



Public Defense Backup Center REPORT

VOLUME XIV NUMBER 7

September 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

State Budget For Public Defense Is Not Great News

The state budget for April 1, 1999–March 31, 2000, approved months late, contained some good news and quite a bit of bad news for public defense. Below are highlights of relevant funding:

- **Aid to Defense (ATD) \$13,837,300.** This funding level has remained the same since FY 93–94. ATD funding at some level has been provided to certain counties since the 1970s to handle specified felony cases. Because the specific details of ATD funds for FY 99–00 have not been published, it can only be assumed that the allocations for ATD programs will remain the same as for the previous fiscal year.
- **New York State Defenders Association (NYSDA) \$1,400,000.** The appropriation for NYSDA and its Public Defense Backup Center remains at the FY 98–99 level, although it is now divided between federal and state sources.
- **Prisoners' Legal Services (PLS) \$3,500,000.** PLS, created in 1976 to provide inmates with meaningful access to New York's justice system and with a peaceful way to resolve their legitimate legal disputes, has been funded for FY 99–00 after being eliminated from last year's budget. However, its budget is substantially less than its previous funding of \$4 million (and the \$4.8 million vetoed in 1998). The emotional and physical toll of the past year has led the head of PLS to resign (see p. 2). There will be some lag time before the program becomes fully functional, as offices and staff must be recreated. As a trade-off for the restoration of PLS, the legislature has imposed a prisoner filing fee, described below.
- **Indigent Parolee Program (IPP) \$1,365,000.** The IPP, created in 1978 to ensure that counties would not be fiscally

burdened by the New York law that entitles indigent parolees to court appointed counsel in revocation hearings and in appeals from adverse parole release or revocation decisions, was cut by \$235,000 for FY 99–00. A breakdown of the total appropriation is as follows:

- \$400,000 for non-contract counties (same as last year). Includes \$25,000 for Cayuga County, related to the Willard drug and alcohol treatment center.
- \$420,000 specifically earmarked for the contract counties (\$315,000 for The Legal Aid Society of New York City, \$35,000 each for the three other contract counties [Monroe, Wyoming, Nassau]).
- \$545,000 remainder will also go to the contract counties, but a decision on the specific breakdown has not yet been made.
- **Neighborhood Defender Service (NDS) \$450,000.** State funding for this model community-based public defender office was nearly eliminated last fiscal year (only \$50,000 being provided). Funding has been restored to \$450,000 for FY 99–00.
- **Death Penalty Representation \$14,756,500.** The appropriation of \$6,148,700 for services and expenses of the Capital Defender Office (CDO) under Judiciary Law 35-b represents a decrease of 3% from FY 98–99 (\$178,900). A line item of \$8,597,800 for the payment of defendants' attorneys' compensation, fees and expenses for expert, investigative and other reasonably necessary services for defendants pursuant to 35-b represents a 19% increase from FY 98–99 (\$1,342,800). The provision of \$10,000 for production of a quarterly report remains at level funding from last year.

■ Inmate Filing Fees Established

Beginning December 7, 1999, indigent state and local inmates who are serving sentences will be required to pay a mandatory filing fee to commence a civil lawsuit, except an Article 78 proceeding con-

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1999 Parole Representation Manuals Ready

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

cerning jail time credit. The sliding-scale fee of between \$15 and \$50 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 an indigent inmate who cannot afford to pay the filing fee, the full amount of the fee will be collected from the inmate's account over time. The law is scheduled to sunset on December 31, 2002. (L: 1999, C. 412)

■ **Megan's Law Amendments Amount to Unfunded Mandate**

Public defense offices should be aware of and budget for the expanded right to counsel provisions found in recent changes to New York's Megan's Law (Sex Offender Registration Act [Correction Law article 6-c]). The County Law has been amended to provide express authorization for compensation of assigned counsel in risk classification proceedings, at the trial court level and in newly authorized civil appeals. Chapter 453 of the Laws of 1999, effective on January 1, 2000, provides that the public defender, a legal aid society, or 18-b counsel shall be assigned when a sex offender is financially unable to retain counsel. This right to counsel will now extend to *civil* appeals, which may be taken by the defense or prosecution, from the trial court's original risk level assessment.

The legislation also provides for assigned counsel on subsequent petitions for downward modification of the risk level score or period of registration, and in connection with prosecution-initiated petitions for upward modification of the same. Although sex offenders cannot appeal as of right from an order denying downward modification, they will have the right to appeal and to assigned counsel when the trial court grants a petition for upward modification. The offender's right to counsel will also extend to prosecution appeals from trial court orders (1) granting a downward modification, or (2) denying a petition for upward modification of a sex offender's risk level score or period of mandatory registration.

■ **Prosecution-Related Functions Receive Level or Increased Funding**

There have been no cuts in state contributions to prosecution funding, and counties have been relieved of the burden of a statutorily-imposed increase in district attorney salaries.

- **Aid to Prosecution \$21,013,000.** Aid to Prosecution, the counterpart to ATD, has been funded at the same level as FY 98-99, receiving over \$7,000,000 more than ATD.
- **DA Salary Reimbursement \$2,624,100.** The State will pay for the increase in district attorneys' salaries approved by the Legislature in December 1998.
- **DA Training \$3,500,000.** State funds for DA training, including the New York State District Attorneys Association and the New York Prosecutors Training Institute, are at the same level as FY 98-99.

Leven Leaving PLS, Terrizzi to Take Over

Having headed Prisoners' Legal Services for 20 years, David C. Leven is leaving the program in November to work at the Lindesmith Center, a project of the Open Society Institute focusing on drug policy. The stress of the past year, during which PLS was defunded, played a major part in Leven's decision to step down as PLS Executive Director. (*Poughkeepsie Journal*, 9/21/99.)

Leven received a Special Recognition Award at NYSDA's 1998 Annual Meeting and Conference. He testified at fact finding hearings held by the League of Women Voters and NYSDA last year, noting that: "Since April [1998], we have laid off virtually our entire staff, 58 of 62 people who worked at [PLS'] six offices around the state. It takes years to develop the kinds of expertise which our lawyers have to be able to handle these kinds of cases adequately and effectively. So if we are required to hire a lot of new staff and it looks like we are going to have to do that it's going to take years to develop the kind of expertise which is needed to handle these kinds of cases as well as they should be handled. . . ."

Tom Terrizzi, currently Associate Director and head of the Ithaca office, will become Executive Director when Leven departs. In the meantime, work continues to hire staff (see p. 4) and re-open offices as a result of the restored funding for PLS in the state 99-00 budget, as noted above.

Press Profiles Death Penalty at Four Years

Analyzing data from a variety of sources, including detailed information maintained by the Capital Defender Office, the *New York Law Journal* published an in-depth look at what has happened under the death penalty statute that went into effect on September 1, 1995. Out of 474 cases identified as potentially capital, the death penalty was sought 37 times. In 20 of those cases, at least one victim was white. Half of the defendants are black. A decision about whether to proceed capitally is pending in another 59 cases.

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Nine capital trials have yielded four sentences of life with out parole and five death sentences. Of the condemned prisoners, three are white (non-Hispanic), one black, and one Hispanic. (*New York Law Journal*, 9/14/99.)

Another paper headlined figures showing that upstate counties are nine times more likely to seek the death penalty than those downstate. Retired Court of Appeals Judge Stewart F. Hancock, Jr. was among sources said to opine that the discrepancy could lead to the overturning of those death sentences already handed down. Katherine Lapp, Commissioner of the Division of Criminal Justice Services and Director of Criminal Justice, said that the available numbers are still too low to detect statewide patterns, and expressed confidence that the state's death penalty is constitutional. (*Democrat and Chronicle* [Rochester], 9/13/99.)

Court to Consider "Commanded" Portion of Capital Punishment Statute

The Court of Appeals will review for constitutional vagueness one of the terms in New York's first-degree murder statute. The statute permits a defendant whose criminal liability is based on another person's conduct to be found guilty of first-degree murder for specified types of killings only if the defendant "commanded" the other person to cause the death. Penal Law 125.27(1)(a)(vii). Because the statute does not define the word "commanded," the Onondaga County Court ruled that portion of the law was void. (As was noted in the *Public Defense Backup Center REPORT* Vol. XIII, No. 3, prosecutors had decided against seeking the death penalty for John Lee Couser before the court's ruling.) The 4th Department reversed. *People v Couser*, __AD2d __ (No. 98-8316, 7/9/99). Leave to appeal was granted on September 12, 1999.

Leave was also granted, on September 16, in the highly publicized case of Kendall Francois, in whose Dutchess County home several bodies were allegedly found. Supreme Court Justice Thomas Dolan ruled in February that he could not accept a guilty plea that Francois entered before prosecutors had announced their intention to seek the death penalty. The 2nd Department rejected Francois's request via an Article 78 proceeding to compel Dolan to entertain his plea. *Matter of Francois v Dolan*, __AD2d__ (No. 99-01573, 7/12/99).

Buffalo Legal Aid Leader has Died

Linda S. Reynolds, Executive Attorney of the Legal Aid Bureau of Buffalo, died in August at the age of 57 following a long battle with cancer. She had joined the Legal Aid Bureau as an appellate staff attorney in 1985, then briefly entered private practice before returning to lead Legal Aid in 1989. Linda, known as a champion of rights for people of low income, regularly participated in NYSDA's Chief Defender Convenings. She will be missed at future Convenings, and NYSDA extends condolences to her family and colleagues. An obituary appeared in the *Buffalo News* on August 14, 1999.

"Accused" Premiers in Albany

"Accused" is a new play, based on the true story of Bill Heirens, who has been an Illinois prisoner for over 50 years and whom many believe was convicted of a crime he did not commit. Written by Connecticut author Trisha Sugarek, the play debuted in a rehearsed staged reading at the Albany Civic Theater's 6th Annual Playwrights' Showcase on September 10. Attorney Jed Stone, who has been Heirens's post-conviction lawyer for some time, was in the audience, and responded to many questions about Heirens's case after the performance. While the play is a fictionalized account of Heirens's story, a stirring speech to the Parole Board by the fictional character's attorney was comprised of Stone's words, taken from a transcript and reworked slightly, the playwright said. Stone is a member of the faculty for NYSDA's Defender Institute Basic Trial Skills Program held each spring.

Van Pelt Presumption of Vindictiveness Gets Amicus Support

The Court of Appeals will hear argument October 14, 1999 on the applicability and limits of the presumption of vindictiveness established nine years ago by the Court in *People v Van Pelt*, 76 NY2d 156 (1990), with regard to longer sentences imposed after successful appeals. In the current case, appellant Rudolph Young successfully appealed a multi-count conviction, was retried and acquitted of all but one count, and saw his sentence on that one count raised from a two-to-four term as a second felony offender to a 25-to-life term as a persistent felony offender. NYSDA, which filed a brief as *amicus curiae* in *Van Pelt*, has also filed an *amicus* brief in *People v Young*. A copy of the brief, written by NYSDA Staff Attorney Mardi Crawford, is available from the Backup Center. It has also been posted on NYSDA's web site: <http://www.nysda.org>.

Get More Defense News at www.nysda.org

Feel like you're missing something? If these few pages of Defender News leave you wanting more, head for the Defense News page at NYSDA's web site. There you will find summaries of and links to defense-related stories from around New York and the nation. Check it often—new items are posted frequently and links to dated stories will expire quickly. Examples of the site's recent postings include:

- A federal investigation has begun into the Nassau County jail following the death of an inmate. *Newsday*, 9/12/99.
- When incarcerated teenagers go to high school, learning competes with a hostile and brutal reality. *New York Post*, 9/12/99
- The new Federal Defender Office in Syracuse has added two experienced criminal defense lawyers to its staff. *Syracuse Online*, 9/11/99
- A diabetic inmate who uses a wheel chair claims in a lawsuit that the Cayuga County Jail failed to meet his

(Continued on page 15)

Job Opportunities

The Legal Aid Bureau of Buffalo, Inc., a non-profit legal services agency in criminal and civil practice (criminal appeals, public defender, housing and family law, and family court [law guardians]), is seeking an **Executive** to lead bureau of 40 attorneys and 20 support staff and administer a \$3.5 million budget. Demonstrated background in social justice sought, with skills in community outreach, administration, staff-development, organization-building, and fund-raising. Practicing attorney preferred; other graduate degree or equivalent experience may be considered. EOE. Salary \$70K+ DOE, full benefits package. Deadline: October 31, 1999. Send letter and resume to: The Legal Aid Bureau of Buffalo, Inc. Search Committee, 237 Main Street, Suite 1602, Buffalo, New York 14203.

The Capital Defender Office, created by statute and charged with guaranteeing effective assistance of counsel in every capital and potentially capital case throughout New York State, seeks **Mitigation Specialists** 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 **Capital Case Investigators** to work in its Central Region office in Albany. Capital Case investigators are responsible for examining, analyzing, and investigating all evidence relevant to guilt in the alleged capital offense, as well as evidence offered in aggravation. Duties include: locating and interviewing witnesses; conducting field investigations; evaluating physical evidence; working with mitigation specialists; interviewing forensic experts; taking still and video photographs; consulting with attorneys to develop case theories and strategies; identifying, locating, and interviewing potential exculpatory witnesses; and other aspects of capital trial preparation. Applicants must be committed to the representation of those unable to afford counsel. Individuals with expertise in specific areas of forensic analysis, as well as those with more general backgrounds but strong commitment to indigent defense are urged to apply. Excellent writing, oral communications, and word processing (WordPerfect) skills are necessary. Fluency

in more than one language, especially Spanish, advantageous. Willingness to travel and work flexible hours essential. Valid New York State drivers license required. Bachelor's degree desirable. Backgrounds in investigation, social work, journalism, community organizing, or education will be considered. Salary CWE. EOE. Send a letter, resume, writing sample and references to address above.

Prisoners' Legal Services of New York has several openings for **Staff Attorney, Managing Attorney** (Poughkeepsie office only), **Paralegal, Office Manager, and Secretary** for offices in Albany, Buffalo, Ithaca, New York City, Plattsburgh, and Poughkeepsie. PLS provides services to people incarcerated in NYS prisons, handling a wide variety of matters including discipline, medical care, conditions of confinement, jail credit, and others. PLS has been extremely successful in the provision of high quality, effective legal services and establishment of important rights for clients. There is a strong emphasis on cooperative and collegial working relationships within and between PLS offices. In-house and outside training are provided, and individual initiative and innovation are encouraged. With a high percentage of clients who are people of color, PLS seeks to be a well-balanced, multi-cultural organization; people of color, women, and the disabled are especially encouraged to apply. Spanish-speaking staff are needed. Competitive salaries; substantial leave and excellent health insurance benefits. Send resume and 3 references including phone numbers to: David C. Leven, Executive Director, 105 Chambers Street, 2nd Floor, New York NY 10007-1076. Indicate which office(s). If seeking the Managing Attorney position, indicate whether you would accept a Staff Attorney position. ☺

Resources Sighted, Cited, or Sited

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

Than Chemistry?" *Science & Justice* [publication of the Forensic Science Society (UK)] Vol. 37 #2 (1997) and the Bayesian Evidence Homepage: <http://www.mcs.vuw.ac.nz/~vignaux/evidence.html>

Also, "More Problems with Probability: The Defence Lawyer's Fallacy," in Vol. 20, #3. Copies of these articles are available from the Backup Center, with the permission of the editor and author.

✓ "The Prosecutor's Fallacy," Joseph F. Kenkel, column in *Criminal Lawyers Association Newsletter* [Canada], Vol. 20, #2. Describes the manner in which prosecutors wrongly use statistical probabilities to overcome reasonable doubt—its bibliography includes "Does Justice Require Less Precision

✓ "People v. Daniel Louis: Right to Counsel in Village Justice Courts," H. Raymond Fasano, article in *The Mouthpiece* [publication of the NYS Association of Criminal Defense Lawyers] Vol. 12, #3, May/June 99. Describes a decision by Thomas F.

(Continued on page 15)

Conferences & Seminars

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

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: MCLE
Dates and Places:
October 16, 1999 — New York City (Weapons for the Firefight)
November 5, 1999 — Poughkeepsie (Mid-Hudson Trainer)
December 3-4, 1999 — New York City ("Last Chance '99 Seminar")
Contact: Patricia Marcus: tel: (212) 532-4434; fax: (212)532-4668; e-mail: nysacd1@aol.com; web site: <http://www.nysacd1.org>

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

Sponsor: New York State Bar Association
Theme: Legislative Law and Lobbying
Date: October 21, 1999
Place: Albany, NY
Contact: NYSBA CLE: tel: (800)582-2452 or (518)463-3724; fax: (518)487-5618; (fax on demand: (800)828-5472; web site: <http://www.nysba.org>

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

Sponsor: Brooklyn Law School
Theme: Annual Seminar—Criminal Law, Procedure & Evidence: The New York State Court of Appeals, *et al.* 1998-1999
Date: October 30, 1999
Place: Brooklyn, NY
Contact: CLPE, Brooklyn Law School, 250 Joralemon Street, Brooklyn NY 11201. (718)780-7952.

Sponsor: National Association of Criminal Defense Lawyers
Theme: Lawyering on the Edge: Limits of Aggressive Advocacy
Dates: November 3-6, 1999
Place: Chicago IL
Contact: NACDL: tel: (202) 878-8600; fax: (202)872-8690; web site: <http://www.criminaljustice.org>

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

Sponsor: National Institute for Trial Advocacy
Theme: Criminal Trial Advocacy
Date: November 12, 1999
Place: Albany, NY
Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; e-mail: nita.1@nd.edu; web site: <http://www.nita.org>

Sponsor: 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: <http://www.csfa.ca>

Sponsor: National Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law Seminar
Dates: January 30, 1999-February 4, 2000
Place: Aspen, CO
Contact: NACDL : tel: (202) 878-8600; fax: (202)872-8690; web site: <http://www.criminaljustice.org>

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

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

BIA Holds NY Youthful Offender Adjudication Is a Conviction for Deportation Purposes

A panel of the Board of Immigration Appeals (BIA) has decided that a New York youthful offender adjudication is a conviction for immigration law purposes despite NYSDA's submission of an *amicus curiae* brief explaining how New York law provides that such a disposition may not be deemed a conviction and is confidential. *Matter of Pereira*, A44-802-198 (BIA, 9/10/99). The decision of the three-member panel did not go to the entire eighteen-member Board and was not designated as a precedent decision. Nevertheless, because the BIA panel reached its conclusion on a youthful offender disposition despite detailed briefing regarding New York youthful offender law, the decision confirms fears expressed earlier in the *REPORT* based on dicta in the BIA's March 1999 precedent decision involving an Idaho plea that was later vacated. *Matter of Roldan-Santoyo*, Int. Dec.#3377 (BIA March 3/3/99). See the *Backup Center REPORT* Vol. XIV, #3, at pg. 6.

The BIA panel in *Matter of Pereira* found that the respondent had pled guilty to two counts of robbery under New York State Penal Law and, although his plea was replaced with a youthful offender finding, was sentenced to serve 1½ to 4 years imprisonment. The panel cited *Roldan-Santoyo* and stated: "Since no effect is to be given to a state action which purports to expunge, cancel, vacate, discharge, or otherwise remove a guilty plea and since an order placing a restraint on the alien's liberty has been imposed we must find that this respondent has been convicted within the meaning of section 101(a)(48)(A) of the Act. We, therefore, reject both the respondent's and the NYSDA's arguments that the respondent's youthful offender adjudication is not a conviction as defined under the Act."

NYSDA will continue its efforts to persuade the BIA and/or federal courts that the new definition of conviction does not cover New York youthful offender adjudications. The Association has submitted *amicus* briefs in two additional cases before the BIA (*Matter of Rose* and *Matter of Das*, both filed September 15, 1999) raising the youthful offender issue. *REPORT* readers who are aware of cases raising the youthful offender issue either before the BIA or the courts are asked to contact the Criminal Defense Immigration Project at (212) 367-9104.

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

US Court in Brooklyn Rules AEDPA Relief Restriction Not Retroactive

United States District Judge Jack B. Weinstein has issued two decisions ruling that the restrictions on deportation relief for lawful permanent residents in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) may not be applied retroactively to individuals whose criminal conduct or conviction preceded AEDPA's enactment even if they were not yet in deportation proceedings on the date of enactment. *Pottinger v Reno*, 51 FSupp.2d 349 (E Dist NY 8/2/99) and *Maria v McElroy*, 1999 WL 680370 (E Dist NY 8/27/99).

At issue was the government's retroactive application of AEDPA section 440(d), which barred lawful permanent residents from eligibility for a waiver of deportation if they were convicted of any of several enumerated criminal offenses no matter how minor the offense or what equities were present. In 1998, the 2nd Circuit held, as a matter of statutory interpretation, that Congress did not intend for this relief restriction to be applied in pending deportation cases. *Henderson v INS*, 157 F3d 106 (2d Cir 1998), *cert den sub nom Navas v Reno*, 199 SCt 1141 (3/8/99). The Circuit did not reach the issue of whether Section 440(d) applies in cases that were not pending on April 24, 1996, but which involved pre-Act convictions and/or conduct.

The federal government is expected to appeal the *Pottinger* and *Maria* decisions.

Project Trainers

Project Director Manny Vargas is having a busy fall making presentations on criminal/immigration issues. On Sept. 2, 1999 he spoke to new law clerks at the US Court of Appeals (2nd Circuit) in New York City about potential crime-related immigration issues. On Sept. 7 he spoke on immigration consequences of criminal convictions to the Criminal Defense Clinic class at City University of New York School of Law in Queens. On Sept. 9, he discussed immigration consequences of "aggravated felony" criminal convictions at the Criminal Courts Bar Association of Nassau County in Westbury. And on Sept. 22 he visited a leading immigration law firm in New York City, **Fragomen, Del Rey & Bernsen P.C.**, to discuss issues of deportability and relief for criminally convicted noncitizens in removal proceedings.

Manny will be traveling to California in October to participate in a panel presentation on relief for criminally convicted noncitizens in removal proceedings during a daylong seminar entitled "The Immigration Consequences of Criminal Conduct" sponsored by the National Immigration Project of the National Lawyers Guild. He has additional trainings scheduled in New York City and elsewhere in the coming weeks. ☺

Case Digest

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

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

United States Supreme Court

Death Penalty (Federal) (Penalty Phase) DEP; 100(70) (120)

Sentencing (Aggravated Penalties) (Instructions to Jury)(Mitigation) SEN; 345 (5)(45)(50)

Jones v United States, No. 97-9361, 6/21/99

The petitioner was sentenced to death for kidnapping resulting in the death of the victim. The 5th Circuit affirmed.

Holding: The petitioner requested a jury instruction that if the jury could neither come to a unanimous decision or decide between life without possibility of release or death, the court would impose a sentence of life without possibility of release. The 8th Amendment does not require that a jury be told of the consequences of a breakdown in deliberations; rather, the object of the jury system is to secure unanimity. To require such an instruction could be "an open invitation for the jury to avoid its responsibility and to disagree." *Justus v Virginia*, 220 Va 971, 979, 266 SE2d 87, 92 (1980).

It is not reasonably likely that the jury instructions and decision forms confused the jurors into believing that without a unanimous decision of either death or life without release, the court would impose a sentence less severe than life in prison. Nor is there proof that the petitioner's substantial rights were affected.

Finally, the petitioner challenges the nonstatutory aggravating factors as vague, duplicative, or overbroad, violating the 8th Amendment. The 5th Circuit's analysis was imperfect, but any error was plainly harmless. Judgment affirmed.

Dissent: (Ginsberg, J) " [A]ccurate sentencing information is an indispensable prerequisite to a [jury's] determination of whether a defendant shall live or die." *Gregg v Georgia*, 428 US 153, 190 (1976) (joint opinion of Stewart, J et al).

Civil Practice (General) CVP; 67.3(10)

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

Prisoners (Conditions of Confinement) PRSI; 300(5)

Martin v Hadix, No. 98-262, 6/21/99

The Prison Litigation Reform Act of 1995 (PLRA) limits the amount of fees awarded to attorneys for litigating prisoner lawsuits. 42 USC 1997e[d][3] (1994 ed Supp II). The

issue is whether the lower fees imposed by section 803(d)(3) of the PLRA should be applied with respect to two cases in which services were rendered both before and after the PLRA took effect. The District Court held that the higher rates should be paid for work performed before the PLRA, and the limited rates for work after the effective date of the act. The 6th Circuit held that the fee limitations did not apply at all to cases pending on that date, because there would be an impermissible retroactive effect regardless of when the work was performed.

Holding: The temporal reach of the PLRA is not specifically set forth. We must determine whether a retroactive effect would result. Limiting fees for work performed before the PLRA's effective date would attach new legal consequences to completed conduct (*Landgraf v USI Film Products*, 511 US 244, 270 [1994]) and upset the attorneys' reasonable expectations. After the PLRA took effect, however, the attorneys were on notice that fees had changed. The PLRA does not limit fees for work performed before its effective date, but it does limit fees for work performed after that date. Affirmed in part, reversed in part.

Concurrence in part, dissent in part: [Scalia, J] The most precisely defined purpose of the PLRA was to reduce the incentive for lawyers to work on prisoners' civil rights cases. [Ginsberg, J] There is no showing that the PLRA was intended to apply to cases brought to court before its enactment.

Search and Seizure (Arrest/ Scene of the Crime Searches [Automobiles and Other Vehicles] [Probable Cause]) (Warrantless Searches) SEA; 335(10[a][g])(80)

Maryland v Dyson, No. 98-1062, 6/21/99

A Maryland sheriff's deputy, acting on a tip about drugs, stopped and searched the respondent's vehicle and found crack cocaine. The respondent appealed his conviction, saying the cocaine should have been suppressed. The Maryland Court of Special Appeals found there had been probable cause for the search, but held that under the 4th Amendment the police should have obtained a search warrant, and reversed.

Holding: In general, police must secure a warrant before conducting a search, but there is an exception for automobiles. Where the facts would justify the issuance of a warrant, a vehicle search has been held proper even though no warrant was actually issued. *United States v Ross*, 456 US 798, 809 (1982). "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Pennsylvania v Labron*, 518 US 938 (1996). The finding of probable cause satisfies the automobile exception. Certiorari granted, judgment reversed.

Dissent: [Breyer, J] Respondent's counsel not being a member of this Court's bar, no brief was filed in opposition

US Supreme Court *continued*

to the petition for certiorari. Counsel should have been invited to file a brief as *amicus curia* before this Court acted on the merits.

New York State Court of Appeals

Accusatory Instruments (Sufficiency) ACI; 11(15)

People ex rel. Ortiz v Commissioner, New York City Department of Correction, No. 125, 6/30/99

The relator was arraigned on two accusatory instruments containing numerous charges, some of which were corroborated by non-hearsay allegations. Each instrument included at least one uncorroborated charge. The Supreme Court denied the relator's *habeas corpus* petitions seeking release pursuant to CPL 170.70, and the Appellate Division affirmed.

Holding: Although CPL 170.70 requires, upon motion, the release of a defendant detained for more than five days where "a misdemeanor complaint is pending *** without any information having been filed," it is inapplicable here. In each criminal proceeding, the relator was not improperly held solely on the basis of hearsay allegations. Each accusatory instrument satisfied the requirements of an information. Each, from inception, could have been the basis for prosecution of a criminal action. See CPL 100.15; 100.40(1) (Relating to the facial sufficiency of an information "or a count thereof"). Order affirmed.

Evidence (Destruction) (Hearsay) EVI; 155(49) (75)

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

People v James, No. 92, 7/01/99

The defendant was convicted of perjury for making sworn denials at a grand jury investigation into allegations of cheating on a police promotional exam. The Appellate Division affirmed.

Holding: A recorded conversation between the defendant's commanding officer and a fellow officer about an upcoming meeting to facilitate the cheating was properly admitted to prove that, contrary to the defendant's contentions, the meeting between the defendant and others took place. The court admitted the conversation as proof of the joint or cooperative action among him, the defendant, and others under the state of mind exception to the hearsay rule. *Mutual Life Ins. Co. v Hillmon*, 145 US 285 (1892). A rigid application of the state of mind exception is rejected, in conformity with the reasoning of *United States v Annunziato* (293 F2d 373 [2nd Cir] cert den 368 US 919). Independent

corroborative evidence existed to support the trustworthiness of the statement. The fellow officer's detailed testimony about the meeting aided in satisfying the corroboration standard regarding declarations against penal interest, which suffices here. See *People v Thomas*, 68 NY2d 194, 200.

The commanding officer's statement made after the alleged meeting was properly admitted as a declaration against penal interest, fitting all four of the prerequisites for admissibility. That the names of the defendant and another officer were not redacted was proper. New York has opted against a *per se* rule of redaction of the accusatory portion of the declaration in the prosecution of a co-defendant, in favor of a nonconclusive presumption against reliability, with the ultimate determination dependent upon the circumstances of the individual case. See *People v Brensic*, 70 NY2d 9, 26.

The admission of both statements did not violate the Confrontation Clause. See *Idaho v Wright*, 497 US 805, 814 (1990).

The court did not abuse its discretion in denying the defendant's request for a permissive adverse inference charge as a sanction against the prosecution for the fellow officer's destruction of evidence. Order affirmed.

Retroactivity (General) RTR; 329(10)

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

People v Martello, No. 111, 7/06/99

Information gained through electronic telephonic eavesdropping constituted a large part of the prosecution's evidence against the defendant. The government's pen register surveillance, used to support the numerous eavesdropping warrant applications, was concluded before *People v Bialostok*, 80 NY2d 738 (1993). The defendant moved to suppress all information gained through this pen register surveillance, relying on the *Bialostok* decision, and the trial court ruled that *Bialostok* should be applied prospectively only. A unanimous Appellate Division affirmed.

Holding: The Court of Appeals' ruling in *Bialostok* should not be applied retroactively to govern all pen register surveillance, including those conducted by members of law enforcement in New York prior to the issuance of the *Bialostok* ruling. Because *Bialostok* is based entirely on New York State law, the issue of retroactivity is subject to New York's flexible approach, and is to be resolved by the application of the *Pepper-Mitchell* tripartite test. See *People v Pepper*, 53 NY2d 213, 220, cert den 454 US 967; *People v Mitchell*, 80 NY2d 519, 525-26. Because *Bialostok* represented a dramatic shift away from customary and established procedure, it broke new legal ground in this State and established a "new" rule of law. See *People v Favor*, 82 NY2d 254, 263. Order affirmed.

First Department

Reargument and permission to file additional briefs was granted by the 1st Department on 5/25/99 in People v Crisp, 246 AD2D 84 (digest in Backup Center REPORT, Vol. XIII, No. 10).

Search and Seizure (Warrantless Searches [Plain-view Objects]) SEA; 335(80[k])

People v Batista, No. 230, 1st Dept, 5/18/99

While police were executing a search warrant for narcotics and paraphernalia at an apartment the defendant rang the apartment's bell. The police allowed the defendant to enter the location, where he was told to "put his hands up." As the defendant raised his hands a brown paper package fell from his jacket. The narcotics officer concluded the package contained narcotics and searched the package finding cocaine. The evidence was suppressed.

Holding: Under the plain view doctrine, if sight of an object gives police probable cause to believe that it is the instrumentality of a crime, the object may be seized with no warrant if (1) the police are lawfully in a position to view the object; (2) the police have lawful access to it; and (3) the object's incriminating nature is immediately apparent. See *People v Diaz*, 81 NY2d 106, 110. The police here were in a lawful position to view the object; they had lawful access to it; and the officer's testimony that in his experience as a narcotics officer, involving hundreds of cases, he had seen narcotics packaged in such a way made it immediately apparent that the package contained narcotics. Further, the location was a veritable narcotics warehouse, as in *People v Aquidelo* (150 AD2d 284). Order reversed. (Supreme Ct, Bronx Co [Marcus, JJ])

Arrest (Probable Cause) ARR; 35(35)

People v Rothwell, No. 899, 1st Dept, 5/18/99

Officers saw the defendant holding a paper bag containing a green bottle with a white label standing with a group of people. The officers approached the defendant, who set the bag down and entered a luncheonette. The bottle was observed to be a beer bottle. The police entered the luncheonette to issue the defendant a citation for public consumption of alcohol. While he was being removed from the luncheonette for safety, several bags containing cocaine fell from his hands. The court suppressed the cocaine.

Holding: The officers had reasonable cause to believe that the defendant had committed an offense (see CPL 140.10) and thus were justified in their actions. The officer observed the defendant, engaged in conversation, holding in front of him what appeared to be a beer bottle. The manner

in which it was concealed suggested that it was an alcoholic beverage. The defendant's reaction to the police and the fact that the bag contained a beer bottle created a reasonable cause to believe that the defendant had committed an offense. The court's reliance on *People v Lee* (58 NY2d 491) was inapposite. Order reversed. (Supreme Ct, New York Co [Yates, JJ])

Evidence (General) (Missing Witnesses) EVI; 155(60) (86)

People v Cordon, No. 1015, 1st Dept, 5/20/99

Holding: The defendant was not deprived of his right to present a defense when he was precluded from introducing into evidence the videotaped grand jury testimony of the deceased complaining witness. That witness had testified at the first trial in this case which resulted in a hung jury, and his testimony from the first trial was read in evidence at the second trial. The only purpose of the videotape was to allow the jury to observe the victim's hostile demeanor at the time of his grand jury testimony. This evidence would have been cumulative since the victim's testimony from the first trial featured angry outbursts that were not redacted from the record. These facts are distinguishable from those in *People v Robinson*, 89 NY2d 648. Judgment affirmed. (Supreme Ct, New York Co [Stackhouse, JJ])

Ed. note: The following decision was issued after reargument and replaces the 2/2/99 decision found at 685 NYS2D 42 (Digest in Backup Center REPORT, Vol. XIV, No. 5).

Sentencing (Excessiveness) SEN; 345(33)

People v Lebron, No. 119, 1st Dept, 5/25/99

The defendant was convicted of seven counts of first-degree robbery, four counts of second-degree robbery, one count of third-degree criminal possession of a weapon, and one count of first-degree criminal possession of a controlled substance. He was sentenced as a second felony offender to four consecutive terms of 25 years on four first-degree robbery counts, to run concurrently with concurrent terms of 25 years on each of the remaining first-degree robbery convictions, 15 years on each of the second-degree robbery counts, 15 years on the weapon charge, and 25 to life on the controlled possession charge.

Holding: The sentences are found to be excessive and are modified as a matter of discretion in the interest of justice as follows: the sentence on each first-degree robbery conviction is reduced to 15 years, the controlled substance sentence is reduced to 15 years to life, and all sentences are directed to run concurrently. Judgment modified, and otherwise affirmed. (Supreme Ct, New York Co [McMahon, JJ])

First Department *continued*

Sex Offenses (Corroboration)

SEX; 350(2)

In re Keisha McL., No. 1245, 1st Dept, 5/27/99

An order of disposition directing commencement of a parental rights termination proceeding was entered after a fact-finding determination that the respondent sexually abused two of the subject children.

Holding: Out-of-court statements by the children that they were sexually abused cross-corroborated each other. Further corroboration is found in their consistent repetitions to their foster mother, the psychologist, and the social worker, which the experts said did not indicate coaching, expert testimony as to the children's knowledge of sexual acts, and proof of and expert testimony as to symptomatic changes in behavior. *See Matter of Latisha W*, 221 AD2d 645. Absent an offer of an innocent explanation, an inference that the touching was done for the purpose of sexual gratification was proper. *See Matter of Thomas N.*, 229 AD2d 666, 668. Order affirmed. (Family Ct, Bronx Co [Weinstein, JJ])

Confessions (General)

CNF; 70(32)

Insanity (Instructions)

ISY; 200(30)

People v Napier, No. 1265, 1st Dept, 5/27/99

Holding: The court properly denied the defendant's motion to suppress statements he made to the authorities concerning the instant case after he was arrested on a bench warrant regarding a prior pending, unrelated charge upon which he was represented by counsel. *See People v Steward*, 88 NY2d 496. The court properly instructed the jury to treat a defendant with multiple personalities as one person with regard to the insanity defense and to evaluate such defense in terms of the state of mind of whichever personality the defendant was experiencing at the time of the crime. Judgment affirmed. (Supreme Ct, New York Co [Snyder, JJ])

Bill of Particulars (General)

BOP; 61(10)

Juries and Jury Trials (Deliberation)

JRY; 225(25)

People v Young, No. 1279, 1st Dept, 6/1/99

Holding: The introduction of uncharged, contemporaneous drug sales to unapprehended buyers was highly relevant to the defendant's intent to sell heroin, and to why the police officer's attention was focused on him. Because the sales were evidentiary in nature, referring to them in the bill of particulars was not required. *See People v Fitzgerald*, 45 NY2d 574, 580. As to the court's responses to three notes in which the jury indicated deadlock, the defendant's claims are unreserved and waived. The defendant proposed the responses to the first two notes and did not object to the court's action with respect to the third note. By opposing the

declaration of a mistrial in each instance, the defendant also waived the claim that the court should have declared a mistrial *sua sponte*. The jury's final note did not indicate a hopeless deadlock over which the court coerced a verdict. Rather, the jury was struggling with interpreting the reasonable doubt principle, and the court sought to address their question. Judgment affirmed. (Supreme Ct, New York Co [Bookson, JJ])

Juveniles (Delinquency—Procedural Law) JUV; 230(20)

In re Anthony R., No. 201, 1st Dept, 6/3/99

Holding: The Presentment Agency challenged the dismissal of a juvenile delinquency petition for failure to provide a fact-finding hearing within 60 days. The period during which a bench warrant is outstanding is included in the 60-day period only if, despite due diligence, the respondent's location cannot be determined or his or her presence obtained. The record here shows that the Presentment Agency made no effort to secure the respondent's presence in court prior to the ninetieth day after filing. Although aware of the respondent's address, no one visited him at home or school. The Family Court was correct in finding a lack of due diligence in securing the respondent's appearance, so the period of time in which the warrant was outstanding was properly included in calculating the 60-day period. Order affirmed. (Family Ct, New York Co [Larabee, JJ])

**Sentencing (Enhancement)
(Resentencing)**

SEN; 345(32)(70.5)

People v Gonzalez, No. 1200, 1st Dept, 6/8/99

The prosecution proposed to drop a pending charge of criminal possession of a weapon and not to seek an indictment on an alleged prison assault if the court imposed a sentence of seven to 21 years, to run consecutively with a prior aggregate sentence for unrelated convictions. The defendant wished to be sentenced without regard to the alleged offenses despite the risk of a maximum sentence of 12½ to 25 years, because he claimed innocence of them. Although the judge believed that an appropriate sentence for the robbery would have been five to 15 years, he imposed a 7-to-21 year sentence as if the defendant had pled guilty to the other charges. The US District Court held that this enhancement of the sentence violated the defendant's due process rights. At resentencing, another judge imposed an identical sentence without explanation.

Holding: The judge abused his discretion as a matter of law. When a harsher sentence is imposed at resentencing, whether by the same judge or a different one, it raises a presumption of institutional vindictiveness unless incidents occurring or discovered after the original sentencing justify the increase. This rule applies to both retrials and resentenc-

First Department *continued*

ings to prevent defendants from being punished for exercising their right to appeal. Because the original sentence was based on the robbery plus the two other crimes, imposing that same sentence for the robbery alone is certainly a sentence enhancement. Judgment reversed, matter remanded. (Supreme Ct, Bronx Co [Vitale, JJ])

Defenses (General) **DEF; 105(31)**

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

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

People v Moolenaar, No. 1349, 1st Dept, 6/8/99

Holding: The defendant challenged the preclusion of defense expert testimony as to the results of a crime scene reenactment, intended to discredit the observing officer's testimony as to his ability to see the drug transactions in question. The accurate replication of the crime scene, especially as to lighting conditions and hand motions, could not be verified. There was no guarantee that the prosecution's cross-examination would suffice to prevent this evidence from confusing and misleading the jury. *See People v Esquilin*, 207 AD2d 686 *lv den* 84 NY2d 907.

The court correctly denied the defendant's motion for speedy trial and excluded a 32-day period as a reasonable delay resulting from motion practice. Although this delay took place after the decision on the omnibus motion, the prosecution was entitled to a reasonable time to prepare for the suppression hearings that were ordered. *See People v Green*, 90 AD2d 705 *lv den* 58 NY2d 784. Judgment affirmed. (Supreme Ct, New York Co [Drager, J on speedy trial motion; Gold, J at trial and sentence])

Prosecutors (General) **PSC; 310(20)**

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

People v Smith, No. 1383, 1st Dept, 6/10/99

Holding: The defense sought to have the prosecutor recused and called as a defense witness regarding a prior inconsistent statement made by the arresting officer and recorded by the prosecutor. The prosecutor's testimony as to the prior inconsistent statement was not necessary because the defendant was able to fully elicit the matter from the arresting officer, who acknowledged the statement. *See People v Sharpe*, 167 AD2d 296 *lv den* 77 NY2d 911. The pretrial activity of the prosecutor was not a material issue and the prosecutor's participation in the trial in no way prejudiced the defendant. *See People v Paperno*, 54 NY2d 294. The claim that the law of the case doctrine was violated is unpreserved for review. The defendant referred to the prior court ruling as advisory and contingent, never claiming it was a final ruling. We decline to review this claim in the interests of

justice, but if we were to review it, we would find that the ruling of the trial court was based on new information not before the prior court. Judgment affirmed. (Supreme Ct, New York Co [Berman, JJ])

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

Lesser and Included Offenses (Instructions)

LOF; 240(10)

In re Application of Morgenthau v Yates, No. 3325 [M-6228], 1st Dept, 6/10/99

Holding: Since the prosecution has the authority to appeal an order dismissing a count on which the jury failed to reach a verdict, it is not the proper subject of an article 78 proceeding. The trial court did err in refusing to instruct the jury to consider the lesser-included offense only as an alternative in case of a unanimous acquittal on the greater offense. *People v Boettcher*, 69 NY2d 174. The respondent justice misinterpreted the law, allowing the jury to consider the charges in "any particular order" despite an inability to reach a unanimous decision on the greater offense. The court erred in informing the jury that a finding of guilt on a lesser charge would be deemed an acquittal on the higher charges.

After the jury indicated it was 11-1 for conviction, but stated that one of the jurors had not demonstrated "consistent well-reasoned arguments," both the defendant and the prosecution asked for a mistrial. The court erred in allowing the jury to continue its deliberations. These errors, however, do not entitle the prosecution to any remedy. The defendant was convicted by a jury of the lesser included offense, and retrial on the greater offense would violate double jeopardy principles. Application denied.

Due Process (Fair Trial)

DUP; 135(5)

People v Sellars, No. 1416, 1st Dept, 6/15/99

Holding: The defendant was convicted and sentenced as a persistent felony offender. The court introduced his counsel to the jury panel as an attorney from The Legal Aid Society. The defense contention that the court deprived the defendant of a fair trial is belied by the fact that the defense declined the court's offer to give a curative instruction to the jury, which would have been a sufficient remedy to any prejudice. In any case, this isolated remark of the court could not have affected the verdict of the jury. Judgment affirmed. (Supreme Ct, New York Co [McMahon, JJ])

Sentencing (Concurrent/Consecutive) (Weapons) **SEN; 345(10) (80)**

People v Fernandez, No. 1498, 1st Dept, 6/17/99

Holding: Prior to the murders, the defendant fired a loaded gun toward the general area in which the murder victims were seated. This act constituted the crime of pos-

First Department *continued*

sessing a loaded gun with intent to use it unlawfully against another, since the jury could reasonably infer that the defendant was attempting to intimidate the victims. The defendant then moved to the center of the bar, crouched down, and aimed directly at the victims, thus initiating a separate and successive act. The defense contention that the defendant's murder sentence should run concurrently with his sentence for criminal possession of a weapon (*People v Salcedo*, 92 NY2d 1019) was properly rejected. See Penal Law 70.25(2). Order affirmed. (Supreme Ct, New York Co [Snyder, J])

Second Department

Arraignment (Delay) **ARN; 31(5)**
Sentencing (General) **SEN; 345(37) (70)**
(Pronouncement)

People v McFadden, No. 95-08652, 2nd Dept, 5/3/99

The defendant, convicted of rape, burglary, robbery, kidnapping, aggravated sexual abuse, assault, and grand larceny, was sentenced for rape, assault and grand larceny.

Holding: There is no merit to the defendant's contention that the delay in his arraignment was solely for the purpose of denying him his right to counsel. "[A]n unnecessary delay in arraignment, without more, does not cause the accused's critical stage right to counsel to attach automatically..." *People v Quartieri*, 171 AD2d 889, 891, quoting *People v Mosely*, 135 AD2d 662, 663-664. Here, the delay was due to the defendant's disclosure of information about an unrelated homicide and robbery to the police, who then questioned him as to further details of that crime.

However, the conviction of second-degree kidnapping must be reversed pursuant to the merger doctrine. The kidnapping was incidental to rape, so that count merges with the rape counts. In the sentencing minutes, the court stated that the robbery, burglary, and sexual abuse counts merged with the rape counts, but immediately thereafter the court stated that the robbery, burglary, and sexual abuse sentences must run concurrently with the rape sentences. Because it appears that the court intended, but failed, to impose sentences on those convictions, the matter must be remitted for sentencing on those counts. Judgment affirmed as modified and remitted. (County Ct, Rockland Co [Kelly, J])

Burglary (Evidence) **BUR; 65(20)**
Evidence (Sufficiency) **EVI; 155(130)**

People v Barnes, No. 97-00372, 2nd Dept, 5/3/99

The defendant broke into a dwelling and was confronted by the landlords, a married couple. When the wife

attempted to assist her husband, who was physically struggling with the defendant, the defendant bit and twisted her arm. She testified that the pain in her arm had rendered her unable to work for three weeks, but no other trial evidence substantiated her injuries.

Holding: Although the trier of fact generally determines whether the element of physical injury has been established, the evidence presented by the prosecution is not legally sufficient to reach the objective level below which the question is one of law. *Matter of Philip A.*, 49 NY2d 198, 200. The conviction for first-degree burglary must be reduced to the lesser-included offense of second-degree burglary, which was proven. See *People v Cicciari*, 90 AD2d 853.

The defendant's contention of prejudice from remarks in the prosecution's summation is unpreserved for review; moreover, all the defense objections to those remarks were sustained by the court. Judgment affirmed as modified, and remitted for resentencing. (Supreme Ct, Kings Co [Marrus, J])

Driving While Intoxicated (Evidence) **DWI; 130(15) (17)**
(General)

People v Miner, No. 97-07538, 2nd Dept, 5/3/99

The defendant was indicted for driving while intoxicated, driving while ability impaired, and first- and second-degree aggravated unlicensed operation of a motor vehicle. A jury found the defendant not guilty of the first two charges.

Holding: To establish first-degree aggravated unlicensed operation, under Vehicle and Traffic Law 511(3)(a), the driver must commit the crime of second-degree aggravated unlicensed operation *and* operate a motor vehicle while under the influence of alcohol or drugs. Because the defendant was acquitted of driving while intoxicated and driving while ability impaired, an essential element of first-degree aggravated unlicensed operation has not been met. The conviction of first-degree aggravated unlicensed operation is reversed, the sentence imposed for that conviction is vacated, and that count of the indictment is dismissed. Judgment modified, and affirmed as modified. (Supreme Ct, Kings Co [George, J])

Evidence (Sufficiency) **EVI; 155(130)**
Juveniles (Delinquency) **JUV; 230(15)**

Matter of John B., No. 98-08063, 2nd Dept, 5/10/99

The appellant was adjudged a juvenile delinquent based on the finding that he committed acts which would have constituted the crimes of third- and fourth-degree criminal mischief (ten counts) if committed by an adult.

Holding: The petition for juvenile delinquency was facially defective as to allegations of property damage in excess of a stated amount. The property owners' deposi-

Second Department *continued*

tions, containing conclusory statements of the amount of damage, were legally insufficient to sustain those counts of the petition that alleged crimes for which the amount of damage is an element. *See People v Lopez*, 79 NY2d 402, 403. Those deficiencies are jurisdictional and cannot be waived. The counts of the petition for which the amount of property damage is an element, and the appellant's admission to the lesser-included offenses of those counts, must be dismissed. *See Matter of Neftali D.*, 85 NY2d 631, 634. Order modified, affirmed as modified, and remitted for a new disposition. (Family Ct, Westchester Co [Scancarelli, J])

Evidence (Other Crimes) **EVI; 155(95)**

Lesser and Included Offenses (General) **IOF; 240 (7)**

People v Castro, No. 98-04675, 2nd Dept, 5/17/99

Holding: The court erred in allowing a sexually explicit videotape recovered from the defendant's person upon arrest to be admitted into evidence. The admission of the videotape was not authorized by the motive, intent, identity, absence of mistake, or accident exceptions to *Molineux*. *See People v Molineux*, 168 NY 264. However, the admission was harmless error.

The defendant's conviction of third-degree sexual abuse must be reversed and the indictment on that count dismissed, as the prosecution concedes, because that crime is an inclusory concurrent count of first-degree sexual abuse. *See CPL 300.40(3)(b); Matter of Rafiq W.*, __ AD2d __ (1st Dept, 1/12/99). Judgment modified, and as modified, affirmed. (Supreme Ct, Queens Co [Finnegan, J])

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

Jurisdiction (General) **JSD; 227(3)**

People v D'Amico, No. 94-11010, 2nd Dept, 5/24/99

After a bar altercation in Suffolk County, the defendant shot out a window of the bar. He was followed to his home in Nassau County by a police officer. The defendant pointed a gun at the officer and shot the roof lights of the police car. The charges presented to the Nassau County grand jury included those stemming from the incident at the Suffolk County bar. Although the grand jury returned indictments for crimes in both counties, the Suffolk County charges were subsequently dismissed for lack of geographic jurisdiction. The defendant was convicted of the Nassau County crimes.

Holding: The exceptional remedy of dismissing an indictment pursuant to CPL 210.35(5) is justified only when the grand jury's decision has been potentially prejudiced by prosecutorial wrongdoing, fraudulent conduct, or errors. *See People v Huston*, 88 NY2d 400. Unlike cases cited by the defendant in which evidence of uncharged crimes was im-

properly brought before the grand jury, the crimes here were charged but later dismissed. The prosecution presented its evidence in the context of an ongoing incident (*See People v Vandenburg*, __ AD2d __ [3rd Dept, 10/15/98]); the evidence was relevant, and there was no intentional misconduct by the prosecution. Finally, the grand jury evidence as to the Nassau County crimes was overwhelming and persuasive, so the indictment was proper. Judgment affirmed. (County Ct, Nassau Co [Thorp, J])

Arrest (Probable Cause)

ARR; 35(35)

Search and Seizure (Stop and Frisk) (Weapons-frisks) **SEA; 335(75) (85)**

People v Canady, No. 98-00878, 2nd Dept, 5/24/99

The defendant admitted an officer into an apartment to execute a bench warrant for another person. Seeing the defendant back away and reach into his pocket, the officer grabbed him and frisked him. The defendant was arrested when a weapon was found.

Holding: The court erred in finding that that the defendant's conduct led to a reasonable suspicion which would allow the police to forcibly stop and frisk him. *See People v De Bour*, 40 NY2d 210. There was no connection between the defendant and the subject of the warrant, nor had there been any report of weapons in the apartment. There was no bulge in the defendant's clothing, and he never reached for his waistband, a common place to conceal weapons. The branch of the omnibus motion that sought to suppress the weapon should have been granted and the indictment dismissed. Judgment reversed, matter remitted. (Supreme Ct, Queens Co [Flaherty, J])

Witnesses (Experts)

WIT; 390(20)

People v Bethea, 98-01256, 2nd Dept, 5/24/99

The defendant was arrested after selling cocaine to an undercover officer for prerecorded bills; the sale took place in a small grocery store and was witnessed by a "ghost" officer shadowing the undercover officer. About ten minutes after a back-up team was notified of the sale, the defendant was arrested on a street corner. When arrested, the defendant had neither drugs nor prerecorded bills in his possession.

At trial, the court permitted expert testimony by the arresting officer, who stated that drugs and money are often not recovered because of third parties who supply the drugs and remove the money from the scene. He admitted he had not questioned the store employees or other people in the area, nor had he searched the store's interior.

Holding: The expert testimony was improperly admitted. To discourage baseless speculation by the jury, opinions of expert witnesses must be based on facts in the record or on personal knowledge. *See Cassano v Hagstrom*, 5 NY2d 643, 646. Here, there was no factual evidence to suggest more

Second Department *continued*

than one person was involved in the drug transaction. Judgment reversed; new trial granted. (Supreme Ct, Queens Co [Kohm, JJ])

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

People v Oliver, No. 97-06175, 2nd Dept, 6/1/99

Holding: Two officers received a radio transmission based on an anonymous tip about a robbery committed by a black male, 6'2" wearing blue earmuffs and blue sweatpants. The police saw a man five blocks from the reported location wearing a brown jacket, with green rainpants, and no earmuffs. Police approached the defendant, led him to the car, and told him to put his hands on the car and step up on the curb. As he did so the officers saw the butt of a gun in his pocket and arrested him. They did not have reasonable suspicion to stop and detain the defendant. The sole predicate for the stop was a radio transmission based on an anonymous tip. That basis is of the weakest type, and under the facts was insufficient to justify the police conduct. *See People v Maya*, 172 AD2d 565. There was no verification, and the arresting officer testified that the defendant was neither suspicious nor furtive. Judgment reversed, matter remitted. (Supreme Ct, Queens Co [Eng, JJ])

Discovery (Prior Statements of Witness) **DSC; 110(26)**
Grand Jury (Witnesses) **GRJ; 180(15)**

**People v Rodriguez, No. 96-10052, 2nd Dept,
6/7/99**

Holding: The prosecution did not violate the rule promulgated in *People v Rosario* (9 NY2d 286 *cert den* 368 US 866) by failing to turn over the minutes of the New York County Grand Jury testimony of a police officer given in connection with the defendant's prior New York County conviction. The Kings county prosecutor had no duty to disclose grand jury minutes from another county as *Rosario* material. The minutes were just as accessible to the defendant as to the prosecutor. *See Matter of Lungen v Kane*, 217 AD2d 849 *affd* 88 NY2d 861. Judgment affirmed, matter remitted. (Supreme Ct, Kings Co [Belen, JJ])

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

People v Sloane, No. 98-06356, 2nd Dept, 6/7/99

Holding: The defendant forfeited his right to counsel by a "persistent pattern of threatening abusive, obstreperous, and uncooperative behavior with successive assigned counsel." *See eg People v Gilchrist*, 239 AD2d 306. The defendant's last three assigned counsel requested to be dismissed ex-

plaining that the defendant was abusive and uncooperative. Over the course of several colloquies with the defendant, the court satisfied the "searching inquiry" that is required to support a finding that the defendant knowingly waived counsel. *See People v Smith*, 92 NY2d 516, 521. The record shows these exchanges touched on the defendant's education, prior exposure to legal procedures, and status as a persistent felony offender. The defendant, with the advice of counsel, accepted an extremely advantageous plea bargain, which had been previously negotiated on his behalf by two of his attorneys but had been previously rejected by him. Judgment affirmed. (County Ct, Westchester Co [Lange, JJ])

Evidence (Business Records) **EVI; 155(15)**

People v Pitti, No. 95-02294, 2nd Dept, 6/14/99

Holding: The court properly ruled during the defendant's assault trial that the complainant's alleged statement to an emergency medical technician about smoking marijuana before his lung collapsed was inadmissible hearsay. An entry in a hospital record comes within the business records exception to the hearsay rule only if it is relevant to a patient's medical diagnosis or treatment. *See Civil Practice Law and Rules 4518*. Here, a medical expert testified that the treatment for a collapsed lung would be the same whether it was created by a traumatic injury, a genetic condition, or smoking. Judgment affirmed. (Supreme Ct, Kings Co [Aiello, JJ])

Accomplices (Instructions) **ACC; 10(25)**

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

**People v Robinson, No. 96-04520, 2nd Dept,
6/14/99**

Holding: In this case involving the defendant and a codefendant, the court erred in failing to instruct the jury to consider the evidence of guilt or innocence separately as to each individual. *See CPL 300.10[4]*. This error was compounded by the failure of the trial court to properly charge accomplice liability. *See People v Bailey*, 249 AD2d 555. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Douglass, JJ])

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

People v Beldres, No. 96-11336, 2nd Dept, 6/14/99

Holding: The trial court improperly denied the defendant's challenge for cause of a prospective juror. The prospective juror stated that he was "not sure" he could convict the defendant on the basis of the evidence, and that he would "wonder why [the defendant] is still involved with drugs if he has a prior'." These comments established prima facie that the prospective juror had a state of mind

Second Department *continued*

likely to preclude him from rendering an impartial verdict based only upon the trial evidence. CPL 270.20[1][b]; See *People v Watts*, 212 AD2d 650, 651. The court was required to either seek clarification from the juror to ensure the juror's ability to render an impartial verdict, or, lacking such assurance, to dismiss the juror for cause. See *People v Torpey*, 63 NY2d 361, 367. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Rutledge, J])

Evidence (Hearsay)

EVI; 155(75)

Matter of Marvin D., No. 97-05261, 2nd Dept, 6/14/99

The juvenile appellant was found to have committed acts which if committed by an adult would constitute the crimes of third- and fourth-degree possession of a weapon.

Defender News *continued from page 3*

medical and physical needs as required by the Public Buildings Law, the Americans with Disabilities Act, the Rehabilitation Act of 1973 and the federal and state constitutions. *Syracuse Online*, 9/11/99

- One of two men whose plea bargains included a prosecution promise not to oppose parole after they had served 15 years of their life sentences missed his chance for release for an additional 19 years because the plea agreement was mislaid. *COURTTV Online*, 9/9/99
- As a result of the restrictive practices and laws concerning inmate law suits in federal courts, inmates in

Resources Sighted, Cited, or Sited

Liotti, Village Justice for the Village of Westbury, ruling that local village justice courts have the authority to assign lawyers to noncriminal cases such as building and zoning code violations carrying the possibility of jail time and substantial fines. The decision sets out a history of the right to counsel. A copy of the full decision is available from the Backup Center.

- ✓ "Combating the Effects of Racial Stereotyping in Criminal Cases," James McComas and Cynthia Strout, article in *The Champion* [magazine of the National Association of Criminal Defense Lawyers], 8/99.
- ✓ *Law Never Here: A Social History of African American Responses to Issues of Criminal Justice*, Alice P. Green and Frankie Y. Bailey, book (1999), \$65. Greenwood Publishing Group, 88 Post Road West, PO Box 5007, Westport CT 06881-5007.
- ✓ "Excluding Violent Youths From Juvenile Court: The Effectiveness of Legislative Waiver," David L. Myers, dissertation (Univ. of Maryland 1999). [Results showed that youth transferred to adult court were more likely to be convicted and

Holding: The driver of the automobile in which the appellant was riding and in which a shotgun was found stated that "the rifle in the car belonged to a friend of hers." Family Court erred by failing to admit the statement into evidence as against the driver's penal interest. Order reversed, matter remitted for a new hearing. (Family Ct, Kings Co [Pearce, J])

Misconduct (Prosecution)

MIS; 250(15)

People v Pointer, No. 97-07072, 2nd Dept, 6/14/99

Holding: "The prosecutor's mischaracterization of the defendant's testimony, which was intended to convince the jury that the defendant had admitted his guilt when in fact he had not, constituted a gross distortion, the magnitude of which was highly prejudicial (see, *People v Romain*, 137 AD2d 848 . . .)." The error cannot be deemed harmless where proof of the defendant's guilt was legally sufficient, but not overwhelming. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Roman, J]) ♪

DeKalb County, Georgia are bringing a class action suit in state court to draw attention to the inhumane and brutal conditions of confinement. *Fulton County Daily Report*, 9/8/99

- Vermont is the first among a dozen states to implement "restorative justice." The success or failure of the program may influence other states. *Christian Science Monitor*, 9/8/99 and 9/9/99.
- A recent lawsuit asks the City to accept responsibility for the mentally ill in the criminal justice system. *New York Times*, 9/7/99

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subjected to longer incarceration than youth in juvenile court, but had worse recidivism rates; study mentioned in *Criminal Justice Newsletter*, 1/4/99.] Available on the Internet at <http://www.preventingcrime.org>. Or call Michael Buckley at (301) 405-8426.

- ✓ *Funds for Experts and Resources*, KY Dept of Public Advocacy, manual, 1999 ed. Available through National Association of Criminal Defense Lawyers (NACDL). tel: (202)872-8600; fax: (202)872-8690; web site: <http://www.criminaljustice.org>
- ✓ "A Few Can Catch a Liar," Paul Ekman, Maureen O'Sullivan, and Mark G. Frank, research report in *Psychological Science*, Vol. 10, #3, May 1999. Described in the *New York Times* 5/11/99. Research suggests that most people, including law enforcement officers other than Secret Service agents, cannot tell when others are lying.
- ✓ *The Handbook of Crime and Punishment*, Michael Tonry, ed., book (803 pg.) Oxford University Press (1998) [reviewed in *The Angolite*, prison news magazine from Angola Prison, Louisiana, Vol. 24, No. 3, 5-6/99] ♪

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