice legislation, 1999 was a relatively quiet year. Among the highlights was the partial refunding of Prisoners' Legal Services at \$3.5 million. Regrettably, the revival of PLS came with a steep price tag for inmates: mandatory filing fees of \$15-\$50 for *pro se* civil lawsuits. The Legislature also passed a comprehensive stalking bill, extensively amended Megan's Law to comply with Judge Denny Chin's decision in *Doe v Pataki*, 3 F Supp2d 456 (SDNY 1998), and greatly expanded the reach and scope of the 1994 DNA databank law. Summarized below are the bills affecting public defense work that have already been signed into law by Governor Pataki, or that have passed both houses and will become law *subject to the Governor's approval*. The complete text of each chapter law or bill can be found on the New York State Senate and Assembly web sites: ([www.senate.state.ny.us](http://www.senate.state.ny.us)) ([www.assembly.state.ny.us](http://www.assembly.state.ny.us)). These sites can also be accessed on the research links page of NYSDA's web site: ([www.nysda.org](http://www.nysda.org)).

**[Ed. Note:** When this issue of the *REPORT* is viewed on NYSDA's web site, the underlined web addresses above act as links directly to those sites. The section of this article directly below (Megan's Law) was placed on our web site (under "Hot Topics") prior to its appearance in the *REPORT*. In that version, many of the laws cited are linked to their full text.]

\* Al O'Connor is a Backup Center Staff Attorney. He coordinates the Association's amicus and legislative work.

## Megan's Law

**Chapter 452 (S.6100) (Megan's Law Amended to Comply with *Doe v Pataki*). Effective: January 1, 2000.**

The Sex Offender Registration/Community Notification Act (Megan's Law) [Correction Law §168], commonly regarded as one of the most poorly drafted bills ever to have passed the Legislature, has been amended to plug the many procedural and substantive gaps strewn throughout the defective legislation enacted in 1995. Signed into law by Governor Pataki on September 2, 1999 (Chap. 453), the extensive amendments, which become effective on January 1, 2000, represent a mixed bag of changes that will benefit both the prosecution and defense. But the predominant and salutary purpose of the amendments is to bring New York's Megan's Law into compliance with the federal court litigation in *Doe v Pataki*, 940 FSupp 603 (SDNY 1996), *rev'd in part* 120 F3d 1263 (2d Cir. 1997), on remand 3 FSupp2d 456 (SDNY 1998), which, since 1996, has largely enjoined enforcement of the Act's community notification provisions. Chapter 453 now gives sex offenders a clear, unambiguous right to assigned counsel at risk classification proceedings, as well as the right to meaningful discovery before the risk assessment hearing. It also offers sex offenders the right to a civil appeal from the trial court's risk level determination, and the right to be represented by assigned counsel on such appeals. In fact, a sex offender's right to the assistance of appointed counsel will now extend beyond the direct appeal, and apply to post-judgment motions for downward modification of the risk level score, which sex offenders may now periodically seek on grounds of changed circumstances.

It should be stressed that the amendments are not retroactive. Therefore, sex offenders who already have been classified in constitutionally defective administrative and court proceedings must await further developments in the Legislature, or in the *Doe v Pataki* litigation itself. In the meantime, the State will continue to be enjoined from proceeding with community notification against sex offenders who were in prison, or on probation or parole, on the original effective date of Megan's Law (January 21, 1996).

### **Right to Court-Appointed Counsel**

At risk classification hearings, the original legislation guaranteed sex offenders the awkwardly phrased right "to have counsel appointed, *if necessary*." [Correction Law §168-n (3)]. Since 1996, a handful of judges have seized upon this semantic ambiguity and refused to assign counsel to indigent sex offenders, reasoning that defense counsel is not "necessary" to safeguard the defendant's interests. The statute has now been amended to make clear that offenders who are "financially unable to retain counsel" have a right to counsel at risk classification hearings. In fact, courts must automatically assign lawyers to sex offenders who were previously represented by assigned counsel in their underlying criminal cases [Correction Law §168-n (3)]. Those who were initially represented by retained counsel, but have

since become indigent, may apply for assigned counsel in advance of the risk classification hearing. The 1995 legislation also failed to include a funding mechanism for assigned counsel. Chapter 453 now directs that all assignments be made pursuant to Article 18-B of the County Law, which, of course, includes representation by a legal aid bureau or society, a public defender or 18-B attorney.

### **Board of Examiners of Sex Offenders Risk Level Recommendation**

The 1995 legislation authorized the Board of Examiners of Sex Offenders to collect information about offenders from “any state or local correctional facility, hospital or institution” as part of its review and recommendation process. The Board has now been additionally authorized to collect information from district attorneys, law enforcement agencies, probation departments, the Division of Parole, courts and child protective agencies. This additional information may include the “arrest file, prosecutor’s file, probation or parole file, child protective file [and] court file.” Since sex offenders now have broad discovery rights under the Act, any information considered by the Board will later be available to the defense at the risk classification hearing. Upon application of either party at the conclusion of the hearing, the court must seal “any portion of the Board’s file . . . which contains material that is confidential under any federal or state law.” But the sealed record will be available for review by the defense and prosecution in subsequent proceedings whenever the Board is required to provide the court with an updated recommendation [Correction Law §168-m].

### **Time and Manner of Risk Assessment Hearing**

The Act requires the Board to issue its recommendation at least sixty days prior to a sex offender’s scheduled release from prison, and the court must render a decision within thirty days of the release date [Correction Law §168-l (6), 168-n (2)]. These short time-frames have proven difficult to meet, especially when the defendant’s production in court from state prison has been delayed for any reason. Although these deadlines have been retained in the Act, an amendment now requires courts to adjourn the hearing until after the offender’s release date whenever necessary for proper adjudication of the issues:

*Where a court is unable to make a determination prior to the date scheduled for a sex offender’s [release], it shall adjourn the hearing until after the offender is discharged . . . and shall then expeditiously complete the hearing and issue its determination [Correction Law §168-n (3)].*

For defendants sentenced to probation, including “split sentences,” as well as other non-incarcerative dispositions, the Act now clearly directs the sentencing court to conduct the risk classification process without referring the defendant’s case to the Board of Examiners of Sex Offenders for a recommendation. In these cases, the district attorney must provide the court and the defense with a written statement

detailing the level of notification and duration of registration sought by the state, as well as a statement of reasons in support thereof [Correction Law §168-d]. In every other respect, the hearing will be governed by the procedural rules of post-incarceration risk assessment hearings (see below).

### **Risk Level Assessment Hearing**

Foremost among the 1995 omissions was the Legislature’s failure to adopt procedural rules for risk classification hearings, an oversight so puzzling it caused many district attorneys to question whether prosecutors were intended to be parties to the proceedings. Under the amended statute, the role of the prosecutor as the state’s representative is clearly defined. After both sides have received copies of the Board of Examiners of Sex Offenders’ preliminary risk level recommendation and any statement of reasons in support of the recommendation, a hearing must be held at which the “district attorney, or his or her designee . . . shall bear the burden of proving the facts supporting the duration of registration and level of notification sought [by the state] by clear and convincing evidence.” If the district attorney wishes to pursue a different risk level determination than the one recommended by the Board, he or she must provide notice and a statement of reasons in support of the alternative determination at least ten days before the hearing, and must satisfy the same clear and convincing evidence standard of proof.

When the parties disagree about the appropriate risk level determination, the court *must* adjourn the hearing to allow for discovery. Relevant discovery material will now be available — voluntarily or by subpoena *duces tecum* — from the Board of Examiners of Sex Offenders and “any state or local facility, hospital, institution, office, agency, department or division.” When making its determination, the court must consider relevant materials and evidence, including reliable hearsay evidence, submitted by the parties, as well as the recommendation and any materials submitted by the Board. The court must also review a victim impact statement when one is available. Facts that “were previously proven at trial or elicited [as part of a guilty plea] shall be deemed established . . . and shall not be relitigated” at the hearing. The court must issue an order fixing the sex offender’s risk level determination and duration of required registration, and set forth its findings of fact and conclusions of law [Correction Law §168-n (3), 168-d (3)].

### **Appeals and Post-Judgment Petitions**

Addressing its major oversight on appellate review [see *People v Stevens*, 91 NY2d 270 (1998)], the Legislature has now granted sex offenders the right to a civil appeal from the trial court’s risk level determination (CPLR Articles 55, 56 and 57). For good measure, the Legislature has also given the People a right to appeal these determinations. When counsel has been assigned to represent a sex offender at the trial court level, the assignment will continue through the direct appeal [Correction Law §168-n (3), 168-d (3)].

The right to assigned counsel has also been extended to post-judgment petitions for downward modification of the risk level assessment and/or the duration of the defendant's required registration as a sex offender. These downward modification applications may be brought by sex offenders as often as once a year, but the court will not be required to assign counsel to draft a petition because the right to counsel for indigent petitioners will not formally attach until after a petition has been filed. Sex offenders who have been registered for at least ten years may petition the court to be relieved of any further duty to register.

The People have also been granted limited authority to move for upward modification of a sex offender's risk level score and/or duration of registration. These prosecution-initiated petitions may be brought when (a) a sex offender has been convicted of a new crime, or has violated probation, parole, post-release supervision, or the terms of a conditional discharge, based upon the commission of a new crime, and (b) the nature of the new criminal conduct "indicates an increased risk of a repeat sex offense." Indigent sex offenders will have the right to assigned counsel whenever the People petition for upward modification.

Upon receipt of a petition by either party, the court must request an updated recommendation from the Board of Examiners of Sex Offenders. For upward modification petitions, the Board must notify the sex offender and his counsel at least thirty days before issuing a recommendation, and must give the defense an opportunity to submit relevant information in opposition. The court must forward copies of the Board's updated recommendation to the parties at least thirty days before the scheduled hearing. For both upward and downward modification petitions, the moving party will bear the burden of proving facts in support of the requested modification by clear and convincing evidence. The court must issue an order setting forth its determination, as well as its findings of fact and conclusions of law. These modification rulings may then result in a new round of appeals, as detailed below:

## **a) Defense Appeals**

- i) A sex offender has a right to appeal, and to assignment of counsel on appeal, from an order granting a prosecution-initiated petition for upward modification;
- ii) Although a sex offender does not have a right to civilly appeal from the denial of a petition for downward modification, the statute does not preclude the possibility of an appeal by permission in these circumstances [See CPLR §5701(c)].

## **b) Prosecution Appeals**

- i) The People have a right to appeal from an order granting a sex offender's petition for downward modification;
- ii) The People also have a right to appeal from the denial of a petition for upward modification of the risk level score or the duration of required registration.

An indigent sex offender will have a right to assigned counsel on both types of prosecution-initiated appeals [Correction Law §168-0].

## **Substantive Amendments**

### **Definition of "sexually violent predator"**

From the defense standpoint, the most significant substantive amendment is the Legislature's redefinition of a Level 3 "sexually violent predator." Under the 1995 Act, a "sexually violent predator" was defined as "a person who has been convicted of a sexually violent offense . . . or a sex offender who suffers from a mental abnormality that makes such person likely to engage in predatory sexual conduct" [Correction Law §168-a (7) (former)]. This definition seemed to permit an interpretation whereby all defendants convicted of the more serious "sexually violent offenses"<sup>1</sup> would be subject to classification as Level 3 "sexually violent predators" without regard to an individualized risk assessment review. The Board of Examiners of Sex Offenders acknowledged this possible interpretation of the statutory language, but rejected it, concluding that a "careful reading of the statute . . . supports the conclusion that the guidelines should eschew *per se* rules and that risk should be assessed on the basis of a review of all pertinent factors."<sup>2</sup>

Despite the Board's opinion, some judges have interpreted the Act as requiring a Level 3 designation whenever a defendant was convicted of a "sexually violent offense."<sup>3</sup> The statute has now been amended to codify the Board's interpretation, but the new definition also eliminates a limitation that applied to defendants convicted of less serious "sex offenses." Previously, such offenders could not have been classified under Level 3 unless they were found to be suffering from a "mental abnormality that makes [them] likely to engage in predatory sexual conduct." The amended definition eliminates this restriction:

### Section 168-a (7)

*"Sexually violent predator" means a sex offender for whom the risk of repeat offense is high and there exists a threat to the public safety as determined by [the risk assessment guidelines].*

Thus, while defendants convicted of more serious crimes are now guaranteed an individualized review of their perceived risk of re-offending, there is no longer any meaningful distinction between "sex offenses" and "sexually violent offenses" under the Act. All sex offenders, even those

1. Under the original legislation, these crimes included rape in the first degree, sodomy in the first degree, aggravated sexual abuse in the first and second degrees, sexual abuse in the first degree, or attempts to commit these crimes.

2. "Sex Offender Registration Act — Risk Assessment Guidelines and Commentary," January 1996 at p. 2.

3. See, e.g. Judge Bellacosa's opinion in *People v Stevens*, 91 NY2d 270, 277 (1998).

convicted of misdemeanor offenses, now face the possibility of a Level 3 “sexually violent predator” designation by application of the guidelines alone.

#### *New criminal offenses covered by Megan’s Law*

Three felony sex crimes that have been enacted since 1995 have been added to the list of “sexually violent offenses” under the Act: aggravated sexual abuse in the third degree (Penal Law §130.66) and course of sexual conduct against a child in the first and second degrees (Penal Law §§130.75, 130.80). Crimes relating to promoting or patronizing underage prostitution have also been added to the list of “sex offenses” covered by Megan’s Law.<sup>4</sup> At the same time, parental kidnapping offenses have been removed from the list of sex offenses defined in the statute. Megan’s Law has also been amended to correct a minor drafting error in the original legislation which would have excused lower level offenders sentenced to a conditional or unconditional discharge from having to register as sex offenders.

#### *Out-of-State Convictions*

Defendants with out-of-state sex offense convictions who relocate to New York now have a right to a court hearing and judicial determination of the appropriate risk level score. Previously, out-of-state sex offenders subject to Megan’s Law were classified administratively by the Division of Parole or the Department of Probation and Correctional Alternatives. The rules for such hearings closely track the procedure for in-state convictions, including an initial recommendation by the Board of Examiners of Sex Offenders, followed by a court hearing in the offender’s new county of residence. The right to court-appointed counsel and to appeal will also apply in these cases. The category of out-of-state convictions subject to Megan’s Law, which was previously limited to crimes for which there is a New York felony sex offense counterpart, has been expanded to include any felony conviction which would require the defendant to register as a sex offender under the laws of the foreign jurisdiction [Correction Law §168-k].

#### **Chapter 113 (A.7102) (Megan’s Law — updates of sexually violent predator subdirectory). Effective: September 20, 1999.**

Amends Correction Law §168-q to require the Division of Criminal Justice Services to distribute to local police departments monthly updates of the sexually violent predator subdirectory maintained under Megan’s Law.

4. Penal Law §230.04 (Patronizing a prostitute in the third degree) (Class A misdemeanor); Penal Law §230.05 (Patronizing a prostitute in the second degree) (Class E felony); Penal Law §230.06 (Patronizing a prostitute in the first degree) (Class D felony); Penal Law §230.30 (2) (Promoting prostitution in the second degree) (Class C felony); Penal Law §230.32 (2) (Promoting prostitution in the first degree) (Class B felony), or attempts to commit any of these offenses. Note that for patronizing an underage prostitute, Chapter 453 requires that the person patronized *in fact* be less than 17. Therefore, in undercover police operation situations, Megan’s Law will not apply, even though the defendant may be criminally liable for an attempt. See *People v Coleman*, 74 NY2d 381 (1989).

## DNA Databank

### **Chapter 560 (A.9037-a) (DNA databank — new crimes added — retroactive application — CPL §440.30 [1-a] appeals). Effective: December 1, 1999.**

In 1994, the Legislature passed a law requiring defendants convicted of certain violent felonies, sex offenses and escape offenses to give blood samples for forensic DNA testing and databanking (L. 1994, ch. 737). As originally enacted, the DNA databank law applied prospectively to defendants convicted on or after January 1, 1996. The law has now been expanded to apply to many new crimes, including non-violent ones, and to apply *retroactively* to offenders who are still serving sentences for certain designated crimes on December 1, 1999. The legislation eliminates the requirement that blood be drawn, allowing for the presumably less intrusive collection of a “sample appropriate for DNA testing,” such as saliva or an oral swab.

The legislation also amends CPL §450.10 and 450.20 to provide the defendant and the prosecution a right to appeal from a trial court order which either denies or grants a post-judgment motion for DNA testing of evidence pursuant to CPL §440.30 (1-a). The defendant’s right to appeal will apply retroactively to any motion for forensic DNA testing made and determined since CPL §440.30 (1-a) was enacted in 1994. [See *People v Rae Kellar*, 89 NY2d 948 (1997).]

The crimes now subject to the DNA databank law include the following offenses (newly added crimes are shown in *italics*):

#### **Assault and Homicide**

Assault 1st degree

Assault 2nd degree

Aggravated assault upon a police officer

*Attempted aggravated assault upon a police officer*

*Gang assault 1st degree*

*Attempted gang assault 1st degree*

*Gang assault 2nd degree*

*Attempted gang assault 2nd degree*

*Assault on a peace officer, police officer etc. (Penal Law §120.08)*

*Attempted assault on a peace officer, police officer etc. (by plea)*

Murder 1st degree

Murder 2nd degree

Attempted murder 1st degree

*Attempted murder 2nd degree*

Manslaughter 1st degree

*Attempted manslaughter 1st degree (by plea)*

*Manslaughter 2nd degree*

#### **Sex Offenses**

Rape/Sodomy 1st degree

*Attempted rape/sodomy 1st degree*

Rape/Sodomy 2nd degree

Rape/Sodomy 3rd degree

Aggravated sexual abuse 1st degree

*Attempted aggravated sexual abuse 1st degree*

Aggravated sexual abuse 2nd degree  
Attempted aggravated sexual abuse 2nd degree  
Aggravated sexual abuse 3rd degree  
Sexual abuse 1st degree  
Incest  
Course of sexual conduct against a child in the 1st degree  
Attempted course of sexual conduct against a child in the 1st degree  
Course of sexual conduct against a child in the 2nd degree

**Kidnapping/Stalking**

Kidnapping 1st degree  
Attempted kidnapping 1st degree  
Kidnapping 2nd degree  
Attempted kidnapping 2nd degree  
Stalking 1st degree

**Arson**

Arson 1st degree  
Attempted arson 1st degree  
Arson 2nd degree  
Attempted arson 2nd degree

**Weapons Offenses**

Criminal possession of a dangerous weapon 1st degree  
Attempted criminal possession of a dangerous weapon 1st degree  
Criminal use of a firearm 1st degree  
Attempted criminal use of a firearm 1st degree  
Criminal possession of a weapon 3rd degree [Penal Law §§265.02 (4)(5)(6)]  
Attempted criminal possession of a weapon 3rd degree [Penal Law §§265.02 (4)(5)(6)]  
Criminal sale of a firearm 1st degree  
Attempted criminal sale of a firearm 1st degree  
Criminal sale of a firearm 2nd degree  
Attempted criminal sale of a firearm 2nd degree  
Criminal sale of a firearm with the aid of a minor  
Criminal use of a firearm 2nd degree  
Attempted criminal use of a firearm 2nd degree

**Burglary**

Burglary 1st degree  
Attempted burglary 1st degree  
Burglary 2nd degree  
Attempted burglary 2nd degree  
Burglary 3rd degree  
Attempted burglary 3rd degree

**Robbery**

Robbery 1st degree  
Attempted robbery 1st degree  
Robbery 2nd degree  
Attempted robbery 2nd degree

**Intimidating a Witness**

Intimidating a victim or witness 1st degree  
Attempted intimidating a victim or witness 1st degree  
Intimidating a victim or witness 2nd degree

**Escape and Absconding Offenses**

Where the defendant has been convicted of any of the above crimes within the preceding five years:

Escape 1st degree  
Escape 2nd degree  
Absconding from temporary release 1st degree  
Absconding from a community treatment facility

**Drug Offenses/Larceny from the person**

*Non-retroactive* — Defendants convicted of the following non-violent offenses *on or after December 1, 1999* must provide a sample for the DNA databank:

Criminal possession of a controlled substance in 1st degree  
Criminal possession of a controlled substance 2nd degree  
Criminal sale of a controlled substance (all degrees)  
Grand larceny in the 1st, 2nd, 3rd and 4th degrees (when larceny is from person).

**Stalking**

**Chapter \_\_\_ A.9036 (Establishes new crimes of stalking in the first through fourth degrees/criminal interference with health care services or religious worship in the first and second degrees). Effective: December 1, 1999.**

Enacts the “Clinic Access and Anti-stalking Act of 1999,” which establishes new crimes relating to stalking and criminal interference with access to reproductive health care services and religious worship.

➤ Penal Law §120.45 Stalking in the fourth degree.

*A person is guilty of stalking in the fourth degree when he or she intentionally, and for no legitimate purpose, engages in a course of conduct directed at a specific person, and knows or reasonably should know that such conduct:*

- 1. is likely to cause reasonable fear of material harm to the physical health, safety or property of such person, a member of such person’s immediate family or a third party with whom such person is acquainted; or*
- 2. causes material harm to the mental or emotional health of such person, where such conduct consists of the following, telephoning or initiating communication or contact with such person, a member of such person’s immediate family or a third party with whom such person is acquainted, and the actor was previously clearly informed to cease that conduct; or*
- 3. is likely to cause such person to reasonably fear that his or her employment, business or career is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person’s place of employment or business, and the actor was previously clearly informed to cease that conduct.*

Stalking in the fourth degree is a Class B misdemeanor.

➤ Penal Law §120.50 Stalking in the third degree.

*A person is guilty of stalking in the third degree when he or she:*

- 1. commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against three or more persons, in three or more separate transactions, for which the actor has not been previously convicted; or*
- 2. commits the crime of stalking in the fourth degree in violation of section 120.45 of this article against any person, and has previously been convicted, within the preceding ten years of a specified predicate crime, as defined in subdivision five of section 120.40 of this article<sup>5</sup>, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or*
- 3. with intent to harass, annoy or alarm a specific person, intentionally engages in a course of conduct directed at such person which is likely to cause such person to reasonably fear physical injury or serious physical injury, the commission of a sex offense against, or the kidnapping, unlawful imprisonment or death of such person or a member of such person's immediate family; or*
- 4. commits the crime of stalking in the fourth degree and has previously been convicted within the preceding ten years of stalking in the fourth degree.*

Stalking in the third degree is a Class A misdemeanor.

➤ Penal Law §120.55 Stalking in the second degree.

*A person is guilty of stalking in the second degree when he or she:*

- 1. commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 of this article*

*and in the course of and in furtherance of the commission of such offense: (i) displays, or possesses and threatens the use of, a firearm, pistol, revolver, rifle, shotgun, machine gun, electronic dart gun, electronic stun gun, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sandbag, sandclub, slingshot, slug shot, shirker, "kung fu star", dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, dangerous instrument, deadly instrument or deadly weapon; or (ii) displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or*

- 2. commits the crime of stalking in the third degree in violation of subdivision three of section 120.50 of this article against any person, and has previously been convicted, within the preceding five years, of a specified predicate crime as defined in subdivision five of section 120.40 of this article, and the victim of such specified predicate crime is the victim, or an immediate family member of the victim, of the present offense; or*

- 3. commits the crime of stalking in the fourth degree and has previously been convicted of stalking in the third degree as defined in subdivision four of section 120.50 of this article against any person; or*

- 4. being twenty-one years of age or older, repeatedly follows a person under the age of fourteen or engages in a course of conduct or repeatedly commits acts over a period of time intentionally placing or attempting to place such person who is under the age of fourteen in reasonable fear of physical injury, serious physical injury or death.*

Stalking in the second degree is a Class E felony.

➤ Penal Law §120.60 Stalking in the first degree.

*A person is guilty of stalking in the first degree when he or she commits the crime of stalking in the third degree as defined in subdivision three of section 120.50 of this article and, in the course and furtherance thereof, he or she:*

- 1. intentionally or recklessly causes physical injury to such person; or*
- 2. commits a Class A misdemeanor defined in article 130 of this chapter, or a Class E felony defined in section 130.25, 130.40 or 130.85 of this chapter, or a Class D felony described in section 130.30 or 130.45 of this chapter.*

Stalking in the first degree is a Class D (violent) felony.

➤ Penal Law §240.70 Criminal interference with health care services or religious worship in the second degree.

*1. a person is guilty of criminal interference with health services or religious worship in the second degree when:*

- (a) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes*

5. "Specified predicate crime" means: a.) a violent felony offense; b.) a crime defined in section 130.20, 130.25, 130.30, 130.40, 130.45, 130.55, 130.60, 130.70 or 255.25; c.) assault in the third degree, as defined in section 120.00; menacing in the first degree, as defined in section 120.13; menacing in the second degree, as defined in section 120.14; coercion in the first degree, as defined in section 135.65; coercion in the second degree, as defined in section 135.60; aggravated harassment in the second degree, as defined in section 240.30; harassment in the first degree, as defined in section 240.25; menacing in the third degree, as defined in section 120.15; criminal mischief in the third degree, as defined in section 145.05; criminal mischief in the second degree, as defined in section 145.10; criminal mischief in the first degree, as defined in section 145.12; criminal tampering in the first degree, as defined in section 145.20; arson in the fourth degree, as defined in section 150.05; arson in the third degree, as defined in section 150.10; criminal contempt in the first degree, as defined in section 215.51; endangering the welfare of a child, as defined in section 260.10; or d.) stalking in the fourth degree, as defined in section 120.45; stalking in the third degree, as defined in section 120.50; stalking in the second degree, as defined in section 120.55; or e.) an offense in any other jurisdiction which includes all of the essential elements of any such crime for which a sentence to a term of imprisonment in excess of one year or a sentence of death was authorized and is authorized in this state irrespective of whether such sentence was imposed.

*with, or attempts to injure, intimidate or interfere with, another person because such other person was or is obtaining or providing reproductive health services; or*

*(b) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing reproductive health services; or*

*(c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such person was or is seeking to exercise the right of religious freedom at a place of religious worship; or*

*(d) he or she intentionally damages the property of a health care facility, or attempts to do so, because such facility provides reproductive health services, or intentionally damages the property of a place of religious worship.*

*2. a parent or legal guardian of a minor shall not be subject to prosecution for conduct otherwise prohibited by paragraph (a) or (b) of subdivision one of this section which is directed exclusively at such minor.*

Criminal interference with health care services or religious worship in the second degree is a Class A misdemeanor.

➤ Penal Law §240.71 — Criminal interference with health care services or religious worship in the first degree.

*A person is guilty of criminal interference with health care services or religious worship in the first degree when he or she commits the crime of criminal interference with health care services or religious worship in the second degree and has been previously convicted of the crime of criminal interference with health care services or religious worship in the first or second degree.*

Criminal interference with health care services or religious worship in the first degree is a Class E felony.

The Act also makes numerous amendments to the Penal Law, the Criminal Procedure Law and the Family Court Act with respect to these new crimes, including the following:

- a) it defines all degrees of stalking as “family offenses” subject to the concurrent jurisdiction of the Family Court and criminal courts pursuant to the Family Protection and Domestic Violence Intervention Act of 1994 [CPL §530.11 (1), FCA §812 (1)];
- b) in connection with the issuance of a temporary order of protection, it requires a court to suspend the defendant’s license to possess a firearm and order him or her to

- surrender any weapons when the court has good cause to believe the defendant has a prior conviction for a stalking offense; and ii) in connection with a violation of an order of protection, the Act requires a court to revoke a defendant’s license to possess a firearm and order him or her to surrender any weapons when the violation entailed “behavior constituting” any degree of stalking;
- c) it adds stalking in the first and second degrees to the list of “designated offenses” covered by New York’s eavesdropping statute (Penal Law §700.05);
- d) the Act adds stalking offenses to the to the list of crimes for which victims are eligible for monetary awards under Executive Law §631 (12);
- e) the Act also provides that stalking offenses and criminal interference with health care services or religious worship do not apply to any activity that is otherwise lawful under the National Labor Relations Act or other federal labor laws, and that stalking “do[es] not bar any conduct, including, but not limited to, peaceful picketing or other peaceful demonstrations protected from legal prohibition by the federal and state constitutions” [amending Penal Law §5.10];
- f) finally, the Act authorizes the Attorney General and local district attorneys to seek an injunction against any violation of the laws concerning access to health care facilities and places of religious worship [Civil Rights Law §79-m (new)].

### New Crimes and Offenses

#### Chapter 118 (A.8338-a) (Establishes the new crime of aggravated cruelty to animals). Effective: November 1, 1999.

Amends the Agriculture and Markets Law to establish the new offense of aggravated cruelty to a “companion animal,” an unclassified felony which carries a maximum sentence of a two year definite term in a local correctional facility. Exceptions are provided for hunting, trapping, fishing, the killing of diseased or dangerous animals, and use of animals in legitimate scientific testing:

➤ Agriculture and Markets Law section 353-a — Aggravated Cruelty to Animals

*A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal<sup>6</sup> with aggravated cruelty. For purposes of this section, “aggravated cruelty” shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.*

6. Agriculture and Markets law section 350: “Companion animal” or “pet” means (a) any dog or cat, and shall also mean any other domesticated animal normally maintained in or near the household of the owner or person who cares for such other domesticated animal. “Pet” or “companion animal” shall not include a “farm animal” as defined in this section.

**Chapter 208 (A.1738-a) (“Canned shoots” of non-native big game animals). Effective: November 1, 1999.**

Amends the Environmental Conservation Law to prohibit “canned shoots” of non-native big game animals (shooting of tethered or fenced-in animals) (Unclassified misdemeanor punishable by up to 1 year imprisonment and a maximum \$5000 fine).

**Chapter \_\_\_ (S.2188-b) (Criminal possession of a taximeter accelerating device). Effective: Upon Governor’s signature.**

Establishes the new crime of criminal possession of a taximeter accelerating device.

➤ Penal Law section 145.70 — Criminal possession of a taximeter accelerating device

*A person is guilty of criminal possession of a taximeter accelerating device when he knowingly possesses, with intent to use unlawfully, a taximeter accelerating device. If such a device is knowingly possessed there is a rebuttable presumption that it is intended to be used unlawfully.*

Class A misdemeanor

**Penal Law**

**Chapter \_\_\_ (A.9038-a) (Placing a false bomb — falsely reporting an incident — on school grounds). Effective: December 1, 1999.**

In 1996, the Legislature established the new crime of placing a false bomb (Penal Law §240.61). The offense has now been divided into two degrees. The existing offense has been reclassified as placing a false bomb in the second degree, and remains a Class A misdemeanor. The first degree crime, which applies to offenses committed on school grounds, is a Class E felony.

➤ Penal Law §240.62 — Placing a false bomb in the first degree

*A person is guilty of placing a false bomb in the first degree when he or she places, or causes to be placed, upon school grounds any device or object that by its design, construction, content or characteristics appears to contain, a bomb, destructive device or explosive, but is, in fact, an inoperative facsimile or imitation of such a bomb, destructive device or explosive and which he or she knows, intends or reasonably believes will appear to be a bomb under circumstances in which it is likely to cause public alarm or inconvenience.*

*Placing a false bomb in the first degree is a Class E felony [which also carries a mandatory 1 year suspension of a driver’s license upon conviction, or the defendant’s adjudication as a juvenile delinquent or youthful offender — VTL §510 (2) (xii)].*

The legislation also amends the crimes of falsely reporting an incident in first and second degrees (Penal Law §§240.55,

240.60) to apply to false reports about the release of a hazardous substance,<sup>7</sup> and adds a new subdivision to the first degree offense pertaining to false reports on school grounds:

➤ Penal Law §240.60 — Falsely reporting an incident in the first degree

A person is guilty of falsely reporting an incident in the first degree when he:

*5. knowing the information reported, conveyed or circulated to be false or baseless and under circumstances in which it is likely public alarm or inconvenience will result, he or she initiates or circulates a report or warning of an alleged occurrence or an impending occurrence of a fire, an explosion, or the release of a hazardous substance upon school grounds and it is likely that persons are present on said grounds.*

*Class E felony [which now also carries a mandatory 1 year suspension of a driver’s license upon conviction, or juvenile delinquency or youthful offender adjudication — VTL §510 (2) (xii)].*

**Chapter 160 (S.1982-a) (Mandatory Restitution payments). Effective: November 1, 1999.**

Requires a court to order defendants convicted of harming an animal trained to aid a person with a disability in the first or second degrees (Penal §§195.11, 195.12) to pay restitution to the animal’s owner (amending Penal Law §60.27).

**Chapter 207 (A.1075-b) (Restitution — falsely reporting an incident). Effective: July 6, 1999.**

Amends Penal Law §60.27 to define certain entities as “victims” of crimes relating to the false report of an incident for purposes of the court’s restitution authority. When the defendant has been convicted of falsely reporting an incident in the first, second or third degrees, or falsely placing a bomb, the term victim “shall also mean any school, municipality, fire district, fire company, fire corporation, ambulance association, ambulance corporation, or other legal or public entity engaged in providing emergency services which has expended funds for the purpose of responding to [the] false report.”

**Chapter 33 (A.5203) (Conforming Amendments — Criminal sale of a firearm). Effective: November 1, 1999.**

In 1998, a series of one-level upgrades was enacted for crimes relating to criminal sale of a firearm (L. 1998, ch. 654). Chapter 33 makes conforming amendments to Penal Law §70.02 to define criminal sale of a firearm in the first degree as a Class B violent felony, and criminal sale of a firearm in

7. “Hazardous substance” shall mean any physical, chemical, microbiological or radiological substance or matter which, because of its quantity, concentration, or physical, chemical or infectious characteristics, may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health [Penal Law §240 (3)].

the second degree, and criminal sale of a firearm to a minor, as Class C violent felonies. The legislation also makes corresponding amendments to the plea-bargaining restrictions included in CPL §220.10.

### Criminal Procedure Law

**Chapter 66 (A.8225) (Witness list for deliberating juries). Effective: June 8, 1999.**

Amends CPL §310.20 to permit courts to distribute a witness list to a deliberating jury:

➤ CPL §310.20 — Jury deliberation; use of exhibits and other material

*Upon retiring to deliberate the jury may take with them:*

*(3) A written list prepared by the court containing the names of every witness whose testimony has been presented during the trial, if the jury requests such a list and the court, in its discretion, determines that such a list will assist the jury.*

**Chapter 216 (A.8235) (Terms and conditions of interim probation). Effective: October 4, 1999.**

Amends CPL §390.30 (6) to expand the list of permissible conditions of interim probation supervision to include electronic monitoring and “any other reasonable condition the court may determine to be necessary and appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant” [cross-referencing Penal Law §65.10 (4) (5)].

**Chapter \_\_\_ (S.3427-a) (Order to reduce indictment — filing of reduced indictment upon expiration of 30 days). Effective: November 1, 1999.**

Amends CPL §210.20 (6) to provide that when a court has ordered a count of an indictment reduced, and the prosecution has not resubmitted the case to another grand jury or appealed the court’s order within thirty days, “the court’s order shall take effect” and the People must file a reduced indictment. [Codifying the holding of *People v Jackson*, 87 NY2d 782 (1996)].

**Chapter \_\_\_ (A.7664) (Designation of new jury foreperson upon discharge of first juror selected). Effective: Upon Governor’s signature.**

Amends CPL §270.35 to provide that the second juror whose name was drawn and called during jury selection shall become the foreperson of the jury upon the discharge of the original foreperson.

**Chapter 428 (S.3898-a) (Geographic jurisdiction of local police officers working with state police). Effective: November 1, 1999.**

Amends Executive Law §223 and CPL §1.20 to provide that local police officers designated to work with the state police on task forces and as part of cooperative investiga-

tions shall have state-wide geographic jurisdiction under the Criminal Procedure Law.

**Chapter 125 (S.5677) (Criminal court jurisdiction of family offenses). Effective: June 29, 1999.**

Amends CPL §530.11 and Family Court Act §812 (1) to expressly provide that a criminal court shall not be divested of jurisdiction in family offense matters when a complainant elects to proceed in Family Court.

**Chapter \_\_\_ (A.8226) (Drug Courts — Transfer of actions in Suffolk and Tompkins Counties). Effective: November 1, 1999.**

Amends CPL §170.15 (4) to authorize criminal courts in Suffolk and Tompkins counties to transfer cases, upon motion of the defendant and with the consent of the prosecution, to other local criminal courts in the same county that have been designated as drug courts.

**Chapter 426 (S.3163) (Audio-Visual Court Appearances — St. Lawrence County). Effective: August 31, 1999.**

Amends CPL §182.20 to add St. Lawrence County to the list of jurisdictions authorized to participate in the experimental program of audio-visual arraignments and court appearances via two-way closed-circuit television.

**Chapter \_\_\_ (S.3964) (Peace Officer status — Nassau County fire inspectors). Effective: Upon Governor’s signature.**

Amends CPL §2.10 to confer peace officer status on full-time fire inspectors in Nassau County.

**Chapter \_\_\_ (A.1540) (Peace Officer status — Canisus College security force). Effective: Upon Governor’s signature.**

Amends CPL §2.10 to confer peace officer status on Canisus college security force members.

### Prisons/Prisoners

**Chapter 412 (S.6107) (Filing fees for *pro se* inmate lawsuits). Effective: December 7, 1999.**

Amends CPLR §1101 and the Court of Claims Act to require indigent state and local inmates who are *serving sentences* to pay a mandatory reduced filing fee in order to commence a *pro se* civil lawsuit, except an Article 78 proceeding concerning jail time credit. The new sliding-scale fee must range between \$15 and \$50 and will be established by the court based on a review of the inmate’s trust account. Although courts will not be authorized to dismiss the lawsuit of a *pro se* inmate who cannot afford to pay the filing fee, the full amount of the fee will be collected by the Department of Correctional Services or local jail from the inmate’s account over time. It should be noted that filing fees do not apply to indigent inmates who are represented by a legal aid attorney, public defender or 18-B assigned counsel. These inmates may continue to assert poor person status and file suit without payment of fees pursuant to CPLR §1101 (e).

**Chapter 412 (S.6107) (Shock Incarceration Program — Age restriction increased to 40). Effective: August 9, 1999.**

Amends Correction Law §865 to increase to 40 the upper age eligibility limit of the Shock Incarceration Program (as of the date of offense — increased from age 35).

**Chapter 518 (S.6101) (Expands pool of state-ready inmates under contract to local correctional facilities). Effective: September 28, 1999.**

The 1995 Sentencing Reform Act authorized the Department of Correctional Services to enter into contracts with local correctional facilities to house state-ready inmates for up to six months. The law was limited to inmates convicted of non-violent felonies. Chapter 518 now permits defendants convicted of violent felonies to be held under these contracts. However, a local warden or superintendent may insist that DOCS take immediate custody of inmates convicted of Class A-1, and B or C violent felonies.

### Crime Victims

**Chapter 40 (S.1126) (Parole — Confidentiality of crime victims' statements). Effective: May 10, 1999.**

Directs the Board of Parole to keep confidential the statements of crime victims or their representatives concerning an inmate's application for parole release [amending Executive Law §259-i (2)].

**Chapter 126 (A.6280) (Crime victims — Toll free number). Effective: June 29, 1999.**

Requires the Division of Parole to maintain a toll free number for crime victims.

**Chapter \_\_\_ (S.5539-a) (Right of Privacy — Victims of HIV related criminal offenses). Effective: Upon Governor's signature.**

Amends §50-b of the Civil Rights Law to accord a right of privacy to victims of criminal offenses involving the transmission of HIV.

**Chapter 427 (S.3776-b) (Crime Victim's Board — Awards to spouses and children of certain crime victims). Effective: August 31, 1999.**

Amends Executive Law §624 to allow awards of compensation to the spouse, child or step-child of a crime victim "who has sustained personal injury as a direct result of a crime."

### Family Court/Juvenile Delinquency

**Chapter \_\_\_ (S.3809) (Juvenile delinquency petitions - restoration of cases adjourned in contemplation of dismissal). Effective: 90 days after Governor's signature.**

Specifies the procedure for restoration of a juvenile delinquency petition to the court's active calendar upon an

alleged violation of the terms and condition of an adjournment in contemplation of dismissal.

**Chapter 173 (S.3817) (Transfer of certain juvenile delinquency cases to juvenile's home county for dispositional hearing). Effective: October 4, 1999.**

Amends Family Court §302.3 (4) to permit judges in New York City to transfer a case to a juvenile's home county for a dispositional hearing following a finding of guilt, except where the finding is entered upon a designated felony act.

**Chapter 506 (Law Guardian assignments in foster care re-view proceedings). Effective: September 28, 1999.**

Mandates assignment of a law guardian for every child in a foster care review proceeding (amending FCA §249).

**Chapter 378 (S.4665-a) (Order of visitation or custody prohibited in favor of a person convicted of murder of a child's siblings). Effective: July 27, 1999.**

In 1998, legislation was enacted to prohibit, with certain exceptions, a court from ordering visitation or custody to a person who has been convicted of murder of the parent, legal custodian, or legal guardian of the child who is the subject of the proceeding (L. 1998, ch. 150). The legislation has now been extended to include murder of a child's sibling, half-sibling or step-sibling.

### Sunset Clause Extended

**Chap. 452 (S.5911) (Omnibus Sunset Extender to September 1, 2001)**

Extends the sunset clauses of the following provisions from September 1, 1999 to September 1, 2001:

- Correction Law Article 22-A (§630 et seq.) — Parole release from a definite sentence
- Correction Law §805 — Earned Eligibility Program
- Correction Law §2 (18) — Pertaining to ASAT
- Correction Law Article 26 (§851 et seq.) — Temporary Release Programs
- Penal Law §70.30 — Absconding from temporary release
- Penal Law §205.19 — Absconding from a community treatment facility
- Penal Law §60.35 — No waiver of mandatory surcharge
- Correction Law Article 12 (§270 et seq.) — Local Conditional Release Commissions
- Executive Law §259-c — Probation Administrative Fees
- Correction Law Article 20 (§500 et. seq.) — Pertaining to Local Correctional Facilities

Chapter 452 also extends the mandatory surcharge and crime victims' fee provisions of VTL §1809 to offenses committed on or before October 31, 2001.

*(Continued on page 23)*

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

### Prior Convictions (Evidence) PRC; 295(5)

#### People v Robinson, No. 127, 7/6/99

The prosecution introduced evidence of the defendant's three prior cocaine-related offenses as evidence of his knowledge of the weight of the cocaine with which he was charged here. The defendant offered to concede his knowledge of the weight of the cocaine, and claimed that his concession negated any need to inform the jury about his prior convictions. The court refused the concession. The Appellate Division affirmed.

**Holding:** The Appellate Division relied on the rule that, notwithstanding a stipulation, every element of a crime has to be charged and submitted to the jury. *People v Hills*, 140 AD2d 71, 79. That is not addressed here; the defendant's trial counsel never effectively conceded the defendant's knowledge of the weight of the cocaine. Neither did counsel definitively offer to stipulate as to that element. Under such circumstances, the trial court did not abuse its discretion as a matter of law in permitting the prosecution to offer the defendant's prior drug sale convictions. Order affirmed.

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

### Juveniles (Abuse) (Neglect) JUV; 230(3) (80)

#### People v Carroll, No. 135, 7/6/99

Over several days, a three-year old child was beaten to death by her father. The defendant, the child's stepmother, witnessed most of the violence, and did not alert the authorities or summon medical assistance until too late. The defendant was charged with Endangering the Welfare of a Child (Penal Law 260.10[2]). The defendant's motion to dismiss the indictment for insufficient evidence was granted, and the Appellate Division reversed.

**Holding:** The defendant was legally charged with the child's care under Penal Law 260.10(2), and was legally responsible for the child's care under Family Court Act (hereafter, FCA)1012(g). Terms from the FCA are incorporated by reference in Penal Law 260.10(2). The FCA specifies that a "custodian" may include any person continually or at regular intervals found in the same household when the

conduct of such person causes or contributes to a child's abuse or neglect. This definition was meant to include paramours. See Besharov, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Court Act 1012, at 373. A person who is legally responsible has a duty to care for a child, and can be named as a respondent in Family Court proceedings for abuse or neglect. See FCA 1012(a). The evidence before this grand jury established a prima facie case that the defendant was legally responsible for the child's care under the relevant law. A person who acts as the functional equivalent of a parent in a familial or household setting is a person legally responsible for a child's care. See *Matter of Yolanda D.*, 88 NY2d 790, 796. Biological relation to the child is not required; a paid full-time caretaker can be criminally liable for failing to seek emergency medical aid for a seriously injured child. See *People v Wong*, 81 NY2d 600, 607-608. Order affirmed.

### Defenses (Notice of Defense) DEF; 105(43.5)

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

#### People v Almonor, Nos. 128 and 129, 7/8/99

These cases turn on the introduction of defense psychiatric evidence in a criminal case. At his re-trial after a hung jury, defendant Pitts was precluded, for failure to present adequate, timely notice, from presenting evidence of a psychiatric defense based on an inability to form an assaultive intent. Defendant Almonor was precluded from introducing three expert witnesses whom the defense never informed the court it would call. The Appellate Division affirmed each case.

**Holding:** CPL 250.10 was designed to create a format by which psychiatric evidence may be prepared and presented manageably and efficiently, eliminating the element of surprise. Despite the court's warning and ongoing prosecution requests, defendant Pitts refused to identify which category of defense he intended to rely upon until three weeks before trial. At that time, written notice furnished by the defendant merely stated that he was diagnosed as suffering from an "acute stress disorder" at the time of the alleged crime. Failing to reveal enough information to identify the paragraph under CPL 250.10(1) on which the defendant planned to rely, such notice was inadequate. The trial court acted within its discretion.

In defendant Almonor's trial, the court precluded the testimony of three psychiatric witnesses whom, despite being asked twice, defense counsel never told the court it intended to call. The defendant did not seek to call these witnesses to offer an opinion as to the defendant's mental condition at the time of the trial, and the defense gave no indication as to whether and when the witnesses would be available to testify or how that would affect trial management. There was no abuse of discretion in the trial court's rulings. See *People v Aska*, 91 NY2d 979, 981. Orders affirmed.

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**Conspiracy (Evidence)** CNS; 80(20)**Sentencing (Concurrent/Consecutive)** SEN; 345 (10)**People v Arroyo, No. 133, 7/08/99**

The defendant and two accomplices were arrested for planning and attempting to shoot another man. The defendant was convicted of conspiracy, attempted murder, and criminal possession of a weapon. He was sentenced to consecutive terms on the attempted murder and conspiracy counts.

**Holding:** Although consecutive sentences may not be imposed where a single act constitutes two offenses, or where a single act constitutes one of the offenses and a material element of the other (see *People v Laureano*, 87 NY2d 640, 643), the defendant was properly sentenced. The prosecution established the commission of separate and distinct acts supporting the imposition of consecutive sentences. See *People v Salcedo*, 92 NY2d 1019, 1021. When the defendant and his accomplices armed and prepared to seek out the victim, the crime of conspiracy was complete. This preparation was sufficient to constitute the requirement that there be an overt act in furtherance of the conspiracy, or an independent act that tends to carry out the conspiracy; such act need not necessarily be the object of the crime. *People v Ribowsky*, 77 NY2d 284, 293. About one hour after the conspirators met, they saw the victim, shot at him, missed, and attempted to shoot again. These separate and distinct acts constituted the crime of attempted second-degree murder. See *People v Yong Yun Lee*, 92 NY2d 987, 989. Order affirmed.

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**Trial (Public Trial)** TRI; 375(50)**People v Glover, No. 175, 8/26/99**

**Holding:** The record was insufficient to establish a substantial probability that the testifying officer's safety would be jeopardized by allowing the defendant's brother and sister to be in the courtroom. *People v Nieves*, 90 NY2d 426, 431. Order reversed, new trial ordered.

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## First Department

**Search and Seizure (Automobiles and Other Vehicles [Probable Cause Searches]) ("Poisoned Fruit" Doctrine)** SEA; 335(15[p]) (55)**Evidence (Exclusionary Rule)** EVI; 155(53)**People v Major, Nos. 1696, 1697, 1698,  
1st Dept, 7/1/99**

The court suppressed physical evidence and a post-arrest statement made by the defendant.

**Holding:** An anonymous tip describing an individual who was seen placing a gun into a car at a specified location was a sufficient basis for a common-law inquiry as to what transpired. However, the testimony at the suppression hearing supports a reasonable inference that the police actions went well beyond the inquiry stage; numerous officers responded within a minute of the dispatcher's broadcast, opening the car door and using a flashlight to look into the car's interior and trunk. After the police allowed the defendant to proceed, other officers, who felt that the first officers had not searched the car adequately, stopped and searched his car. There was no lawful basis for this stop since there was no evidence of any additional factor supporting a reasonable suspicion of criminal activity by the driver. See *People v Spencer*, 84 NY2d 749, 753, cert den 516 US 905. Therefore, it was proper to suppress both the gun seized from a hidden compartment after the unlawful stop and the defendant's statement as to the ownership of the car as tainted fruit. Suppression order affirmed. (Supreme Ct, New York Co [Sudolnik, JJ])

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**Admissions (General  
(Voluntariness))**

ADM; 15(17) (35)

**People v Palmer, No. 1700, 1st Dept, 7/1/99**

After invoking his right to counsel at the police station, the defendant was paged by an accomplice. The defendant then made incriminating statements about a planned robbery to a detective and consented to the taping of his return call to the accomplice.

**Holding:** Although the accomplice had been cooperating with police about the instant case, the record fails to support the defendant's claim that the accomplice was acting as a police agent. The initial statements made by the defendant to the detective, and his taped statements to the accomplice, were properly admitted as spontaneous and voluntary. See *People v Lynes*, 49 NY2d 286, 293-295. The new crime, emergency, and public safety exceptions allowed questioning of the defendant about the planned crime without *Miranda* warnings and despite his having invoked the right to counsel, because he stated his accomplices would commit the planned robbery without him. See *People v Bell*, 73 NY2d 153. The defendant failed to object to the admission of these statements as evidence of an uncharged crime, and did not request the redaction of the statements or ask the court to issue limiting instructions, so these issues are not preserved for appellate review. In any event, the evidence was properly admitted to establish the relevant criminal relationship between the defendant and the accomplice. Judgment affirmed. (Supreme Ct, New York Co [Obus, JJ])

**Second Department**

**Insanity (Civil Commitment)** **ISY; 200(3) (45)**  
**(Post-Commitment Actions)**

**Alphonse P. v Palmer, Nos. 98-07743 and 98-07744**  
**2nd Dept, 6/14/99**

**Holding:** The petitioner/respondent, on in-patient status at Kingsboro Psychiatric Center, had petitioned for rehearing and review of a subsequent retention order dated Apr. 25, 1996. In July, 1998 the court terminated the respondent/petitioner's in-patient status subject to an order of conditions, but directed him to stay at the Center for six months with certain unescorted furlough privileges. The court's denial of the respondent/appellant's efforts to reopen the rehearing and review constituted an improvident exercise of discretion *Cf Alayo v City of New York*, 217 AD2d 567. A doctor who examined the respondent/petitioner after the hearing to determine his fitness for unescorted furloughs found that with less supervision the respondent/petitioner would pose a significant risk for relapse into overt psychosis and violence. This and other new information should have been examined at a reopened hearing. Further, the resettled order of conditions issued by the court improperly granted the respondent/petitioner certain unescorted furloughs. *See CPL 330.20(10); 14 NYCRR 541; Matter of Stone v Rivera, \_\_AD2d\_\_ (2nd Dept 9/21/98).* Release order reversed, resettled order of conditions vacated, matter remitted for reopening of the rehearing and review of the subsequent retention order. (Supreme Ct, Kings Co [Schneier, JJ])

**Juries and Jury Trials (General)** **JRY; 225(37) (50) (55)**  
**(Qualifications) (Selection)**

**Matter of Sistrom v Donohoe, No. 99-03072,**  
**2nd Dept, 6/14/99**

**Holding:** The petitioner, a criminal defendant, sought under Judiciary Law 509 to direct the Commissioner of Jurors of Suffolk County to reveal to counsel all juror qualification documents and similar records for Suffolk County from 1986 to the present. The requested relief is not granted. *See Matter of Gordon*, 249 AD2d 395. Petition denied.

**Misconduct (Judicial)** **MIS; 250(10)**

**Due Process (General)** **DUP; 135(7)**

**People v Brown, No. 97-08575, 2nd Dept, 6/21/99**

The teenage complainant was robbed by two men. The defense at trial was misidentification.

**Holding:** The court did not err in making forceful remarks requiring defense counsel to stop asking questions relating to discrepancies between a police report and the complainant's trial testimony concerning the robbers' description, where defense counsel had repeatedly sought to

get such evidence before the jury during examination of an officer who had not taken the complainant's statement. The court intervened to maintain order, clarify evidence, and ensure fairness. *See People v Yut Wai Tom*, 53 NY2d 44. The court's rulings as to the prosecutor's opening statement and evidentiary matters with regard to how the defendant came under suspicion in the case were not error. Judgment affirmed. (County Ct, Nassau Co [Cotter, JJ])

**Dissent:** [Friedmann, JJ] The court interfered excessively with the presentation of evidence, denigrated the defense attorney, and made many erroneous evidentiary rulings that prejudiced the defense and bolstered the prosecution's case. The harm from the court's summary of the "clear" testimony of the complainant with regard to the description of his attackers was not cured by an instruction that the court's recollection of testimony was less important than the jury's recollection. Other erroneous rulings included the overruling of defense counsel's objections to the prosecution's elicitation of and reliance on the police witnesses' heroism in unrelated cases.

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

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

**People v Lewis, No. 97-09801, 2nd Dept, 6/21/99**

**Holding:** The readback directed by the court after a request from the jury did not include certain testimony elicited on cross-examination of the undercover officer. The testimony was clearly within the scope of the jury's request. The prejudice to the defendant was sufficient on this record to warrant a new trial even if the error was not properly preserved. *See gen People v Lourido*, 70 NY2d 428.

The trial court erred in summarily denying the defendant's request for a grand jury synopsis sheet without an *in camera* review of the document or a *voir dire* of its author to determine whether it constituted *Rosario* material. *See People v Adger*, 75 NY2d 723. The court erred in allowing the prosecution to introduce \$190 recovered from the codefendant. Generally, the prosecution may not introduce evidence of unmarked money recovered from a defendant charged with a single sale of narcotics. *See People v Martin*, 216 AD2d 329. The prosecutor also improperly asked a witness whether defense counsel had offered him money or drugs in return for his testimony. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Finnegan, JJ])

**Evidence (General)** **EVI; 155(60)**

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

**People v Brown, No. 97-10612, 2nd Dept, 6/21/99**

**Holding:** "The defendant is entitled to a new trial because of errors committed by the court in allowing the introduction into evidence of the \$190 taken from him at the time of his arrest, failing to respond to meaningfully to the jury's

## Second Department *continued*

request for a readback of testimony, and because of prosecutorial misconduct relative to the questioning of a witness (see, *People v Lewis*, \_\_ AD2d \_\_ [decided herewith])." The court also erred by deviating from the standard charge, stating that the defendant's absence from part of the proceedings was "his own choosing." See 1 CJI [NY] 4.22, at 166. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Finnegan, JJ])

### Lesser and Included Offenses (General) LOF; 240(7)

#### *People v Vega*, No. 98-01978, 2nd Dept, 6/21/99

The defendant was charged and convicted of first-degree burglary, and two counts of second-degree burglary.

**Holding:** The defendant's convictions of second-degree burglary must be vacated and the two counts of the indictment charging that crime must be dismissed, as it is a lesser-included offense of first-degree burglary. See *People v Henry*, 151 AD2d 501. Judgment modified, and as modified, affirmed. (Supreme Ct, Queens Co [Rosenzweig, JJ])

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

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

#### *Lauer v City of New York*, No. 97-02327, 2nd Dept, 6/28/99

Dr. Lilavois, the city's medical examiner, found that the death of a three-year-old child was a homicide. The child's father was the prime suspect. Three weeks later it was determined that the child died of natural causes. Dr. Lilavois issued no correction to his original autopsy findings. Many months later, a newspaper expose led to the filing of an amended certificate and Dr. Lilavois's resignation. The defendants appealed following a personal injury action.

**Holding:** The Office of the Chief Medical Examiner owed the plaintiff a duty of reasonable care to timely correct its records when it learned that the plaintiff's son had died of natural causes, and when it knew or had reason to know that as a consequence of the original, mistaken autopsy findings, the plaintiff was unnecessarily the target of a murder investigation. The breach of a duty to perform a ministerial act—to advise the prosecuting authorities of the original autopsy error—resulted in direct and foreseeable damage to the plaintiff, for which he may recover on a theory of negligent infliction of emotional distress. See *eg Martinez v Long Is. Jewish Hillside Med. Ctr.*, 70 NY2d 697. The plaintiff was not entitled to damages for intentional infliction of emotional distress. See *Lauer v City of New York*, 240 AD2d 543. Nor does the civil rights violation cause of action lie. See *Creary v Village of Mamoroneck*, 110 AD2d 870, 871. Order modified, and as modified, affirmed. (Supreme Ct, Queens Co [Polizzi, JJ])

**Concurrence in Part, Dissent in Part:** [Sullivan, JP] Recovery below was erroneously based on the medical examiner's error in the initial autopsy report, an act of professional judgment.

### Counsel (Anders Brief)

COU; 95(7)

#### *People v Melvin*, No. 97-08419, 2nd Dept, 6/28/99

**Holding:** Appellate counsel's request, pursuant to *Anders v California* (386 US 738 [1967]), to be relieved of the assignment to prosecute the defendant's appeal was granted, and new appellate counsel was assigned. See *People v Casiano*, 67 NY2d 906. Arguable issues exist as to the adequacy of the allocution at the defendant's probation violation proceeding and as to whether the sentence imposed was unduly harsh or excessive. Further, appellate counsel used language that had a coercive tone when advising the defendant as to the risk of a greater sentence following an appeal. Motion granted, new counsel assigned. (County Ct, Orange Co [Patsalos, JJ])

### Civil Practice (General)

CVP; 67.3(10)

#### *Christodoulou v Terdeman*, No. 98-07799, 2nd Dept, 6/28/99

**Holding:** An action for damages based on assault, battery, rape, sodomy, and unlawful imprisonment was lodged based on a series of events alleged to have occurred between 1990 and 1994. These actions are governed by a one-year statute of limitations. See CPLR 215. The statute allowing a crime victim one year from termination of a criminal action against a wrongdoer to bring a civil action extended the limitations period only for those claims based on events for which a criminal prosecution was commenced against the wrongdoer. McKinney's CPLR 215, subd. 8. Order reversed, the branch of the defendant's motion which is to dismiss all claims except those for which a criminal prosecution was commenced, granted. (Supreme Ct, Queens Co [Posner, JJ])

### Identification (Eyewitnesses) IDE; 190(10) (17) (50) (General) (Suggestive Procedures)

#### *People v Astuto*, No. 98-08156, 2nd Dept, 7/6/99

The defendant was arrested and photographed during a murder investigation. The prosecution concedes that the arrest was improper and that the photographs should not have been shown to the witnesses. The court suppressed the identification testimony of those witnesses.

**Holding:** Pretrial hearing evidence established that the eyewitness knew the defendant and had identified him as the shooter to another witness before identifying him to the police. The other witnesses had seen the defendant many times, and one confirmed the identification by the eyewitness. Because the witnesses knew the defendant prior to

**Second Department** *continued*

being contacted by police, there was no identification testimony within the meaning of CPL 710.30. It was therefore irrelevant whether the witnesses had an independent source for their identification. In any event, the defendant does not contend that the photographic identification procedure was suggestive. Illegal detention does not deprive the prosecution of the opportunity to prove a defendant's guilt through untainted evidence. *U.S. v Crewe*, 445 US 463, 474 (1980). Since the witnesses knew the defendant, their identification testimony was not tainted by the illegal arrest. Order reversed, motion to suppress denied, and matter remitted for further proceedings. (Supreme Ct, Kings Co [Hall, JJ])

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

**Juries and Jury Trials(Challenges (Qualifications)(Voir Dire)** JRY; 225(10)(50)(60)

**People v Maragh, No. 98-02536, 2nd Dept, 7/12/1999**

The defendant claimed at trial that the victim died from a blood embolism, rather than from blunt trauma or the resulting blood loss. A physician, testifying as an expert witness, supported this theory with estimates of the victim's blood volume and pressure. Juror #12, a nurse, used her medical knowledge to devise a theory that death did result from the loss of blood, and shared her opinion with the other jurors. The trial court set aside the guilty verdict on the grounds that the jury did not confine itself to legally admitted evidence, and that Juror #12 became an unsworn witness for the prosecution.

**Holding:** Asked on voir dire whether she would be able to consider medical evidence without using her personal knowledge, Juror #12 stated, "I won't say that my experience won't affect what I believe." The jury instructions advised the jurors to use their experience to decide credibility issues, and Juror #12 was not told to disregard her personal expertise in determining witness credibility. The defendant neither sought to disqualify that juror nor requested cautionary instructions. Therefore, there is no evidence of a violation of jury instructions, and any question of law as to whether the jury instructions were proper was unpreserved for review. Order reversed, verdict reinstated, and matter remitted for sentencing. (County Ct, Orange Co.[Berry, JJ])

[Ed. note: The following decision was substituted for a decision and order dated 5/17/99.]

**Sentencing (Credit for Time Served)** SEN; 345(15)

**Matter of Maisonave v Goord, 98-10424, 2nd Dept, 7/12/99**

In April, 1991, the petitioner was sentenced to four years in Connecticut prison, but four months later he escaped. A year later he was arrested in New York. He pled guilty to the New York charges but failed to appear for sentencing. In 1997, the petitioner was again arrested in Connecticut, and was returned to custody to complete both his original Connecticut sentence and an additional term for the 1991 escape. He was sentenced in New York to an indeterminate term of one and one half to three years, to run concurrently with the Connecticut term. In May 1998, he was released to New York custody to serve his undischarged sentence.

**Holding:** The court erred in granting the petitioner's article 78 request for credit toward his New York sentence for all the time served under his concurrent sentence in Connecticut. Under the Penal Law existing prior to its 1995 amendment, the petitioner would be given jail time credit toward the minimum portion of his New York sentence if the sentences imposed in both states were indeterminate. However, because he was subject to a definite sentence in Connecticut as well as an indeterminate sentence in New York, he does not qualify for credit under Penal Law 70.30(1)(a) *Cf People ex rel Harris v Sullivan*, 74 NY2d 305. Judgment reversed, petition denied, and proceeding dismissed on the merits. (Supreme Ct, Kings Co [Lewis, JJ])

**Third Department**

**Search and Seizure (Stop and Frisk)** SEA; 335(75)

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

**People v Hill, No. 11119, 3rd Dept, 6/24/99**

At 3 a.m. a police officer saw the defendant leaving a parking lot where vehicle break-ins had recently occurred. He followed and questioned the defendant, who gave straightforward answers. Seeing a bulge in the defendant's front jacket pocket, the officer patted him down and found cassette tapes, then found a gun at the small of the defendant's back. The defendant's motion to suppress the gun and related statements was granted.

**Holding:** At most, the officer's knowledge of the vehicle break-ins supported his right to question the defendant. Having no reason to suspect a crime was in progress, had just taken place, or was imminent, he had no basis on which to stop and detain the defendant or to pat him down. *See People v Powell*, 246 AD2d 366, 369-370 *app dismsd* 92 NY2d 886. Without a reasonable suspicion that the defendant was armed or dangerous, no frisk was justified. *People v Batista*, 88 NY2d 650, 654. The defendant was cooperative and the crimes in the area had not involved weapons. The bulge in the defendant's front pocket did not suggest a gun, nor did his actions suggest that he was armed. The officer admitted he thought the pocket might contain stolen goods from a vehicle. Even if he had reason to suspect the bulge was a gun, the search should have ended after that pocket was searched.

## Third Department *continued*

The evidence was properly suppressed. Order affirmed. (County Ct, St Lawrence Co [Nicandri, JJ])

**Witnesses (Credibility)**                      **WIT; 390(10) (22) (40)**  
**(General) (Police)**

### **People v Borgia, No. 76947, 3rd Dept, 7/1/99**

A deputy, alerted by an open window and cut screen, saw a person inside a market at night. As he approached, someone he described at trial as a thin white male with a ponytail, in a tank top and jeans, came out and fled, followed by another person whom the deputy arrested. Shortly thereafter, a state trooper and K-9 dog apprehended the defendant, who matched the deputy's description, about 200 yards from the market. Two troopers testified to the description given by the deputy at the scene.

**Holding:** Fortifying a witness's credibility with prior consistent statements, known as "bolstering," is precluded at trial. Because the deputy's description was not attacked as a recent fabrication, the troopers' testimony was inadmissible hearsay, "of no probative value, and yet strongly calculated to influence a jury of laymen not versed in the rules of evidence." *People v Jung Hing*, 212 NY 393, 401. Proof of the defendant's guilt was entirely circumstantial, so the ruling cannot be considered harmless error. Judgment reversed, remitted for new trial. (County Ct, Sullivan Co. [Sheridan, JJ])

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

### **People v Henderson, No. 11020, 3rd Dept, 7/8/99**

The defendant, following an altercation with two off-duty police officers in a bar, said that after the officers had arrested him, they assaulted him in a parking garage while he was handcuffed. A special prosecutor was appointed, and the officers were indicted. The defendant testified as a witness at the grand jury proceeding without executing a waiver of immunity. Although the focus of his testimony was the assault, he did refer to the incident at the bar. When another grand jury, having heard testimony by the officers, indicted the defendant for the bar incident, the defendant successfully moved to dismiss the indictment. The court found that the defendant had transactional immunity because his testimony about the officers' assault was clearly connected to the crimes with which he was charged, and would tend to convict him by using his own words.

**Holding:** The court's finding of immunity is supported by reading the defendant's testimony at the officers' grand jury, and examining the charges lodged against him. See *People v Feerick*, 241 AD2d 126, 139 *aff'd* \_\_ NY2d \_\_ (6/8/99). The prior decision to deny the police officers transactional testimony is not controlling here; the officers' testimony did not touch upon the parking garage assault at all, and tended

to exculpate them. In contrast, the defendant's testimony was incriminating and substantial, and was given in response to the questions asked of him rather than gratuitously, conferring immunity upon him. See CPL 190.40(2)(b). Order affirmed. (County Ct, Albany Co [Rosen, JJ])

**Guilty Pleas (Vacatur)**                      **GYP; 181(55)**  
**Plea Bargaining (General)**                      **PLE; 284(10)**

### **People v Di Donato, No. 10455, 3rd Dept, 7/15/99**

The defendant entered a guilty plea in exchange for a court-imposed cap on the minimum of his indeterminate sentence. The court also agreed to vacate the plea and sentence if the denial of a motion by the defendant to file a late notice of intent to present psychiatric evidence (CPL 250.10) proved nonappealable. On appeal after sentencing, it was held that by accepting the plea the defendant had forfeited his right to appeal the denial of the motion.

**Holding:** The defendant contended his guilty plea was not knowing and voluntary because it was based on the court's promise to allow him to withdraw the plea if he could not appeal the denial. It is well settled that "a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored." *People v Selikoff*, 35 NY2d 227, 241 *cert den*, 419 US 1122. The record is not clear as to whether the court's promise induced the defendant to enter the guilty plea; a hearing is required on that issue. Order reversed, remitted for further proceedings. (County Ct, Schenectady Co. [Eidens, JJ])

**Defenses (Agency)**                      **DEF; 105(3)**  
**Instructions to Jury (Theories of**                      **ISJ; 205(50)**  
**Prosecution and/or Defense)**

### **People v Magee, No. 10706, 3rd Dept, 7/22/99**

Arrested for selling drugs, the defendant claimed his intent was to pretend to be a drug dealer long enough to abscond with prospective buyers' money. He changed his mind when a drug dealer acquaintance arrived, from whom he procured drugs for an undercover officer without profit. The defendant relied on the agency defense, but the court denied his request for jury instructions on it.

**Holding:** The agency defense was not warranted here. No reasonable view of the evidence suggests that the defendant acted solely to benefit the buyer. The defendant was not acquainted with the undercover police officer buyer. Rather than wishing to accommodate the buyer, the defendant's stated original intent was to scam her out of her money. When he changed his mind and procured the drugs, it was with the expectation that the dealer would compensate him. Merely serving as an intermediary in his own interest does not implicate an agency defense. See *People v Herring*, 83 NY2d 780, 782.

**Third Department** *continued*

Admissions made by the defense attorney did not constitute ineffective assistance of counsel, because they were fully consistent with trial strategy and did not prejudice the defendant. Nor was defense counsel's failure to proffer a psychiatric defense prejudicial; the defendant's testimony at trial that the events were "very clear," and his disavowal of an affidavit in which he claimed to be psychotic, would compromise such a claim. Judgment affirmed. (County Ct, Tompkins Co. [Sherman, JJ])

**Sentencing (Excessiveness) (General) SEN; 345(33) (37)**

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

**People v Carroll, No. 10968, 3rd Dept, 7/22/99**

The defendant's stepdaughter, age 13, accused him of sexually abusing her. Following police instructions, she telephoned him to try to elicit incriminating statements, but the defendant denied any wrongdoing. The police then confronted the defendant with a false polygraph test and told him the test showed the complainant was truthful. The defendant admitted the accusations were true.

**Holding:** The admission of expert testimony about the behavior of sexually abused children to explain the complainant's delay in reporting the crime was justified. *See People v Shay*, 210 AD2d 735 *lv den* 85 NY2d 980. The taped conversation in which the defendant denied any abuse was properly excluded. Given the allegations of prolonged abuse, we cannot agree that the defendant's normal reflective processes were rendered inoperative by the complainant's accusations. *People v Vasquez*, 88 NY2d 561, 574. The sentence imposed for the first six counts of the indictment exceeded the maximum allowable sentence; those offenses took place prior to changes in the Penal Code increasing the allowable minimum from one-third of the maximum to one-half. *See People v Trimm*, 252 AD2d 673, 675 n 1 *lv den* 92 NY2d 931. Judgment modified as to the sentence, and as modified, affirmed. (County Ct, Rensselaer Co.[Sise, JJ])

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

**People v Williams, No. 74657, 3rd Dept, 7/22/99**

The defendant was convicted of having kidnapped and murdered a woman in January 1988, upon a February 1994 indictment. He had been arrested for theft in March 1988, and was asked to submit to a lie detector test about attacks on women. He refused. He was then assigned counsel, and, with no attorney present, was given several items taken from him at his arrest, along with a medallion found at the abduction scene. He denied having seen it before. Imprisoned in 1994 for parole violation, the defendant made inculpatory statements about this case to an informant and two other inmates.

**Holding:** When an individual in custody requests or retains a lawyer, no further interrogation is permitted. Therefore, the defendant's statements about the medallion should have been suppressed. But they tended to be exculpatory, and admission was harmless. As to the statements to the informant inmate in 1994, the defendant was not represented by counsel at that time. The representation of trial counsel did not continue through parole. *See People v West*, 81 NY2d 370. No *Miranda* warnings were needed prior to the statements to the informant; placing the informant in an adjacent cell did not further restrict the defendant's freedom. *See People v Alls*, 83 NY2d 94 *cert den* 511 US 1090. No suppression was required as to the statements to other inmates because they were not acting as state agents. Collateral estoppel did not require the suppression of 1988 statements made while in custody for the theft, despite the lack of probable cause for that arrest. Judgment affirmed. (County Ct, Albany Co [Breslin, JJ])

**Fourth Department**

**Accomplices (Corroboration)**

**ACC; 10(20)**

**People v Potter, No. KA 97-5433, 4th Dept, 6/18/99**

**Holding:** The testimony of a school bus driver who saw three men in a car leave the driveway of the residence that was burglarized was insufficient to connect the defendant to the charged offense in a way that could reasonably satisfy the jury that the accomplice's testimony against the defendant was true. *People v Miller*, [Appeal No. 2], 158 AD2d 929 *lv den* 76 NY2d 739. Judgment reversed, indictment dismissed. (County Ct, Herkimer Co [Kirk, JJ])

**Sentencing (Excessiveness)**

**SEN; 345(33)**

**New York v Everson, No. KA 98-2011, 4th Dept, 6/18/99**

**Holding:** The defendant was sentenced to 21 years to life for second-degree murder. The police had a reasonable suspicion that the vehicle in which the defendant was a passenger had been used in a robbery, justifying the stop. *See People v Bernier*, 245 AD2d 137 *lv den* 91 NY2d 940. Briefly detaining the defendant for a showup was reasonable, and yielded probable cause to arrest the defendant. Statements obtained at the Criminal Investigation Division were properly admitted and there was sufficient evidence corroborating the confession. There was no *Brady* or *Rosario* violation, nor did the other errors complained of warrant reversal. However, "...we agree with both parties that modification of the sentence is warranted because of defendant's youth, lack of prior convictions and limited participation in the commission of the murder." Sentence reduced to 15 years to life. *See CPL 470.15(6)(b)*. (County Ct, Onondaga Co [Mulroy, JJ])

## Fourth Department *continued*

**Constitutional Law (General)** CON; 82(20)

**Due Process (Vagueness)** DUP; 135(35)

**Obsenity (Definition)  
(Evidence) (Standards)** OBS; 270(10) (15) (25)

**People v Foley, Sr., No. KA 98-2083,  
4th Dept, 6/18/99**

**Holding:** Penal Law 235.22 makes it a crime to disseminate indecent material to a minor via a computer communications system and importune the minor by such communication to engage in sexual conduct for the sender's benefit. The law is intended to prevent the abuse of children over the Internet. The defendant challenged the constitutionality of the statute. A previous challenge to the constitutionality of the statute as overbroad, vague, and violative of the Commerce Clause was initially rejected by the Kings County Supreme Court in *People v Barrows*, 174 Misc2d 367, 372-373. However, after a jury trial, the verdict was set aside as to counts under this statute. *People v Barrows*, 177 Misc2d 712. Nevertheless, the statute is constitutional. The definition of "harmful to minors" used in this law mirrors the permissible standard in *Miller v California* (413 US 15, 24 *reh den* 414 US 881 [1973]). This definition distinguishes the instant law from that in *Reno v American Civ. Liberties Union* (521 US 844, 871 [1997]). Any overbreadth can be cured by a case-by-case analysis. See *New York v Ferber*, 458 US 747, 773-774 (1982). The terms used in the statute are not impermissibly vague. The compelling interest of protecting minors is served by the precisely drawn language of the statute. There is no 1st Amendment violation.

The "luring" prong of the instant law narrows it, and distinguishes it from the statute struck down under the Commerce Clause in *American Libs. Assn. v Pataki* (969 FSupp 160). Judgment affirmed. (County Ct, Oneida Co [Dwyer, JJ])

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

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

**People v Fiori, No. KA 98-2310, 4th Dept, 6/18/99**

**Holding:** As the prosecution concedes, a new trial is required because the police violated the defendant's right to counsel by contacting him during trial and using the information thus obtained during trial. See *gen People v Samuels*, 49 NY2d 218. Prosecutorial misconduct such as suggesting during cross examination of the defendant that the defendant was tailoring his testimony to the prosecution's proofs, improperly denigrating the defense, vouching for prosecution witnesses, and calling the defendant a liar also require reversal. See *People v Paul*, 229 AD2d 932, 933. Judgment reversed, new trial granted. (County Ct, Niagara Co [Hannigan, JJ])

**Accomplices (Corroboration)**

ACC; 10(20)

**People v McGrath, No. KA 98-5254,  
4th Dept, 6/18/99**

**Holding:** The prosecution's main witness was a student who testified that he had telephoned the defendant, gone to the defendant's apartment, and purchased marijuana which the witness took to a party. Other witnesses established that the main witness had sold or given marijuana to others at the party. The defendant moved to dismiss his conviction on the basis of insufficient corroboration of the accomplice's testimony, preserving the error for review. See *People v Gray*, 86 NY2d 10, 19. There was no evidence other than the accomplice's testimony tending to connect the defendant to the crime, as is required by CPL 60.22(1). Judgment reversed, indictment dismissed. (County Ct, Lewis Co [Merrell, JJ])

**Discovery (Experts)**

DSC; 110(10)

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

**People v Greene, No. KA 98-8183,  
4th Dept, 6/18/99**

**Holding:** The prosecution furnished the defense with a copy of the ballistics expert's report on the same day that the prosecution received it, five days before trial. The court did not err in allowing the expert to testify, and the defendant has not shown prejudice from the delay. See *People v Montebano*, 232 AD2d 255 *lv den* 89 NY2d 944. The prison term imposed for first-degree burglary (Penal Law 140.30[2]) must run concurrently with that imposed for felony murder (Penal Law 125.25[1]), as the burglary was a material element of the felony murder. See Penal Law 70.25(2); *People v Adams*, 163 AD2d 881, 882-883 *lv den* 77 NY2d 875. The shots causing injury in the course of the burglary were separate from the shot fired outside, causing death. It was therefore not error to order the burglary charge to run consecutively to the intentional murder count (Penal Law 125.25[3]), but it was unduly harsh. The terms of imprisonment are directed to run concurrently. Judgment modified. (Supreme Ct, Erie Co [Tills, JJ])

**Prisoners (Disciplinary Infractions)**

PRS I; 300(13)

**Matter of Booker v Goord, No. TP 98-8330,  
4th Dept, 6/18/99**

The petitioner was found guilty of violating various inmate rules. The substantial piece of evidence used to support a finding against him was the testimony of the correction officer who made the misbehavior report. The officer stated that he observed the petitioner leave his seat in the mess hall and run toward a group of inmates who were assaulting correction officers. This article 78 proceeding was transferred.

**Fourth Department** *continued*

**Holding:** The petitioner’s actions did constitute creating a disturbance, but did not constitute rioting according to the pertinent regulation. 7 NYCRR 270.2(B)(5)(i); *cf Matter of Boyce v Coughlin*, 191 AD2d 936 *lv den* 82 NY2d 651. There was no evidence of what mess hall policies are, so the charge of failure to comply with such polices cannot stand. As only one penalty was imposed for the multiple disciplinary infractions, an appropriate penalty must be determined and imposed as to the creating a disturbance charge. Determination modified, and as modified, affirmed. (Supreme Ct, Wyoming Co [Dadd, JJ])

**Sentencing (Credit for Time Served) SEN; 345(15)**

**People ex rel Dennis v Piscioti, No. KAH 98-8363, 4th Dept, 6/18/99**

**Holding:** Convicted of two counts of felony driving while intoxicated (Vehicle and Traffic Law 1192[2], [3], 1193[1][c]), the petitioner was sentenced to four months of weekend jail time and five years probation. After completing the jail time, he violated probation and was sentenced to a one-year term of incarceration. He was properly given credit only for the number of days that he was actually incarcerated under the intermittent sentence, and was not entitled to four months credit. *See Penal Law 70.30(3); 85.05(4); People ex rel Fancher v Wasser*, 244 AD2d 79, 80-81. While the petitioner has already served his sentence, this issue qualifies for an exception to the mootness doctrine. *See Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715. Affirmed. (County Ct, Wayne Co [Kehoe, JJ])

**Admissions (General) (Spontaneous Declaration) ADM; 15(17) (37)**

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

**People v Sanchez, No. KA 98-8374, 4th Dept, 6/18/99**

**Holding:** The court improperly refused to redact the portions of the defendant’s admission to police regarding uncharged crimes. These portions did not help establish any element of the charged crime, nor fall under any other exception to the general rule of exclusion. *People v Lewis*, 69 NY2d 321, 325. Nor were they inextricably interwoven with the defendant’s admissible statements. *People v Ely*, 68 NY2d 520, 531. The error was harmless as the proof of the defendant’s guilt was overwhelming. It was not error to admit the defendant’s statement to police that “You guys did a nice job, but it took a cop from Buffalo to get me,” because it was spontaneous, not elicited in violation of the defendant’s right to counsel. *See People v Payne*, 233 AD2d 787, 788. (Supreme Ct, Monroe Co [Affronti, JJ])

**Juries and Jury Trials (Waiver)**

**JRY; 225(65)**

**People v Finkle, No. KA 99-1, 4th Dept, 6/18/99**

**Holding:** The defendant’s waiver of a jury trial was ineffective. The initial waiver, at the outset of trial, was neither in writing (*see NY Const, art I, section 2*) nor in open court (CPL 320.10[2]). The defendant was then tried without a jury. The court reserved its decision, and when court was reconvened to receive the verdict, the court indicated that there had been no proper waiver. A written waiver was then signed by the defendant, without any new inquiry or warnings by the court. It is not clear whether the waiver was signed in open court, as required. Whether or not the defendant abandoned any argument as to where the waiver was signed, the post-trial procedure, with its lack of warnings, did not cure the error of trying the defendant in the absence of a valid waiver. Judgment reversed, new trial granted. (County Ct, Oneida Co [Fahey, JJ])

**Dissent:** [Pigott, Jr., JJ] The defendant said on the record that he understood his right to have his case heard by a dozen citizens of the county, and waived that right. Defense counsel agreed when the court asked if the post-trial waiver was being executed *nunc pro tunc*. By failing to object to the procedure, and by failing to include in his brief the specific argument that the record did not show the waiver was executed in open court, the defendant abandoned the argument.

**Counsel (Right to Counsel)**

**COU; 95(30)**

**Grand Jury (Procedure)**

**GRJ; 180(5)**

**People v Schumaci, No. KA 99-22, 4th Dept, 6/18/99**

**Holding:** The defendant testified at the grand jury with his counsel present. When the defendant tried, during the proceedings, to confer with counsel, the prosecutor would not allow it, violating the defendant’s right to seek the advice of counsel during testimony. CPL 190.52(2); *cf People v Diaz*, 211 AD2d 402 *lv den* 85 NY2d 972. The integrity of the proceedings was impaired, and there was an articulable likelihood that the defendant was prejudiced by the error. *People v Adessa*, 89 NY2d 677, 686. The court properly dismissed the indictment. Order affirmed. (County Ct, Oneida Co [Donalty, JJ])

**Auxiliary Services (Constitutional Right to) (Odontologists)**

**AUX; 54(7) (40)**

**People v Koberstein, No. KA 99-148, 4th Dept, 6/18/99**

**Holding:** The defendant failed to preserve several alleged errors, including jury instructions on false exculpatory statements as evidence of guilt, admission of a security videotape, and the prosecutor’s summation. Admission of

## Fourth Department *continued*

photographs of the victim's body was not error because, while gruesome, the relevance of the pictures to material issues at trial outweighed their prejudice. See *People v Poblner*, 32 NY2d 356, 369-370 *rearg den* 33 NY2d 657 *cert den* 416 US 905. While an indigent defendant has a rights to funds for retaining expert witnesses upon the proper showing, the award is discretionary. See *People v Lane*, 195 AD2d 876, 878 *lv den* 82 NY2d 850. This defendant received \$1,150 to retain an odontologist at his prior trial (see *People v Koberstein*, 204 AD2d 1016), who did not testify at that trial. The court denied the initial request for funds in this case, but when the amount requested was lowered to \$3,000, the court indicated it was "receptive" to the request and told

the defense to confer with the court before making any expenditures. The issue was not raised again. There was no error here, nor in the court's refusal to allocate funds for further examination of the defendant by a psychologist who had already examined him.

Other issues raised are also without merit, including a brief mention—inextricably interwoven with the testimony of the witness who said it—of a prior crime committed by the defendant. See *People v Till*, 87 NY2d 835, 836-837. Admission of an audiotape of a conversation between the defendant and his friends did not deny him a fair trial. There was no abuse of discretion in admitting expert testimony comparing pattern injuries on the body with markings on the defendant's ring. Judgment affirmed. (County Ct, Oneida Co [Brunetti, JJ]) ⚖️

## Defender News *continued from page 1*

to adult behavior might not come to light. One of the study subjects above had been run over by a vehicle at age 15 months and appeared to recover fully within days. No behavioral abnormalities were observed until the age of three years, and the child was not especially disruptive in school or at home. However, her behavior became progressively disruptive; by age 14, she required placement in the first of several treatment facilities. In the often chaotic lives of public defense clients charged with serious offenses, the relationship between a similar early injury and later developmental problems could well go unnoted.

It is not news that early childhood injuries and experiences can be a source of mitigation in capital murder and other serious cases. National guidelines have long urged defense counsel to consider in preparation for a penalty phase hearing information "relating to the client's life and development, from birth to the time of sentencing" that would, *inter alia*, explain the offense, and to consider the need for expert witnesses who could "provide medical, psychological, sociological or other explanations for the offense(s) . . ." (*Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, American Bar Association [1989] Guideline 11.8.3[f][1] and [2].)

## Mitigation Specialists Are Vital in Death Penalty Work

Capital litigators depend on mitigation specialists to assist them in compiling and analyzing a client's life-history to find a key to saving the client's life. This means—get everything. Head injuries are not the only source of explanation for a client's developmental problems. Seemingly unrelated information such as dental records may lead to unexpected discoveries, such as that clients were so neglected in childhood that their teeth had rotted from malnutrition and poor hygiene requiring emergency treatment. (See training materials from NYSDA's 32nd Annual Meeting and Conference, announced in the *Backup Center REPORT* Vol. XIV, No. 6.)

The New York Capital Defender Office recognizes the importance of including experienced mitigation specialists on capital defense teams. (See p. 3.) And the National Legal Aid and Defender Association (NLADA) recently announced the availability of an affidavit in support of funding for a mitigation specialist in a capital case. For more information, contact: Scott Wallace, Defender Legal Services Director, 1625 K St. NW, Suite 800, Washington DC 20006-1604. tel (202) 452-0620; fax (202)872-1031; e-mail info@nlada.org ⚖️

## 1999 Legislative Review *continued from page 13*

### Chapter 140 (A.7699) (Sunset Extender — VTL — suspension of driver's license for failure to pay child support).

In 1995, legislation was enacted to mandate suspension of a parent's driver's license for failure to pay four or more months or child support (L. 1995, ch. 81). The sunset clause of this legislation has been extended from June 30, 1999 to June 30, 2001.

Extends the sunset clause of VTL §1198, which established a pilot ignition interlock program in certain counties, from July 1, 1999 to July 1, 2001.

### Chapter 135 (S.4754) (Sunset Extended — VTL — DWI Ignition Interlock Program).

### Chapter 60 (A.8394) (Sunset Extender — Arts and Cultural Affairs — Scalping).

Extends the sunset clause on New York's scalping laws (Arts and Cultural Affairs Law Art. 25) from June 1, 1999 to June 1, 2000. ⚖️

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