



Public Defense Backup Center REPORT

VOLUME XIV NUMBER 4

April/May 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

Reno Advocates for Adequate AC Fee

In materials prepared for the observance of Law Day on May 1, U.S. Attorney General Janet Reno and the Department of Justice recognized that there can be no "Justice for All" without "adequate funding, training, and resources for indigent defense." Reno's Law Day remarks noted that skimping on adequate representation undermines public confidence in the legal system and hampers effective law enforcement by creating delays and reversible error. Background points released by DOJ acknowledged a recent ABA study which showed a general disbelief that the courts treat the rich and poor, and all ethnic groups, equally. (That report is available from the ABA online at <http://www.abanet.org/media/perception/home.html> or call (312)988-5000 or e-mail info@abanet.org.)

One of the three stated DOJ goals to achieve "Justice for All" was to ensure that indigent defendants receive adequate representation. Other materials fleshed out this broad objective—while maintaining the law enforcement viewpoint—including a call for the following: "Adequate indigent defense funding should include funding for attorneys, resources and expertise, such as access to new technology that can help establish the innocence or guilt of the accused."

The above information was posted by the National Legal Aid and Defender Association on its web site: <http://www.nlada.org>. (Should anyone want to see and hear Reno's

message, the DOJ web site provided a downloadable Real Time™ version of her speech: http://www.usdoj.gov/01whatsnew/01_1.html.)

■ NY Fees Remain Unchanged

Meanwhile, efforts to increase New York's assigned counsel fees continue.

New York City Council members Stephen DiBrienza and Guillermo Linares introduced a resolution calling on the state to increase the assigned counsel rates set in County Law article 18-B, noting that the rates have not changed since 1986. A resolution supporting a permanent state funding stream for civil legal services was also announced at the May 6 press conference, at which speakers included representatives of the Legal Services for New York City, NYS Association of Criminal Defense Lawyers, Network of Bar Leaders, NY Public Interest Research Group, and The Legal Aid Society, Civil Division.

The Judicial Section of the New York State Bar Association has passed a similar resolution urging an increase in state fees to match the federal CJA (Criminal Justice Act) rates, which range from \$60 to \$75 per hour (and which national organizations note have also not increased for 15 years). The State Bar Association has engaged special counsel to press for an increase in 18-B fees.

At the same time, district attorneys are asking the state to cover the pay hike for DA's triggered by the December pay hike for judges and legislators. The head of the New York State District Attorneys Association (NYS-DAA), William J. Fitzpatrick of Onondaga County, has told the Governor that it is reasonable for prosecutors salaries to be tied to that of judges, because "the people's representative in court certainly ought to be paid equal to the person sitting as umpire." (*Times*

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Plan to be at the Queensbury Hotel
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for our

Annual Summer Meeting 1999

Due to the popularity of the Saratoga racetrack,
just minutes from our conference site in
Glens Falls, hotel rooms will be held only
until the announced cutoff date.

Watch for the brochure and
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Union, 4/18/99.) William L. Murphy, District Attorney in Richmond County and past president of the National District Attorneys Association, has urged NYSDDA to continue to stand behind an increase in assigned counsel and capital fees, and funding for Prisoners' Legal Services as well.

Legislative action on fees, as well as on the late state budget which effects many public defense organizations (see *Backup Center REPORT*, Vol. XIV, No. 3), does not appear imminent.

DNA Developments

Forensic use of scientific tests to identify individuals by the genetic markers found in all cells of the body may increase in New York if Governor Pataki has his way. And while he is urging passage of legislation to expand the state's bank of genetic profiling to everyone convicted of felonies and attempted felonies, new DNA technologies continue to appear, challenging defense counsel to keep up with how prosecutorial DNA evidence can be met and how defense DNA evidence can be developed.

■ **Expanded DNA Profiling Proposed**

The governor's bill is reportedly even broader than the proposal outlined in his January state-of-the-state address. The legislation would provide for samples of DNA to be taken not only from newly-convicted offenders but from those convicted in prior years if they are still under sentence when the law takes effect. It would also direct the state's Criminal Justice Services Director to study the feasibility of taking DNA samples from suspects upon arrest. Implementation of an arrest-based system in New York could create the largest DNA databank in the nation. Expressed reservations about the expansion of the DNA databank range from civil liberties concerns to fears that the state's crime labs would be overwhelmed, actually interfering with the ability to proceed in the most serious cases.

The current law, Executive Law 995-c, was enacted in 1994, and has required that DNA samples to be taken from felony offenders convicted of 21 of the most serious crimes (including murder, manslaughter, rape and felony assault) since 1996. The State Police lab has reportedly been able to process only about 1,500 of the 6,000 samples it has received so far.

The proposed bill addresses privacy concerns merely by making unauthorized disclosure of DNA records (currently a misdemeanor) a class E felony. It would also be a felony to tamper with a DNA sample or to refuse to provide a sample upon conviction. (*New York Law Journal*, 4/14/99.)

■ **On-Site DNA Tests May Become Possible**

A prototype machine that can perform a standard DNA test on blood samples from start to finish without human intervention was announced by scientists at the Department of Energy's Ames (Iowa) Laboratory and Iowa State University in the March 15 issue of *Analytical Chemistry*. According to one of its developers, Edward S. Yeung, the machine is

small enough to fit in the back of a van for transportation to crime scenes. (*Science News*, Vol. 155, 3/27/99.)

■ **Feds Fund Defense Training on DNA in TX**

One of the seven technology grants for public defense awarded by the federal Bureau of Justice Assistance in March went to the El Paso County (TX) Public Defenders Office for a series of legal seminars and purchase of library materials on complex scientific evidence such as DNA. The grant was for just under \$60,000. (One of the other grants [\$80,000] goes to The Legal Aid Society's Criminal Appeals Bureau for design and implementation of new case management and other databases. Among the other five grants were nearly \$80,000 for multimedia presentation systems for courtroom use throughout the state of Tennessee, and almost \$35,000 to the Navajo County Public Defender [AZ] for computer purchases and training.) (*Indigent Defense*, March/April 99.)

Jurisdictions Differ on Laser Devices Used to Snare Speeders

Only a few jurisdictions—lower New York courts among them—have approved use of evidence of laser-measured speed measuring devices. Other courts have disallowed such evidence, or at least required proof of its reliability rather than allowing judicial notice to be taken that readings from laser guns are scientifically based.

■ **Lower NY Courts Have Allowed Laser Evidence**

Among the cases allowing such evidence are *People v Depass*, 165 Misc2d 217, from the Village Court of Roslyn Harbor in Nassau County and *People v Clemens*, 168 Misc2d 56, from the Justice Court of the Town of Chatham, Columbia County. Both courts relied on expert testimony by Dr. Daniel Y. Gezari of the NASA Goddard Space Flight Center to find the laser-device evidence admissible. In both cases,

Public Defense Backup Center *REPORT*

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XIV Number 4 April/May 1999

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The *REPORT* is published ten times a year by the Public Defense Backup Center of the New York State Defenders Association, Inc., 194 Washington Avenue, Suite 500, Albany, NY 12210-2314; Phone: 518-465-3524; Fax: 518-465-3249. Our web address is <http://www.nysda.org>. All rights reserved. This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is distributed with the understanding that its contents do not constitute the rendering of legal or other professional services. All submissions pertinent to public defense work in New York State and nationwide are welcome.

the measuring instrument was an LTI 20-20 device. (LTI is Laser Technology Inc., a Colorado company that designs and manufactures many laser-based speed and distance measurement instruments.)

Perhaps because the cost of obtaining an expert may be greater than the cost of a speeding ticket, or because defendants (and attorneys) are unaware that challenges can be made to the reliability of laser speed guns, experts are rarely called by the defense in laser cases, the *REPORT* has been told. In the *Clemens* case, the defendant herself testified that a black or dark car would give a higher reading, and argued that the laser principle is not generally accepted in the scientific community. In both *Clemens* and *Depass*, the defendants appeared *pro se*.

■ **No Judicial Notice Allowed in GA**

The Georgia Court of Appeal recently held that vehicle speed measuring devices using laser technology have not yet reached the point of such general acceptance that courts may take judicial notice of their reliability. *Izer v State*, No. A98A2475 (Ga. Ct. App. 2/5/99), 64 CrL 387. At least until the Georgia legislature acts on a pending bill that would overrule *Izer*, courts there must hear evidence about the reliability of any such measurements offered as evidence.

■ **Some Experts Disagree That Existing Device Is Reliable**

Henry Roberts, an engineer from New Jersey, has testified in several cases around the country involving laser speed-measuring devices. He told the *REPORT* that movement of the laser gun, among other things, may affect the results obtained. He also noted that expert testimony in support of laser devices should be scrutinized; in at least one instance, a purported expert who claimed to have tested the device in question had not, in fact, compared its readings with any other measurement in order to verify the device's accuracy.

Roberts worked with defense counsel Joseph T. Maccarone and others in New Jersey, where a Superior Court judge initially ruled the device had not been shown to be accurate and reliable enough for law enforcement purposes, but re-opened the matter a year later (even though the pending motor vehicle cases raising the issue had been resolved). The judge then held that speed readings by a LTI Marksman 20-20 were admissible without expert testimony other than proof that the officer operating the device had been appropriately trained and the device had been properly checked. Readings made during heavy rain or snow, or at a distance of over 1,000 feet, would require the support of adequate expert testimony. *Matter of Admissibility of Motor Vehicle Speed Readings Produced by LTI Marksman 20-20 Laser Speed Detection System*, 314 NJSuper. 233, 714 A2d 381 (NJ Super.L. 3/20/98).

The *Izer* and *Matter of Admissibility* decisions, as well as potential expert referrals regarding laser speed measuring devices, are available from the Backup Center.

NJ Troopers Charged With Racial Discrimination Cover-up

In other New Jersey highway law enforcement news, two white State Troopers have been indicted for falsifying documents to hide the disproportionate number of motorists of color that they were stopping. The two are accused of writing down license plate numbers from the cars of white drivers they did not stop, and inserting those numbers in paperwork when the stop of an African American or Hispanic motorist yielded no citation or arrest. At least 10 other troopers may face charges for what has been called "ghosting." The indictment was announced shortly before scheduled hearings by the Black and Latino Caucus of the New Jersey legislature on the subject of racial profiling by highway law enforcement. (*New York Times*, 4/20/99.)

A special task force appointed by New Jersey's Attorney General concluded in an interim report released April 20 that minorities are more likely to be pulled over, and much more likely to be searched, than whites. In the wake of the report, the state dropped its appeal of a 1996 ruling in which criminal charges were dismissed against several defendants who had been illegally singled out for traffic stops and searches based on their race. (*Criminal Justice Newsletter*, Vol. 29, No. 24, 12/15/98.)

Over a month before the report was issued, Governor Christie Whitman fired the head of the New Jersey State Police for saying in a press interview that minorities were more likely to be involved in drug trafficking. (*Times Union*, 3/1/99.)

■ **Racial Bias Confronted in NY**

Questions of racial bias in law enforcement are of course not unique to New Jersey or to highways in largely white, rural areas. Highly publicized incidents of alleged police brutality against blacks in New York City have led a group of police officers called 100 Blacks in Law Enforcement to hold seminars for young black men on "how to behave during a stop-and-frisk so as not to inflame the officers from the Street Crime Unit, to keep them from mistaking a man fumbling for a wallet or a child with a candy bar for an armed criminal." The lieutenant who formed the organization, Eric Adams, said that although "reaching while black shouldn't be punishable by death," current realities require that kids be taught how things are, not how it ought to be. (*New York Times*, 4/13/99.)

Neighborhood Ban on Sex Offenders Challenged

In still other news from New Jersey, a lawyer has challenged her homeowner association's bylaw barring the residency of former sex offenders who are in the highest risk category for recidivism. The attorney, Elinor Mulligan, argues that the bylaw alienates her property, as it limits her right to sell it. She also makes the public policy argument

that the bylaw is improper as a form of “vigilante justice.” Mulligan’s suit has national implications; proposals of similar bans are growing as the number of states with sex-offender registration laws similar to New Jersey’s “Megan’s Law” increases.

Counsel for the homeowner association, J. David Ramsey of the Morristown firm Hersh, Ramsey & Berman, says that high-risk sex offender registrants are not a recognized, protected class and so can be excluded by private communities. He previously authored an article for the January issue of *Journal of Community Association Law* [publication of the Community Association Institute] discussing arguments for and against bans on Tier 3 sex offender registrants. (*New Jersey Law Journal*, 3/3/99.)

Waiver Questions and Anders Issues Arise in Appeals

The statutory right to appeal a criminal conviction and/or sentence has been curtailed in a variety of ways in New York state and around the country. Increasing use of waivers of appeal in plea bargains to legally deprive New York criminal defendants of their right to appeal has been recognized—if not outright encouraged—by a recent amendment of the rules for the Appellate Division, First Department. Meanwhile, the nation’s high court has agreed to again grapple with what procedural safeguards must accompany the *de facto* deprivation of the right to appeal that occurs when appellate counsel seeks to withdraw from cases on the basis that no appellate issues of merit exist.

■ **1st Dept: Waiver Can be Sole Issue in Prosecutor’s Brief**

The 1st Department has announced an amendment to Section 600.16 of the Rules of the Court (22 NYCRR 600.16). The new subdivision (b) states:

Metropolitan Trainer Materials Now Available

Materials from the 13th Annual Metropolitan New York Trainer, held on March 13, are now available from the Backup Center for \$25. Sessions were:

- *Recent Developments in Criminal Law and Procedure*, Edward Nowak
- *Internet Resources for NY Criminal Defense Lawyers*, Charles O’Brien & Ken Strutin
- *Watertight Objections: Preserving Titanic Errors from Appellate Icebergs*, Lynn W.L. Fahey
- *No Surprises: Anticipating Unusual Trial and Evidentiary Issues*, Panel Moderated by Andrew Eibel
- *Counsel or Coercion? Advising Clients to Plead or Not to Plead*, Steven Zeidman

On an appeal from a judgment rendered in a criminal proceeding following entry of a guilty plea pursuant to CPL Article 22, respondent may elect to file a brief that urges an affirmance of the judgment solely upon a claim that there is no reviewable issue because appellant made a valid waiver of the right to appeal. Upon the submission or argument of the appeal, the court in its discretion may direct the respondent to submit a supplemental brief addressing additional issues to which the appellant may reply.

(*New York Law Journal*, 5/6/99.)

■ **US High Court to Review Issues of Plea Appeals and Anders**

On another front concerning appeals following guilty pleas, the United States Supreme Court has granted review of an attorney’s duty to appeal following a client’s guilty plea. *Roe v Ortega*, No. 98-1441, 5/3/99. In *Ortega*, the client has said he requested an appeal within the applicable time limit, but that his lawyer never followed through. Prosecutors contend that no constitutional violation occurred.

The Supreme Court has also agreed to hear state prosecutors’ challenge to a 9th Circuit opinion upholding a new trial after appellate defense counsel filed a brief that identified no issues for appeal but did describe the procedural history of the case. *Smith v Robbins*, No. 98-1037, 64 CrL 2182. Such review comes more than 30 years after *Anders v California* (386 US 738 [1967]), which established criteria for appellate counsel to follow when claiming an inability to identify nonfrivolous issues. Like *Anders*, *Robbins* is a California case.

■ **Others Continue to Contemplate Anders**

An Arizona court came to a conclusion at odds with the 9th Circuit’s *Smith v Robbins* holding. The court found that indigent criminal defendants seeking to bring appeals deemed frivolous by appointed counsel are better served if the attorneys’ brief doesn’t mention possible appeal grounds. *Anders*, the opinion said, has created a conflict between constitutional requirements and professional ethical responsibilities. If counsel who believes an appeal would be frivolous is forced to file a brief, it may ultimately be a brief against counsel’s client; if counsel has to identify issues and argue why they are frivolous, it may poison the attorney-client relationship. An *Anders* brief setting out the factual and procedural history of the case is adequate, where the court then examines the record for itself, under this ruling. (*State v Clark*, Ariz. Ct. App. 1st Div., No. 1 CA-CR 97-9673, 1/16/99; ABA/BNA *Lawyers’ Manual on Prof. Responsibility*, Vol. 15, pg. 32).

Tensions inherent in applying *Anders* have been recognized by the National Legal Aid and Defender Association’s *Standards and Evaluation Design for Appellate Defender Offices* (Standard O.2.) since 1980:

... Appellate defenders should consider that filing merit briefs in every case may undermine the credibility of the appellate defender with the appellate courts. On the other hand, appellate defenders should consider that the filing of *Anders* briefs may compromise the office's reputation within the client community.

Appellate defenders should adopt extremely strict standards for determining that cases have "no arguable merits," the *Standards* note. Only genuinely frivolous cases, not simply cases the lawyer believes will not prevail on appeal, should be *Anders* eligible. (Standard O.3). These standards are available from NLADA: tel: (202) 452-0620; fax: (202) 872-1031; e-mail: info@nlada.org; web site: <http://www.nlada.org>

Appellate offices and attorneys should also consider the conflict of interest potential inherent in a situation where trial counsel is alleging that no nonfrivolous appellate issues exist:

... Without determining whether the filing of an *Anders* brief [citation omitted] by the Public Defender's office at the appellate level, after having represented a defendant at the trial level, is an inherent conflict of interest, we reiterate the caution propounded by Chief Judge Fuld in *People v Emmett* (25 NY2d 354) that "[t]here is no substitute for the single-minded advocacy of appellate counsel. Experience has demonstrated that they not infrequently advance contentions which might otherwise escape the attention of judges of busy appellate courts, no matter how conscientiously and carefully those judges read the records before them" (*id.*, at 356).

Concluding that it is necessary that independent counsel take a fresh look at this proceeding so as to assess whether any nonfrivolous issues, including a claim of ineffective assistance in connection with the representation of defendant before the sentencing court, should be raised, we hereby relieve defense counsel of this assignment (*see, People v Casiano*, 67 NY2d 906).

(*People v Rhodes*, 245 AD2d 844.)

■ **NY Courts May Disagree with Attorney's Assertion of *Anders***

Whether called *Anders* cases, *Crawford* cases (for *People v Crawford*, 71 AD2d 38), or something else, appellate attorneys' requests to withdraw for a lack of issues are not and should not automatically be granted. Court review may reveal issues that counsel overlooked or improperly discounted. For example, the 4th Department recently rejected an assigned counsel attorney's motion to be relieved of her

assignment, filed with a brief concluding there were no issues meriting consideration. The court reviewed the plea colloquy, which revealed a question as to whether the defendant had raised a possible justification defense. Accordingly, counsel was relieved and new counsel was assigned. (See case digest in *People v Nieves*, p. 26; see also *People v Maldonado*, No. 75072 [3rd Dept, 10/22/98], digest in *Backup Center REPORT*, Vol. XIV, No. 1.)

Federal Defender for Northern District Named

Alexander Bunin, a Manhattan native, has been charged with the responsibility of setting up federal defender offices in Albany, Syracuse, and Burlington, VT. Currently the head of the federal defender office in Mobile, AL, Bunin plans to move to the Capital Region of New York by mid-July, and hopes to have the new offices fully operational by December. It took nearly two years after the federal judiciary approved a federal defender office for the district for Congress to approve funding. Assistant federal defender salaries are expected to range from \$38,795 to \$100,940, depending on experience. (*Times Union*, 4/16/99.)

A History of Imprisonment Honored

Distinguished Honors in the 1999 Robert F. Kennedy Book Award competition have been awarded to Scott Christianson for *With Liberty for Some: 500 Years of Imprisonment in America*. The book recounts the history and illuminates the meaning of imprisonment in American life from the colonial slave trade to today's expanding prison complexes. (See review, p. 9.)

Christianson is a former investigative journalist whose works have appeared in *The New York Times*, *The Nation*, and many other newspapers and magazines, as well as on television and radio. He received his Ph.D. from the State University of New York at Albany, where he directed the Center on Minorities and Criminal Justice. He has held several high-level positions in the New York State criminal justice system and is currently senior editor of the *Empire State Report*, contributing editor of the *Criminal Law Bulletin*, and director of the New York Death Penalty Documentation Project. ☪

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Conferences & Seminars

Sponsor: National Association of Drug Court Professionals
Theme: 5th Annual Training Conference
Dates: June 3-5, 1999
Place: Miami Beach, FL
Contact: Price Daniel Communications, Inc. for brochure:
(877) NADCP99 (623-2799)

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

Sponsor: New York State Association of Criminal Defense Lawyers and
New York Trial Lawyers Association
Theme: Criminal Defense Seminar
Date: June 11, 1999
Place: New York City
Contact: Patricia Marcus: tel: (212)532-4434; fax: (212)532-4668;
e-mail: nyascdl@aol.com; web site:
http://www.nysacdl.org/NYS6_Cle.html

Sponsor: Association of the Bar of the City of New York
Theme: Whither Civil Rights, 35 Years After the Murders of Chaney,
Schwerner, & Goodman?
Date: June 14, 1999
Place: New York City
Contact: ABCNY: (212) 382-6600

Sponsor: Association of the Bar of the City of New York
Theme: Advancing the Promise: Honoring the Legacy of James
Chaney, Andrew Goodman and Michael Schwerner
Date: June 15, 1999
Place: New York City
Contact: ABCNY: (212) 382-6600

Sponsor: National Legal Aid and Defender Association
Theme: Juvenile Defender Training/TeamChild
Dates: June 17-19, 1999
Place: Seattle, WA
Contact: NLADA: (202)452-0620 (Aiyana Bullock); e-mail:
training@nlada.org; web site: <http://www.nlada.org>

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

Sponsor: National Institute for Trial Advocacy
Theme: Workshops and other CLE
Dates & Places:
June 18, 1999—Binghamton, NY (Criminal Trial Advocacy:
Breakthrough Techniques that Work and Win)
June 25, 1999—Albany, NY (Mastering Federal Evidence)
July 16, 1999—New York City (Mastering Federal Evidence)
July 23, 1999—Rochester, NY (Criminal Trial Advocacy:
Breakthrough Techniques that Work and Win)
August 10-17—Hempstead, NY (Building Trial Skills)
Contact: NITA: tel: (800)225-6482; fax: (219)282-1263; e-mail:
nita.1@nd.edu; web site: <http://www.nita.org>

Sponsor: National Bar Association
Theme: 74th Annual Convention & Exhibits
Dates: July 24-31, 1999
Place: Philadelphia, PA
Contact: NBA: 1225 11th Street NW, Washington DC 20001.
tel: (202)842-3900; fax: (202)289-6170

Sponsor: New York State Defenders Association
Theme: 32nd Annual Meeting & Conference
Dates: July 29-August 1, 1999
Place: The Queensbury Hotel, Glens Falls, NY
Contact: NYSDA: tel: (518)465-3524; fax: (518)465-3249;
e-mail: info@nysda.org; web site: www.nysda.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: MCLE
Dates and Places:
September 18, 1999—New York City (Criminal Trial Skills
Seminar)
September 25, 1999—Rochester
October 2, 1999—Buffalo
October 16, 1999—New York City (Weapons for the Firefight)
November 5, 1999—Poughkeepsie (Mid-Hudson Trainer)
December 3-4, 1999—New York City ("Last Chance '99
Seminar")
Contact: Patricia Marcus: tel: (212) 532-4434; fax: (212)532-4668;
e-mail: nysacdl@aol.com; web site:
<http://www.nysacdl.org>

Sponsor: National Coalition to Abolish the Death Penalty
Theme: 19th Annual National Conference
Dates: September 30-October 3, 1999
Place: Philadelphia, PA
Contact: NCADP: 1436 U Street NW, Suite 104, Washington DC
20009. tel: (202)387-3890; fax: (202)387-5590

Sponsor: National Association of Criminal Defense Lawyers
Theme: "Why We Do What We Do—And How"
Dates: July 21-24, 1999
Place: Washington, DC
Contact: NACDL: tel: (202) 872-8600; fax: (202) 872-8690; e-mail:
assist@nacdl.com; web site: www.criminaljustice.org ⚖️

Job Opportunities

St. Lawrence County seeks a **Public Defender** to administer and supervise the Public Defender's Office. Duties include: provide representation to indigent defendants charged with crimes; supervise and manage professional legal and support staff; coordinate with Assigned Counsel Administrator, Indigent Defense Coordinator, courts, and other criminal justice agencies to ensure effective, efficient operation of the Program, which also provides legal support to clients in Family Court; initiate proceedings as necessary and appeals if warranted. Work is performed under guidelines provided by law and under the supervision of the County Administrator. Suggested minimum qualifications: NYS bar admission, 10 years paid experience practicing law (five in criminal defense and/or Family Court). Administrative and supervisory experience preferred. Salary: DOE (incumbent \$68,495). Send letter and resume to: St. Lawrence County Board of Legislators' Office, 48 Court Street, Canton NY 13617. Deadline 5/28/99.

North Country Legal Services, Inc., a not-for-profit providing free legal services to low income people and protection and advocacy services to the developmentally disabled and mentally ill in the 5 northernmost counties of New York, seeks a **Staff Attorney** for the Plattsburgh office. Duties would include handling a general caseload and providing training to clients and human services providers on substantive legal issues. Required: NYS bar admission, commitment to poverty law, and strong advocacy skills. Salary: up to \$37K DOE, excellent benefits. Send cover letter, resume and writing sample by May 28 to: Peter Racette, Director, North Country Legal Services, Inc., PO Box 989, Plattsburgh NY 12901.

The National Legal Aid and Defender Association (NLADA) seeks a **Senior Manager** for its National Defender Clearinghouse, to provide support for the organizational development and management capacity of member indigent defense programs and interface with other organizations providing programs or services relevant to indigent defense program management. Requirements: 7 years experience as an attorney in an indigent defense program office, including at least 4 years legal practice experience and 3 years managerial experience in an indigent defense program or association; experience with: information clearinghouse database; design and implementation of organizational development and management systems; and training programs for indigent defense. Strong supervisory and management skills; ability to coordinate multiple tasks; initiative; good judgment; work well with all levels of personnel; knowledge of all types of indigent defense systems and structures, and management

and litigation systems within each structure; strong analytical and writing abilities; broad perspective of systemic problems and opportunities for reform or improvement; creative vision; deep commitment to the improvement of indigent defense. Salary \$75K+ DOE. AA/EOE. Minorities, women, the elderly and disabled encouraged to apply. Send resume, cover letter, references, writing sample and any salary requirements to: NDC Search, 1625 K Street NW, Suite 800, Washington DC 20006.

NLADA is also seeking **Counsel** in its **Defender Legal Services Division**. Duties and responsibilities include: design and implement (or consult other staff on) a variety of defender training or technical assistance events in areas including trial skills, management skills, appellate practice, and death penalty litigation and mitigation investigation; respond to requests for information and technical assistance from defenders, criminal justice professionals, and government officials; write/edit/produce standards, guidelines, position papers, and articles for Association periodicals; act as liaison to the Association's governing bodies and other organizations. Required: significant experience as an attorney in indigent defense program(s), in design and implementation of major defender training events; as faculty delivering defender training; strong written and oral communications skills. Salary: \$60K+ DOE, excellent fringe benefits and relocation allowance. Send cover letter, resume, 2 writing samples or excerpts and 3 professional references to: Director, Defender Legal Services (address above).

California Attorneys for Criminal Justice, a non-profit membership association dedicated to the protection of constitutional rights and liberties, seeks a **Legislative Advocate** to: work with the Executive Director and Legislative Committee to conduct legislative and issues analysis and develop policy recommendations for the Board on state and federal issues; review proposed state legislation to assess impact on criminal law and CACJ issues, and maintain computerized summary of bills; work with Exec. Dir. and Leg. Comm. to formulate positions on pending legislation; advocate on specific criminal justice and related issues, including writing letters, drafting bills and finding sponsors, coordinating appearances of CACJ witnesses, contact CACJ members, and representing CACJ at hearings and other forums; establish and maintain working relationships with legislators and staff, and other organizations; establish and maintain a grassroots network; work with Exec. Dir. and Public Information Committee to develop and implement public education and media campaigns on CACJ issues; author article for CACJ and other publica-

tions; and fulfill many other duties. Full-time position in Sacramento, CA; some travel in state, and some work on nights and weekends. Required: law degree, active bar admission in at least one state, 3 years criminal defense experience, demonstrated legislative and policy advocacy experience, knowledge of California criminal justice issues, experience in issues analysis, policy formation and implementation; outstanding verbal and written communication skills; ability to work on multiple teams. Salary DOE, fringes offered. AA/EOE. Send cover letter, resume, salary history and requirement, writing sample and 3 references to: CACJ Legislative Advocate Search, 4929 Wilshire Boulevard, Suite 688, Los Angeles CA 90010.

The Sentencing Project seeks a capable criminal justice professional to be **Special Assistant for Programs**, to work under the direct supervision of the Executive Director and Assistant Director. Duties will include assisting with the management and administration of, and doing substantive work on, one or more discrete projects such as: developing a model program design and curriculum planning and training to improve defender dispositional advocacy for juveniles "automatically transferred" into criminal courts; and preparing a practical handbook for criminal justice practitioners on reducing racial disparity in the criminal justice system. The Special Assistant for Programs will manage two major federal grants, assist in developing financial support for research, advocacy and technical assistance (TA) to defenders and others on sentencing issues, provide TA to defender offices on issues related to representation of juveniles in adult courts and coordinate the work of other TA providers, conduct site visits and informally evaluate defender programs, act as contact and liaison with criminal justice professional associations, conduct research and writing, and coordinate research and writing assignments for consultants. Required: demonstrated writing skills and familiarity with research in criminal justice issues; defender or other advocacy experience in criminal or juvenile courts; experience and working relationship with juvenile and/or minority defendants; management and administrative skills. The position is open to a lawyer or person with social services background having the other requisite qualifications. Salary \$28-\$42K DOE. Send resume, cover letter indicating interest and experience, and references to: Gayle Hebron, The Sentencing Project, 918 F St NW, Ste 501, Washington DC 20004. (202) 628-0871. Fax: (202)628-1091; e-mail: staff@sentencingproject.org; web site: <http://www.sentencingproject.org>

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.

- ✓ Referrals to treatment programs for sex offenders in New York, including prison programs, are available from a national nonprofit agency working for the prevention and treatment of sexual abuse. The Safer Society Foundation Inc., PO Box 340, Brandon VT 05733-0340. Referral tel: (802)247-5141 (Mon., Wed., & Fri. 1:00-4:30 pm); publications and other information tel: (802)247-3132 Mon.-Fri. 9-noon and 1-5)
- ✓ "The Folly of Video Courts," Juliana B. Humphrey, article in *Indigent Defense* [publication of the National Legal Aid and Defender Association], Sept./Oct. 98. tel: (202)452-0620; web site: <http://www.nlada.org>
- ✓ *Parole Board Dispositions at DOCS Facilities 1997*, State of New York Department of Correctional Services, report. Provides state-wide statistics for the year and broken down by month and by facility, as well as comparison with other years (1997 had the lowest percentage of paroles approved from 1989 through 1997). Contact: Paul H. Korotkin, Assistant Director of Program Planning, Evaluation & Research, DOCS, Harriman State Campus, 1220 Washington Avenue, Albany NY 12226-2050.
Other reports available upon request from DOCS include: *Earned Eligibility Program Summary: Semiannual Report April 1997-September 1997*; *Tenth Annual Shock Legislative Report 1998*; and *Comprehensive Alcohol and Substance Abuse Treatment Program as of June 30, 1997*.
- ✓ *Double Exposure: Poverty and Race in America*, Chester Hartman, ed., book. \$68.95 (hardcover), \$21.95 (softcover) (+\$3.50s&h). Poverty and Race Research Action Council, 1711 Connecticut Avenue NW, Suite 207, Washington DC 20009. tel: (202) 387-9887; fax: (202)387-0764; e-mail: prrac@aol.com
- ✓ "Felony Voir Dire, an exploratory study of its content and effect," Cathy Johnson and Craig Haney, 18 *Law and Human Behavior* pp. 487-506 (1994) [recommended by the National Jury Project East]. Observations of 4 felony trials in Calif. revealed *inter alia* that judge and attorneys accounted for 61% of the talking done during voir dire, and several jurors interviewed after trial didn't know what "impartial" meant.
- ✓ "How the 1996 Changes in the Immigration Laws Affect

Veterans," Public Policy Advocacy Clinic of the Brennan Center for Justice at NYU School of Law, issue paper, fact sheets and profiles (9 pg.). A copy is available from the Backup Center.

- ✓ "A Calculated Arson," John Lentini, article in *Fire & Arson Investigator* [publication of the International Association of Arson Investigators (IAAI)]. Detailed, technical description of "junk science" testimony that led to conviction of an innocent person. A copy is available from the Backup Center, with permission from the author.
- ✓ IAAI, above, has a web site which includes a Code of Ethics for Arson Investigators, articles, an amicus brief filed in the US Supreme Court case of *Kumho Tire* [see pp. 10-11], and links to related sites: Among the links is the Fire and Arson Investigation Resource Page, which includes many more links.
- ✓ "The Federalization of Criminal Law," American Bar Association Criminal Justice Section Task Force on the Federalization of Criminal Law," (Feb. 1999), report (269 pg.) \$10 (+s&h), product code 5090074. Contact ABA Service Center (800) 285-2221. Also on the Section's Web site: <http://www.abanet.org/crimjust/fedreport.html>
- ✓ "The State of Criminal Justice," ABA Criminal Justice Section, report (released Feb. 1999). \$12 (+s&h), product code 5090073. Contact ABA Service Center (800) 285-2221.
- ✓ *Verdict*, magazine of the National Coalition of Concerned Legal Professionals. For information on the magazine and the organization, call or write: Michele Hays or Rory McGahan, CCLP, 590 Leland Avenue, San Francisco CA 94134. (415)587-4240.

In light of the 2nd Department case mentioning jury nullification (*Parks*, digest, p. 15), the following materials may be of interest:

- ✓ *People v Kriho*, No. 96CR91 (Colo. Ct. Apps 4/29/99) reversing an order holding a juror in contempt for obstructing justice and remanding for a new trial. [The court declined to directly address the vitality of the jury nullification doctrine in Colorado because other errors required reversal, but the juror's handing out of a pamphlet about nullification after a mistrial had been declared was a prominent feature in the facts of the case.]
- ✓ "Stopping the Runaway Train: Jury Nullification," Shirley A. Tolentino, article, in *NBA Magazine* [National Bar Association] Nov./Dec. 98.
- ✓ "Jurors Can Make Any Decision," article, in *Graterfriends* [nonprofit Pennsylvania publication or Graterford and other prisoners, their families, etc.] Oct. 98. ♪

Book Review

With Liberty for Some: 500 Years of Imprisonment in America

by Scott Christianson
(Northeastern University Press 1998)

by Barbara DeMille

In the prison newspaper in 1954, inmates of San Quentin Prison defined the limits of their existence as a “metropolis of men without women, a beehive without honey, caged loneliness without privacy, a ranch where all sheep are black, a cement park with barbed wire shrubbery and an enormous microscope under which psychiatrists study a smear from civilization’s ulcers.”

In his book, from which the above quotation comes, Scott Christianson documents a tradition of imprisonment in our country. His interests are not only in the construction and maintenance of American prisons but also the imprisonments of slavery, indentured servitude, and convict labor with which the colonization and economic development of the United States began.

Christianson begins by tracing the coincidence of English jails in the 17th and 18th century overflowing with the poor—often arrested for minor theft and given the alternative of hanging or transportation—with the urgent need for labor in the American colonies where the felons were disposed. Convict’s and indentured servant’s terms of servitude were sold by brokers who had provided their passage. In the concurrent slave trade of the time, the very lives of the black Africans were sold as well. Bondage of one man, or woman, to another was a principal factor in the American economy in the late 17th, 18th, and 19th centuries until our Civil War.

Christianson describes the consequent growth of fortress prisons as a main means of dealing with the social problems of the underclass once indentured bondage and convict labor from England ceased after the American Revolution and the slave trade was outlawed.

In New York State the first such prison was built in Greenwich village in 1799, with Auburn, in 1816, Mount Pleasant (Sing Sing) in 1826, and Clinton (Dannemora) in 1844 following not far behind. Under Quaker Thomas Eddy’s principles of “industry, obedience, silence,” Auburn was considered a model prison of the time.

But for most of the time, with some instances of humane reformers who for a time prevailed, the history of our prisons which Christianson gives us is one of brutality, endless and dehumanizing tedium, isolation, and ultimately non-productivity of a large segment of our young male popula-

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tion—increasingly and disproportionately in our half of this century, hispanic and black.

With segments given to military prisons in both the American Revolution and the Civil War (avoidable deaths from disease and malnutrition on both sides); to the appalling living conditions of the prison farm systems in the southern states up into this century (convicts leased to private contractors, working them nearly to death in the face of an ever fresh supply from an indifferent state); and the cages, floggings, and mutilations with which captured slaves were punished, Christianson completes the dismal picture of our attempts to remedy our social mistakes with force.

Although Christianson also transcribes a record of reform movements, inquiries, inspections, and various reformers such as Eddy, Rev. Louis Dwight, and Dr. Enoch Cobb Wines in mid-19th century and Thomas Osborne in the early 20th—who tried and sometimes did make a difference—and the gains in prisoner’s rights in the courts in the latter half of our century, his overall picture is a disturbing one.

One of his main points is that the imprisonment of one person by another—whether it be slavery or forced convict labor—has historically been an economic benefit for the prisoner. (In the 19th century, Sing Sing was not only self-supporting from convict labor in its marble quarries and subsidiary industries—with flogging and similar sadism most severe—but turned over a profit to the state.) Ultimately Christianson sees small difference between the slave trade and the trade in convict labor.

But his even more urgent call is for us, as a social whole, to see the enormous waste of human resources withering in that “cement park with barbed wire shrubbery,” the poor, the poorly educated, the unemployed, the most often non-violent, drug-addicted young black males of our own time and how their incarceration without rehabilitation further devastates extended families left behind.

That most of these abuses of our less privileged segment of humanity have continued in our own time will be no secret to those daily involved in securing justice for the poor. Indeed Christianson sees our present prison policies circling around, from a point of hope for the reform and rehabilitation of prisoners in the 19th century, back to the harsher “lock them away and forget the key” policy evident in the present day “get tough” rhetoric.

The particular value of Christianson’s book lies in his thorough research and arguments careful to present all sides. He has no easy answers; he is fully aware of the complexities of the social ills that fill our ever growing prison cells. He only pleads for compassion, humane treatment, and productive remedies of the economic conditions and social attitudes that create this growing segment of our people. And he does this by showing, in documentation plentiful with facts and figures, that what we have tried and are still trying doesn’t work. ♪

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

Federal Law (Crimes)

FDL; 166(10)

Holloway v United States, No. 97-7164, 3/2/99

The defendant was convicted of carjacking, defined by 18 USC 2119 as "tak[ing] a motor vehicle . . . from . . . another by force and violence or by intimidation" "with the intent to cause death or serious bodily harm." The 2nd Circuit affirmed. The defendant's accomplice had testified that the plan was to steal the cars without harming the victims, but that he would have used the gun if any of the drivers had given him a "hard time."

Holding: The petitioner contends that the carjacking statute applies only when there was an actual attempt to harm, or intent to do so regardless of the driver's reaction, but a commonsense reading of the carjacking statute counsels that Congress intended to criminalize a broader scope of conduct than attempts to assault or kill in the course of automobile robberies. This conclusion is consistent with the principle that "the meaning of statutory language, plain or not, depends on context." *Brown v Gardner*, 513 US 115, 118 (1994). Here, the statute as a whole reflects an intent to authorize federal prosecutions as a significant deterrent to a type of criminal activity that was a matter of national concern at the statute's enactment. It is also reasonable to presume that Congress was familiar with authority recognizing that the "specific intent" to commit a wrongful act may be conditional. See *Cannon v University of Chicago*, 441 US 677, 696-698 (1979). A defendant may not negate a proscribed intent by requiring the victim to comply with a condition the defendant has no right to impose.

Dissent: [Scalia, J] It is not common usage to speak of having an "intent" to do something, when the perpetrator's plans are contingent upon an event that is not virtually certain.

Appeals and Writs (General)

APP; 25(35)

Guilty Pleas (General)

GYP; 181(25)

Peguero v United States, No. 97-9217, 3/2/99

When the petitioner pled guilty, he was not told by the court of his right to appeal his sentence. Over four years later, he moved to set aside the conviction and sentence. The relief was denied, and the 3rd Circuit affirmed.

Holding: A district court's failure to advise a defendant of the right to appeal is not grounds for *habeas corpus* relief where the defendant knew of the right and therefore was not prejudiced by the omission. As a general rule, a court's failure to comply with the Federal Rules regarding advice that must be given is a basis for relief only when prejudice can be shown. *Eg Hill v US*, 368 US 424 (1962). The holding in *Rodriquez v US*, 395 US 327 (1969) does not mandate otherwise; the court's failure there to advise that defendant of his right to appeal was only one factor underlying the grant of a resentencing and appeal where counsel had failed to file a requested appeal. Judgment affirmed.

Concurrence: [O'Connor, J] A defendant might not be prejudiced by a court's failure to advise of the right to appeal because the defendant already knew of the right, or because there were no meritorious grounds for appeal. But defendants should not have to demonstrate meritorious appellate grounds to win the right to appeal when the court has failed in its obligation.

Death Penalty (Cruelty) (General)

DEP; 100(40)(80)

Stewart v LaGrand, No. 98-1412, 3/3/99

Walter and Karl LaGrand were convicted of murder and other crimes, and sentenced to death. Karl's second *habeas corpus* petition was granted by the 9th Circuit, and the order of execution was stayed until the Supreme Court vacated the order. Walter then filed a second *habeas corpus* petition, denied by the District Court, but heard by the 9th Circuit, which denied the stay of execution but enjoined the State from executing Walter by means of lethal gas.

Holding: Walter LaGrand was offered the choice of being executed by means of lethal injection or lethal gas. By declaring his method of execution, picking lethal gas over the state's default form of execution—lethal injection—he waived his objection to that method of execution. See *eg Johnson v Zerbst*, 304 US 458, 464 (1938). His other claims are procedurally defaulted or waived. Order reversed in a *per curiam* opinion.

Concurrence: [Souter, J] On the understanding that no claim has been made that lethal injection would be cruel and unusual, the portion of the opinion relating to the method of execution is joined. Any issue as to the applicability of *Teague v Lane*, 489 US 288 (1989) is not reached.

Dissent: [Stevens, J] The important question of whether a capital defendant may consent to execution by unacceptable torturous methods should not be decided without full briefing and argument.

Federal Law (Procedure)

FDL; 166(30)

Witnesses (Experts)

WIT; 390(20)

Kumho Tire Co. Ltd. v Carmichael, No. 97-1709, 3/23/99

The plaintiffs here relied upon an expert in tire failure analysis who concluded that the blowout which caused the

US Supreme Court *continued*

accident underlying the suit was caused by a defect in the manufacturing or design of the tire. The district court examined the expert's methodology in light of *Daubert* and excluded his testimony. The 11th Circuit reversed.

Holding: The general holding of *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993), which sets forth trial courts' "gatekeeping" obligation as to scientific expert testimony under the Federal Rules of Evidence, also applies to "technical" and "other specialized" testimony. Rule 702 makes no relevant distinction between scientific knowledge and technical or other knowledge. *Daubert's* rationale applies equally to these other forms of knowledge. The factors set out in *Daubert* for analyzing the reliability of proffered testimony are not a definitive checklist, and trial courts have considerable leeway in deciding how to determine the reliability of particular expert testimony. "In sum, Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." Judgment reversed.

Concurrence in part, dissent in part: [Stevens, J] The question of whether a court may consider the four *Daubert* factors in analyzing and engineering expert's testimony is correctly answered. Whether the judge here abused his discretion by excluding the expert's testimony should be decided on remand because it requires a study of the record.

New York Court of Appeals

Juveniles (Delinquency-Procedural Law) JUV; 230(20)
Speedy Trial (Due Process) (General) SPX; 355(25) (30)

Matter of Benjamin L., No. 7, 2/11/99

Over one year after the Family Court denied a pre-petition detention application for the 15-year-old appellant, the County Attorney's Office filed a petition relating to the same incident. The Family Court denied the appellant's motion to dismiss the petition, and the Appellate Division affirmed.

Holding: A proceeding to adjudicate a person a juvenile delinquent is originated by the filing of a petition (Family Court Act 310.1[1]), so a pre-petition detention application can not be equated with a petition with respect to the time limits set forth Family Court Act 310.2, 320.2 and 340.1. The statute does not establish a specific time limitation for the period between filing a pre-petition detention application and filing a petition itself when the juvenile is not at a detention facility. Many of the policies underlying a criminal defendant's right to a speedy trial are applicable as a matter of fundamental fairness to juveniles in delinquency proceedings (see *McKeiver v Pennsylvania*, 403 US 528 [1971]). Numerous factors should be considered in determining the merits of a speedy trial claim in a delinquency context, including the extent and reason for the delay. See *People v Taranovich*, 37 NY2d 442, 445-47. Courts should be cognizant of the goals,

character and unique nature of juvenile proceedings in applying these factors, and recognize that undue delay especially disrupts the rehabilitative process. *People v Singer*, 44 NY2d 241, 254. No *per se* rule is endorsed; the factors must be collectively evaluated on a case-by-case basis. A hearing should be held in this case in accordance with this opinion. Order reversed.

Juveniles (Hearings)

JUV; 230(60)

Matter of Bernard T., Nos. 8 and 9, 2/11/99

In separate proceedings the Family Court denied appellants' motions to dismiss for violation of their speedy hearing rights. In both cases the defendants were released from detention and had their fact-finding hearings adjourned. The Appellate Division affirmed, noting compliance with Family Court Act 340.1, and in appellant Oldalys' case, also noted that good cause existed for a requested adjournment granted on the 14th day following his initial appearance.

Holding: The Family Court Act sets forth strict time requirements to assure swift adjudication at all phases of a juvenile delinquency proceeding. *Matter of Frank C.*, 70 NY2d 408, 413. The applicable time period for a presentment agency to commence a fact-finding hearing depends upon the juvenile's detention status and the severity of the charges. Family Court Act 340.1. Both appellants were detained only as long as statutorily permitted, and once released were subject to the 60-day time period required for non-detained juveniles. Family Court Act 340.1(2). No showing of good cause or special circumstances was required for the court's subsequent adjournment within that period. Family Court Act 340.1(4)(a); 340.1(6). Here, neither juvenile's right to a speedy fact-finding hearing was violated; both fact-finding hearings were conducted within the 60-day period that became applicable upon their release. Orders affirmed.

Double Jeopardy (General)

DBJ; 125(7)

People v Hart, No. 14, 2/11/99

The defendant was sentenced to three and one-half to seven years for first-degree escape, in addition to the Department of Correctional Services' disciplinary sanction of 15 years confinement in a Special Housing Unit. The Appellate Division affirmed.

Holding: The Double Jeopardy Clauses of the Federal 5th Amendment and Article 1 §6 of the New York Constitution did not bar the imposition of an additional sentence of imprisonment for a separate criminal offense arising out of the same escape for which the defendant was disciplined by Correctional Services. The disciplinary sanctions imposed were not "so grossly unrelated to the non-criminal governmental objectives at stake in a prison environment that they may only be viewed as criminal punishment." *People v Vasquez*, 89 NY2d 521, 532. Part of the plan to escape included a former cellmate parolee providing a gun to the

NY Court of Appeals *continued*

defendant. The defendant also acknowledged in his disciplinary proceeding that he would take any future opportunity to escape. Under these circumstances, the disciplinary penalty was manifestly related to the legitimate, non-criminal, correctional goals of maintaining safety, discipline and order in the prison. The penalty imposed should prevent the defendant from conspiring with others to attempt escape as he did in this case, and it should serve to deter other inmates from attempting to escape or violating other prison rules. Order affirmed.

Accusatory Instruments (Sufficiency) ACI; 11(15)
People v Henderson, No. 23, 2/16/99

The defendant was charged in a local court by information—a misdemeanor complaint and supporting deposition—with third-degree assault and other offenses. The instrument read in pertinent part that the defendant “did then kick the informant about the legs, causing the informant to suffer contusions and swelling about the legs, as well as causing informant to suffer substantial pain, alarm and annoyance.” The Appellate Term reversed the subsequent plea-based conviction, finding the accusatory instrument facially insufficient.

Holding: The definition of “physical injury” in the third-degree assault statute (Penal Law 120.00[1]) was intended by the legislature to set a threshold of more than a mere technical battery. *See People v Rojas*, 61 NY2d 726, 727. A jury accepting as true the allegations in the information could well infer that the complainant had felt “substantial pain” within the statutory definition. Given that a deposition in support of a misdemeanor complaint will be filed soon after the events complained of, the lasting effects of those events may not necessarily be known with certainty when the deposition is made; the *prima facie* case required is not the same as the trial-required proof beyond a reasonable doubt. *See People v Gordon*, 88 NY2d 92. Order reversed, judgment reinstated.

Counsel (Right to Counsel) COU; 95(30)
Sentencing (Alternatives to Incarceration) SEN; 345(7)
People v Garcia, No. 24, 2/16/99

The defendant pled guilty to third-degree sale of drugs with the understanding that he would be admitted into the Treatment Alternatives to Street Crime (TASC) program and that, if he successfully completed an approved drug treatment program, the felony charges would be dropped. He was told that failure to complete the program would vitiate any promise and that the minimum sentence he could receive if that happened would be four and a half to nine years. He ultimately received that sentence and the Appellate Division affirmed.

Holding: No attorney appeared in court with the defendant on four occasions after he was ejected from the treat-

ment program. At the last of those proceedings, the court discharged TASC and set the matter down for sentencing. This did not violate the defendant’s right to counsel, where an attorney for the defendant was present when he was sentenced. The fourth hearing was not analogous to proceedings involving revocation of probation or parole where counsel is required (*see eg People ex rel Donohoe v Montayne*, 35 NY2d 221) because it was not an accusatory proceeding at which the defendant had a chance to explain the charges or at which the court was required to make factual or legal determinations affecting liberty. It was uncontested that the defendant had violated treatment program rules and been ejected. TASC initially said at the fourth hearing that TASC was willing to keep working with the defendant but needed more time to find a bed, but then (as the court asked the defendant why he had left the program) said, “Your honor, if you want to sentence this defendant, go ahead.” The only issues addressed at this proceeding were administrative concerns—no factual or legal questions were at issue, and the defendant’s views were irrelevant to whether TASC would readmit him or find space. Order affirmed.

Competency To Stand Trial (General) CST; 69.4(10)
People v Tortorici, No. 15, 2/18/99

The defendant was certified fit to stand trial. The prosecution later had the defendant examined by Dr. Seigel pursuant to CPL 250.10(3), to rebut the defense that the defendant was not responsible for his actions by reason of mental disease or defect. Dr. Seigel was of the opinion that the defendant was incapable of rational participation in court proceedings and not fit to proceed to trial. Both the prosecutor and the defense stated that they were still ready to proceed. The defendant was found guilty.

Holding: The trial court did not abuse its discretion as a matter of law by failing, on its own, to order a competency hearing under CPL article 730. A trial judge determining whether a hearing is necessary may also consider available expert medical proof, coupled with all other evidence and the court’s own observations of the defendant. *See People v Gensler*, 72 NY2d 239, 244 *cert den* 488 US 932. The first report (certifying the defendant competent, stating that he knew the court procedures and personnel) along with the judge’s progressive personal observation of the defendant (who waived his right to be present at trial) and defense counsel’s consistent position that the defendant was competent and ready to proceed (which distinguishes this case from *Pate v Robinson*, 383 US 375, 384 [1966]) supported the court’s determination that no competency hearing was required.

Dissent: [Smith, J.] Notwithstanding the defense failure to move for a competency hearing, Dr. Seigel’s report was sufficient to establish a reasonable ground to believe that the defendant was not competent; the court was required, independent of any application, to order a hearing. *See People v Smyth*, 3 NY2d 184, 187.

NY Court of Appeals *continued***Attempt (General)****ATT; 50(7)****Kidnapping (General)****KID; 235(17)****People v Fullan, No. 17, 2/18/99**

The defendant hired Cepeda and Esquilin to abduct the decedent, a business associate of the defendant holding promissory notes representing a \$150,000 obligation owed by the defendant. The plan was for Cepeda and Esquilin to kidnap the decedent, take him to a certain location, and kill him. When the abduction was attempted at gunpoint, the culprits' gun fired, hitting the decedent, who was then killed by Esquilin. The defendant, who was present throughout, took the promissory notes from the decedent's body. The defendant and Esquilin were tried together and convicted of multiple counts. The Appellate Division modified the judgment of conviction for each, dismissing as a matter of law a first-degree attempted kidnapping count and the felony murder charge predicated thereon.

Holding: First-degree attempted kidnapping is a cognizable crime in the circumstances of this case. The kidnapping statute (Penal Law 135.25[3]) parallels the robbery statute (Penal Law 160.15) which has been construed to make an attempt charge a legally cognizable crime on appropriate facts. *People v Miller*, 87 NY2d 211. The case of *People v Campbell* (72 NY2d 602) is distinguishable. Order modified to reinstate appropriate counts and, as modified, affirmed.

Arson (General)**ARS; 40(37)****Accomplices (Accessories)****ACC; 10(5)****People v Grassi, No. 30, 2/18/99**

The defendant and three co-defendants were indicted for second-degree arson (Penal Law 150.15) on a theory of accessorial liability (Penal Law 20.00). The jury convicted the defendant, but acquitted the co-defendants. The County Court granted the defendant's motion to set aside the verdict because the defendant was not physically present in the county when the fire occurred, which could not be reconciled with the prosecution's contention that defendant "importuned, commanded or solicited the other three co-defendants to commit the crime . . ." The Appellate Division reversed.

Holding: The evidence is legally sufficient to sustain the conviction. In addition to determining that the defendant had the requisite *mens rea* and that each element of arson was proven beyond a reasonable doubt, the jury could have concluded that the defendant had a motive and opportunity to "solicit, request, command, importune, or intentionally aid the unknown arsonist in setting the fire (*see generally, People v Ficarrotta*, 91 NY2d 244 . . .)." The defendant's investment in the burned nightclub was at risk; numerous complaints about the club had been filed with the police; the liquor license was in jeopardy; and there were no prospects of a sale. The fire alarm system had been disabled; there was

no evidence of a break-in prior to the fire; and valuable property was removed shortly before the fire. The defendant hid a very expensive lighting system and lied about its "destruction" in the fire. Order affirmed.

Driving While Intoxicated (Evidence)**DWI; 130(15)****Self Incrimination (General)****SLF; 340(13)****People v Berg, No. 1, 2/23/99**

The defendant drove her car into a ditch. After an off-duty officer observed that the defendant had glassy eyes and her speech was slurred, police were called. When it was discovered that the defendant had given a false name, she was taken to the police station. There, she was asked to perform four field sobriety tests and refused. She was then arrested and given *Miranda* warnings. The Appellate Division reversed the trial court's ruling that the defendant's refusal to take the tests could not be used by the prosecution at trial because no *Miranda* warnings had been given at that time.

Holding: Whether or not the defendant's refusal to perform the field sobriety tests was non-testimonial (as the results of such tests are, *see eg People v Hager*, 69 NY2d 141, 142), it was not the product of custodial interrogation and therefore was admissible.

There was no direct compulsion on the defendant to perform the sobriety tests, and there must be a measure of compulsion above custody itself for the constitutional protection to apply. *Rhode Island v Innis*, 446 US 291, 300 (1980). On the contrary, the police wanted the defendant to take the tests, since the inference of intoxication arising from failing them is far stronger than that arising from a refusal to take them at all. *See South Dakota v Neville*, 459 US 553, 564 (1983). The defendant had the legitimate option of performing the tests, which involved no forfeiture of a constitutional privilege. *People v Thomas*, 46 NY2d 100, 108 *app dmsd* 444 US 891. Order affirmed.

Appeals and Writs (Counsel)**APP; 25(30)****Counsel (Right To Counsel)****COU; 95(30)****People v Garcia, No. 28, 2/23/99**

Holding: Where the defendant, who had retained counsel for his trial, was unrepresented on the prosecution's appeal, the Appellate Division had the obligation to satisfy itself that he was represented or that a record basis existed for finding that he had waived his constitutional right to counsel. While the defendant had been told by the court that set aside his conviction that the prosecution might appeal, trial counsel informed the prosecution that they had not been retained for the appeal, and no appearance was filed. No brief was filed for the defendant as respondent. After the appellate court reinstated the defendant's conviction, it was determined that the defendant was unrepresented because he was indigent; once he was advised of his right to counsel at the trial level he

NY Court of Appeals *continued*

immediately accepted. Absent record evidence that the defendant had been informed of his right to counsel and had waived it, the court should not have proceeded to consider and decide the prosecution's appeal. *See Swenson v Bosler*, 386 US 258, 260 (1967). The record on appeal cannot substitute for appellate counsel's single-minded advocacy and the meaningful submission of a brief. *People v Emmett*, 25 NY2d 354, 356. For the future, it would be advisable for the Appellate Divisions to ensure, by promulgating rules, that defendants are told of their right to counsel on appeal. Order reversed, case remitted for *de novo* appeal.

Evidence (Character and Reputation) EVI; 155(20)

People v Cook, No. 31, 2/23/99

Holding: When appropriate, as when there is a relationship between the defendant and the complainant like the relationship here, evidence of a defendant's prior abusive behavior toward a complainant may be admissible to prove the element of forcible compulsion in a rape case. *See People v McClain* __ AD2d __ (3d Dept. 5/7/98). This is true, if the probative value of the evidence exceeds its potential for prejudice (*see People v Ely*, 68 NY2d 520, 529), even though the defense is not consensual sex, but that the rape never occurred and that the complaint's allegation was a lie. The order of the Appellate Division is affirmed.

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

People v Tonge, No. 90, 2/23/99

Holding: The defendant's claim that he was deprived of a fair trial because the prosecutor stated in summation that his conduct fit the "typical behavior of a sex offender" is unpreserved for review. Only a general objection was made to the prosecutor's remark at summation; failure to specify the basis for a general objection renders the argument unpreserved. *See People v Dien*, 77 NY2d 885, 886. Viewed as a whole, however, counsel's efforts reflect a reasonable and legitimate strategy, not ineffective assistance of counsel. *People v Benevento*, 91 NY2d 708, 712-713. Order of the Appellate Division affirmed.

First Department

Witnesses (Child) WIT; 390(3)

Sex Offenses (Corroboration) SEX; 350(2)

People v Cordero, No. 2505, 1st Dept, 1/7/99

The defendant was convicted of sodomizing his six-year-old nephew. The court ruled that the complainant could testify, but could not be sworn. After a jury verdict, a defense

motion to dismiss was granted, the court finding the evidence legally insufficient because the complainant's unsworn testimony was not adequately corroborated.

Holding: The record shows the complainant was familiar with his circumstances and the reason he was in a courtroom, and expressed a keen understanding of the difference between lying and telling the truth, which he knew was good. *See People v Young*, 225 AD2d 339 *lv den* 88 NY2d 971. He demonstrated sufficient intelligence and capacity to be sworn to overcome the rebuttable presumption of incompetence in CPL 60.20[2]. *People v Nisoff*, 36 NY2d 560, 566. The trial court said the complainant did not appreciate the nature of an oath, but the complainant was never asked about an oath, or even if he could keep a promise to tell the truth. "[W]e have no doubt that more specific and concrete inquiries would have yielded an express recognition of the obligation to tell the truth, and the consequences of not doing so." Even if the complainant could not give sworn testimony, the prosecution offered adequate corroborative evidence. The complainant's outcries (*see People v MCDaniel*, 81 NY2d 10, 16 [a hearsay case]), the testimony of his brother and mother to his change in attitude (*See People v Groff*, 71 NY2d 101, 104), and his refusal to see the defendant after the incident were sufficient corroborating evidence. Additionally, there were independent corroborative facts. Order reversed, verdict reinstated, matter remanded for sentencing. (Supreme Ct, New York Co [Williams, JJ])

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(15)(k)

Search and Seizure (Consent) SEA; 335(20)

People v Fields, No. 2938, 1st Dept, 1/7/99

Holding: The defendant's activities before boarding a bus (*ie* arriving one minute prior to departure time, walking in a small circle while the last passenger was boarding, and then hurriedly handing his ticket over, and being the last passenger to board), and the officer's subsequent observation of the defendant apparently moving things between his pockets and his bag before sitting down, were all susceptible of an innocent explanation, and provided the officer with no more than justification for asking Level-I type questions about the defendant's residence, destination and length of visit to New York City. *See People v DeBour*, 40 NY2d 210, 223. The officer did not have the founded suspicion that criminality was afoot required for a Level-II inquiry when he asked about the contents and ownership of the defendant's gym bag. *See People v Hollman*, 79 NY2d 181, 191. Even if the question of whether anyone had asked the defendant to take the bag on the bus was a Level-I question, its repetition and subsequent request for consent to search the bag were unjustified. That the defendant became nervous and began to sweat did not provide the basis for a more elevated level of intrusion. *See People v Owens*, 206 AD2d 303, 304. Judgment reversed. (Supreme Ct, New York Co [Bookson, JJ])

First Department *continued*

Counsel (Right to Counsel) COU; 95(30)
Identification (In-court) IDE; 190(24)

People v Lainfiesta, No. 2434, 1st Dept, 1/12/99

The defendant was convicted of second-degree murder and second-degree criminal possession of a weapon.

Holding: The trial court's ruling prohibiting one of two attorneys representing the defendant from cross-examining the medical examiner did not violate the defendant's qualified right to counsel of his choice set out in *People v Arroyave* (49 NY2d 264). The request, near the end of the prosecution's case, was untimely. Co-counsel had not examined any witnesses to that point, and had been absent for significant periods of the trial. Unlike the case of *People v Knowles* (88 NY2d 763), co-counsel was not completely excluded, being present to assist during the medical examiner's testimony, and having participated in *voir dire*, charge requests, and other matters. Furthermore, the defendant did not personally object to the ruling.

The court's finding that a witness was so familiar with the defendant's appearance that her pretrial identification of him in photographic array was impervious to suggestion, so that her identification was not subject to statutory notice requirements, was supported by evidence. *People v Rodriguez*, 79 NY2d 445, 451. Any error with respect to the court's *Rodriguez* ruling determination was harmless in light of overwhelming evidence of guilt. Judgment affirmed. (Supreme Ct, Bronx Co [Covington, J])

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

People v Chambers, No. 2952, 1st Dept, 1/12/99

Holding: The defendant was properly sentenced to consecutive sentences for vehicular assault and leaving the scene of an accident without reporting. Concurrent sentences must be imposed "for two . . . offenses committed through a single act or omission, or through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other." Penal Law 70.25[2]. The *actus reus* of second-degree vehicular assault—operating a motor vehicle with criminal negligence and a .10 or more blood alcohol level, causing serious physical injury—did not constitute a material element of the second crime. The defendant's acts or omissions under each offense were separate and distinct, so that consecutive sentences may be imposed. See *People v Laureano*, 87 NY2d 640, 644-645. The case relied upon by the defense, *People v Catone* (65 NY2d 1003), was nullified by a 1986 amendment of Vehicle and Traffic Law 600, eliminating any culpability requirement for the offense of leaving the scene of an accident. Judgment affirmed. (Supreme Ct, New York Co [White, J])

Second Department

Identification (In-court) IDE; 190(24)
Juries and Jury Trials (Nullification) JRY; 225(48)
Sentencing (Concurrent/Consecutive) SEN; 345(10)

People v Parks, No. 96-05774, 2nd Dept, 1/19/99

Holding: The court properly examined the jury pool during *voir dire* on the issue of jury nullification. See *Rosales-Lopez v United States*, 451 US 182, 189 (1981). The fact that an eyewitness could not positively identify the defendant at a pretrial lineup did not render his in-court identification of the defendant inadmissible. The witness's earlier failure to identify the defendant goes to the weight of the witness's in-court identification, not to its admissibility. See *People v Finley*, 190 AD2d 859, 860.

Inasmuch as the defendant's convictions for robbery and felony murder were part of the same act, the court erred in imposing consecutive sentences for two of the counts of robbery in the first degree. The sentences were modified to run concurrently. See *People v Ramirez*, 89 NY2d 444, 452-453. Judgment affirmed as modified. (Supreme Ct, Queens Co [Hanophy, J])

Juries and Jury Trials (Competence) JRY; 225(15)

People v Guzman, No. 97-00014, 2nd Dept, 1/19/99

Holding: The court's refusal to disqualify a sworn juror who expressed some apprehension after the defendant approached her as she exited the courthouse was not error. When questioned by the court, the juror unequivocally stated that she would be able to reach a fair and impartial decision. The court properly concluded that the juror was not unqualified to serve. See CPL 270.35; *People v Rodriguez*, 71 NY2d 214, 219. Judgment affirmed. (Supreme Ct, Queens Co [Spires, J])

Search and Seizure (Plain View Doctrine) SEA; 335(53)

People v March, No. 97-05720, 2nd Dept, 1/19/99

The defendant was arrested after police observed a handgun in plain view in the back of his van.

Holding: Probable cause is not always required as a predicate for a limited intrusion into the passenger compartment of a vehicle. Facts learned during an encounter may lead to the conclusion that there is a weapon located within the vehicle that presents a danger to the officers. See *People v Carvey*, 89 NY2d 707, 710-711. The evidence established that the police had reasonable suspicion that criminal activity was afoot. Based on the suspicious circumstances, and one officer's knowledge that one of the occupants had been recently arrested for armed robbery, the officer was justified in taking the minimally intrusive action of stepping into the van to scan its interior for weapons; the officer did not enter the vehicle to illuminate portions of its interior which could

Second Department *continued*

not have been seen from outside the vehicle and which the defendant legitimately expected to remain private. *See eg People v Hernandez*, 238 AD2d 131. Once the police found the handgun, probable cause existed for the defendant's arrest and for the subsequent search of the van, which revealed a machine gun. *See People v Yancy*, 86 NY2d 239, 245. The defendant's motion to suppress the guns was properly denied. Judgment affirmed. (Supreme Ct, Queens Co [Eng, J])

Dissent: [Bracken, JP] The "plain view" doctrine does not apply in a situation where the officer entered the van before observing the contraband which he later seized.

Arrest (Probable Cause)

ARR; 35(35)

People v Spencer, No. 97-07091, 2nd Dept, 1/19/99

Holding: Probable cause to arrest existed where the defendant was arrested in close temporal and geographic proximity to the crime scene and the prosecution established that a security guard, who called the police and provided a detailed description of the perpetrator that matched the defendant, was reliable. *See People v Parris*, 83 NY2d 342. Viewing the evidence in a light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), it was not legally sufficient to establish the defendant's guilt beyond a reasonable doubt of criminal possession of stolen property. *See People v Alamo*, 34 NY2d 453. Conviction of criminal possession of stolen property and sentence thereon vacated. Judgment affirmed as modified. (Supreme Ct, Queens Co [Hanophy, J])

Identification (In-court) (Show-ups)

IDE; 190(24)(40)

People v Matthews, No. 97-09050, 2nd Dept, 1/19/99

Holding: The show-up identification, which occurred at the scene three weeks after the commission of the crime and two weeks after the complainant's release from the hospital, was unduly suggestive. Pretrial show-up identification procedures are permissible only if the suspects are found at or near the crime scene and can be viewed by the witness immediately (*see People v Riley*, 70 NY2d 523), or where exigent circumstances require it. *See People v Rivera*, 22 NY2d 453 *cert den* 395 US 964. The fact that the police officer questioned the complainant as to whether he "recognized anybody on the corner" while standing beside the defendant was highly suggestive. *See People v Liano*, 142 AD2d 602. Because the prosecution failed to show the presence of exigent circumstances and that steps were taken to ensure the identification was not suggestive (*see People v Chipp*, 75 NY2d 327), the order denying that branch of the defendant's motion to suppress identification testimony was vacated.

Since the only evidence connecting the defendant to the crime was the show-up identification testimony and the complainant's in-court identification of the defendant, a new

trial was ordered, to be preceded by an independent source hearing. *See People v Burts*, 78 NY2d 20. Judgment reversed. (Supreme Ct, Queens Co [Rosenzweig, J])

Trial (Public Trial)

TRI; 375(50)

People v Oliphant, No. 97-01252, 2nd Dept, 2/08/99

Holding: The defendant's right to a public trial was not violated where the court, rather than close the courtroom to protect the prosecution's interest in guarding the identities of undercover officers that were testifying, posted a court officer outside the courtroom. The measures adopted were reasonable alternatives to full courtroom closure and were narrowly tailored to protect the interests of all parties. *See People v Ramos*, 90 NY2d 490. The court officer was instructed to obtain names and addresses of those who wished to enter and the purpose of their presence and the defendant's family and defense counsel's colleagues were permitted to remain in the courtroom. *See People v Brown*, 243 AD2d 641. Judgment affirmed. (Supreme Ct, Kings Co [Wade, J])

Search and Seizure (Warrantless Searches [Abandonment])

SEA; 335(80)(a)

People v Green, No. 98-04248, 2nd Dept, 2/8/99

The defendant was using a public telephone, holding a shopping bag, and wearing a knapsack when police approached the phone both to investigate the making of an unfounded call for assistance. The defendant hung up, left the shopping bag, and walked away. While one officer questioned the defendant about the police call the other looked in the bag and found a brick of cocaine. The defendant, who then fled but was caught, disclaimed ownership of the shopping bag. An officer confiscated the knapsack and searched it, discovering more cocaine. Later, during a search of his person after *Miranda* warnings had been given, the defendant made certain statements regarding contraband in his possession. The trial court suppressed the drugs and statements.

Holding: The contents of the shopping bag and the statements should not have been suppressed. The defendant abandoned the shopping bag as a calculated risk and not in response to any unlawful police conduct, (*See People v Ramirez-Portoreal*, 88 NY2d 99), and the statements were voluntary and spontaneous, not the result of police interrogation or its functional equivalent (*See People v Lynes*, 49 NY2d 286). However, the suppression of the contents of the knapsack must be upheld. It was not recovered pursuant to a search incident to a lawful arrest and the requisite exigent circumstances to justify the search were not present. *See People v Gokey*, 60 NY2d 309. Order affirmed as modified. (Supreme Ct, Kings Co [Silverman, J])

Second Department *continued*

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

People v Fields, No. 97-00978, 2nd Dept, 2/16/99

At defendant's arraignment his attorney, who was appointed for the arraignment only, served the prosecutor with notice that the defendant wished to testify before the grand jury. See CPL 190.50(5)(b). Although the court apparently intended to assign the same attorney who represented the defendant at the arraignment, it never did so. The court did direct the prosecutor to give prompt notice of the grand jury date, which the prosecutor did not do. The grand jury was adjourned, but eventually convened and indicted the defendant, who had never been notified of the grand jury date.

Holding: The defendant was deprived of the right to effective assistance of counsel at the grand jury proceedings. As a result of the confusion over the assignment of counsel, and the prosecutor's lack of notice, the defendant was also deprived of his right to appear and testify before the grand jury. See *People v Lincoln*, 80 AD2d 877. Judgment reversed, indictment dismissed without prejudice. (Supreme Ct, Queens Co [Butcher, J])

Guilty Pleas (General) GYP; 181(25)

People v Guretzky, No. 97-10620, 2nd Dept, 2/16/99

Holding: The defendant claimed that his plea, entered at the close of evidence, was coerced because the court said that if the defendant continued with the trial he would receive a jail sentence, but that if he pleaded guilty to the top count of the indictment he would receive a sentence of probation and a certificate of relief from civil disabilities. These allegations are sufficient to raise an issue as to the voluntariness of the plea which should be resolved at a hearing. See *People v McCoy*, 41 AD2d 743. Appeal held in abeyance, matter remitted for hearing before different judge. (Supreme Ct, Queens Co [Browne, J])

Discovery (Brady Material) DSC; 110(7)

People v Pugh, Nos. 96-03286 and 96-11480, 2nd Dept, 2/22/99

Holding: The court erroneously ruled at the suppression hearing that a certain report prepared by the prosecutor's witness was not *Rosario* material. See *People v Rosario*, 9 NY2d 286 *cert den* 368 US 866. When a defendant is deprived of the opportunity to cross-examine a suppression hearing witness with *Rosario* material, the remedy is a new hearing. See *People v Banch*, 80 NY2d 610. In addition, a new trial is warranted because the court improperly precluded testimony by a defense witness that another man confessed to her that he, not the defendant committed the crime. That testimony satisfied the four-prong test enunciated in *People v Settles*, 46 NY2d

154, 167, for admitting in evidence the statement of an out-of-court declarant as a declaration against penal interests. Although a one-witness identification is sufficient to support a judgment of conviction, in this close of a case, all of the foregoing errors "may have tipped the balance against defendant and operated to deprive him of a fair trial. See *People v Morris*, 100 AD2d 600. Judgment reversed, new trial ordered, to be preceded by *de novo* suppression hearing. (County Ct, Nassau Co [Wexner, J])

Trial (Public Trial) TRI; 375(50)

People v Pena, No. 96-05770, 2nd Dept, 2/22/99

Holding: The defendant was deprived his right to a public trial because the Supreme Court excluded his wife and children from the courtroom during the testimony of an undercover officer. When the defendant seeks to limit the closure to permit the attendance of certain individuals, the People must present evidence that those individuals threaten the safety of the witness (see *People v Nieves*, 90 NY2d 426). There was no evidence that the defendant's family posed a threat to the undercover officer. Judgment reversed, new trial ordered. (Supreme St, Queens Co [McDonald, J])

Evidence (Other Crimes) EVI;155(95)

People v Balazs, No. 96-06529, 2nd Dept, 2/22/99

Holding: The evidence of the defendant's prior conviction for robbery was properly admitted to establish his identity as the perpetrator of the instant crime, where identity was not otherwise conclusively established. (See *People v Ventimiglia*, 52 NY2d 35). A unique modus operandi was sufficiently established by showing that in each crime the perpetrator posed as a pizza deliveryman using silver colored duct tape to immobilize the victims, and that the crimes all occurred within one week of each other, in the same geographical location, involving victims of similar age and ethnicity. (See *People v Beam*, 57 NY2d 241). Judgment affirmed. (Supreme Ct, Kings Co [Hall, J])

Third Department

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

Evidence (Sufficiency) EVI; 155(130)

People v Archbold, No. 10162, 3rd Dept, 1/7/99

Holding: The defendant, a prison inmate, was seen carrying a broken table leg during a riot and convicted of first-degree promoting prison contraband and third-degree possession of a weapon. The corrections officer who testified did not see the defendant break off the leg or assault anyone with it; he saw other inmates damaging property with similar items. Defense counsel did not cross-examine the officer,

Third Department *continued*

a strategy to which the defendant specifically consented. Counsel unsuccessfully moved for dismissal for failure to prove that the leg was contraband or a dangerous instrument. The evidence presented was sufficient for the jury to conclude that the leg was contraband as it had been “altered.”** so as to change its original intent and/or purpose” (Standards of Inmate Behavior § 113.11).” The jury could also have concluded that as the defendant was carrying the leg during a riot, it constituted a dangerous instrument. See *People v Carter*, 53 NY2d 113. Counsel’s failure to request an instruction on temporary innocent possession of a weapon was not ineffective assistance of counsel; the court charged on all the necessary elements of the crime, and the defendant’s right to a fair trial was not compromised. See *People v Snyder*, 240 AD2d 874 *lv den* 91 NY2d 881. (County Ct, St. Lawrence Co [Nicandri, J])

Evidence (Sufficiency) EVI; 155(130)

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

People v Dolphy, No. 10316, 3rd Dept, 1/7/99

Holding: The prosecutor’s explanation that he exercised a peremptory challenge to excuse the only African American juror on the panel because the juror was overweight was a “racially neutral explanation which was given credence by County Court.” The prosecutor said that in his personal experience, heavy people tended to be very sympathetic toward defendants. The defendant’s “bald contention” that this explanation was pretextual” is rejected. There was no violation of the equal protection clause of the federal constitution. See *Batson v Kentucky*, 476 US 79 (1986).

There was sufficient evidence to establish the elements of the multiple crimes charged: third- and fourth-degree possession of drugs, second-degree possession, and first-degree attempted assault. There was testimony that the defendant fired a pistol at a drug-dealer who had warned the defendant to leave the area, and that while being pursued by police, the defendant stopped, “pawed” at the ground, placed something on the ground, and continued to run. Cocaine was discovered by a drug dog under a rock in the area. A police officer said that the defendant admitted buying a gun and shooting at the complainant. The jury could have validly believed the prosecution’s witnesses instead of the defendant’s trial testimony. *People v Rose*, 215 AD2d 875, 876 *lv den* 86 NY2d 793, 801. The defendant’s prior admission coupled with the prosecution’s evidence provided ample basis for a guilty verdict. Judgment affirmed. (County Ct, Broome Co [Smith, J])

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

Speedy Trial (General) (Remedies) SPX; 355(30) (35)

People v Grey, No. 76551, 3rd Dept, 1/7/99

“Fresh” fingerprints matching the defendant’s were alleged to have been found on a video cart’s storage door from which a television and VCR were stolen during a burglary in July 1993. Police investigated a series of addresses, and an arrest warrant was mailed to an address in Arizona. The defendant was arrested under the warrant in Saratoga County in 1995.

Holding: Defense counsel’s failure to move for dismissal based on the right to a speedy trial denied the defendant effective representation. See *People v Courtney*, __ AD2d __, 671 NYS2d 667. That the defendant was in another jurisdiction does not necessarily exclude the delay from calculations under the statute, CPL 30.30. The conclusory contention that the defendant had absconded and that the police made diligent efforts to locate him and secure his presence for trial is insufficient on this sparse record. However, as the matter was not raised in County Court so that the prosecution had no opportunity to offer evidence on this issue, there must now be further factual inquiry. Decision withheld, matter remitted for assignment of new counsel and consideration of the speedy trial matter. (County Ct, Schenectady Co [Sheridan, J])

Counsel (Conflict of Interest) COU; 95(10)

People v Magee, No. 76784, 3rd Dept, 1/7/99

Holding: The defendant failed to sustain his burden of proof as to claimed errors of selective prosecution and denial of an impartial grand jury, which were raised and denied in a co-defendant’s appeal as well. See *People v Jones*, 213 AD2d 801 *lv den* 85 NY2d 975. The defendant was not denied effective assistance of counsel where his lawyer was disbarred four years after the defendant was sentenced, and had a conflict of interest with regard to a prosecution witness. Despite the initial disclosure at the commencement of the witness’s testimony that defense counsel had previously represented the witness, and the witness’s refusal to waive the attorney-client privilege, the potential conflict did not independently give rise to a claim of ineffective assistance. See *gen People v Mattison*, 67 NY2d 462. Counsel for the co-defendant had ample opportunity to impeach the witness with numerous prior convictions. Where the conflict did not relate to the main prosecution witness, and substantial evidence apart from that witness’s testimony corroborated his story, the conflict did not bear a substantial relationship to conducting the defense. *People v Recupero*, 73 NY2d 877, 879. Judgment affirmed. (County Ct, Tompkins Co [Barrett, J])

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

Discovery (Matters Discoverable) DSC; 110(20)

People v Evans, No. 78843, 3rd Dept, 1/7/99

The defendant appeals his murder conviction after discovering that a psychiatrist who testified for the defense had

Third Department *continued*

previously been convicted of insurance fraud, for which his license to practice in New York had been revoked.

Holding: The defendant contends that defense counsel's failure to inquire whether the psychiatrist was a convicted criminal constituted ineffective assistance of counsel. This is not supported by the record, which shows that the doctor was recommended by a prominent attorney. Moreover, the curriculum vitae listing the doctor's credentials did not provide any reason for a prudent and competent attorney to have suspected the existence of a criminal record of which there was no indication. The defendant also asserts that he was denied a fair trial because the prosecution failed to disclose the criminal history of the psychiatrist to the defense. Although the record indicates that the prosecution was aware of the prior record, the obligation to disclose such information arises only to witnesses for the prosecution. *People v Rosario*, 9 NY2d 286. Since the information withheld is not *Brady* material, there was no duty for the prosecution to provide it to the defense. *See Brady v Maryland*, 373 US 83 (1963). Judgment affirmed. (County Ct, Ulster Co [Bruhn, JJ])

Search and Seizure (Parolees and Probationers)

SEA; 335(50)

People v Nelson, No. 10226, 3rd Dept, 1/14/99

The defendant was convicted of possession of stolen property after his employer, a store owner, informed his parole officer that the defendant was selling stolen clothing. When parole officers made an unannounced home visit, the defendant admitted them. Two open closets revealed large quantities of new clothing; more clothing was found in other closets after the defendant consented to their examination.

Holding: The defendant contends that the search was unconstitutional and the seized evidence should have been suppressed. While it is true that a parolee does not surrender his protection against unreasonable search and seizure (*see People v Huntley*, 43 NY2d 175, 181), his status as a parolee and the fact that his own parole officer conducted the search are relevant factors in determining whether the search was reasonable. Because the parole officer's duties included unannounced home visits and the informant was an identified source, the search was rationally and reasonably connected to the officer's duty.

It was not error for the police to release the clothing to the store owner before trial. Written notice was provided to defense counsel pursuant to Penal Law 450.10, and counsel did not respond with any requests for further inspection. Judgment affirmed. (County Ct, Schenectady Co [Sise, JJ])

Appeals and Writs (Preservation of Error for Review)

APP; 25(63)

Guilty Pleas (Errors Waived By)

GYP; 181(15)

People v Torres, No. 10364, 3rd Dept, 1/14/99

Two inmates were separately charged in a single indictment after they allegedly intended to injure each other with weight-lifting equipment. The defendant moved to dismiss, claiming that the defendants were improperly joined in the indictment and that preindictment delay had violated his due process rights. After his motion was denied, the defendant pleaded guilty to attempted criminal possession of a weapon.

Holding: The defendant waived his right to appeal all nonjurisdictional issues, including improper joinder, by pleading guilty. *People v Thomas*, 74 AD2d 317, 320-321 *aff'd* 53 NY2d 388. The claim that a preindictment delay of 19 months violated due process survived the guilty plea. The burden is on the prosecution to show that the delay was for good cause. *See People v Gallup*, 224 AD2d 838, 839. The delay here was reasonable in light of a large turnover in the prosecutor's staff and numerous prosecutions arising from a prison riot; the indictment was well within the 5-year statutory period allowed. CPL 30.10(2)(b). Judgment affirmed. (County Ct, St. Lawrence Co [Nicandri, JJ])

Competency to Stand Trial (General)

CST; 69.4(10)

People v Perrotti, No. 76450, 3rd Dept, 1/14/99

The defendant was charged with two counts each of attempted murder, burglary and assault, and pleaded guilty to two counts of assault with consecutive sentences. The defendant moved to vacate the conviction pursuant to CPL 440.10 on several grounds.

Holding: The defendant contends that upon learning at the arraignment that a psychiatric examination had been ordered, the court should have adhered to the procedures of CPL 730.20 before allowing him to agree to a plea bargain. However, he has not shown that the psychiatric testing was ordered because of any doubt as to his competency to stand trial. When such an exam is ordered for an undisclosed reason, it need not necessarily relate to whether the defendant is capable of understanding the charges against him. *People v Dover*, 227 AD2d 804, 805 *lv den* 88 NY2d 984. At the time the plea was entered, psychiatric reports available to the court showed his speech and thought processes were normal. The defendant's actual participation at his arraignment supports the finding that a formal competency hearing was not required.

The argument that the defendant was denied effective assistance of counsel because his attorney did not use the competency issue as a possible defense is unsubstantiated. The recommendation for the defendant to accept the guilty plea was based on a realistic assessment of the situation. Order affirmed. (County Ct, Albany Co [Breslin, JJ])

Third Department *continued*

Admissions (General) (*Miranda* Advice) (Voluntariness) ADM; 15(17) (25) (35)

Search and Seizure (Automobiles and Other Vehicles [Investigative Searches]) SEA; 335(15[k])

People v Carrillo, No. 77375, 3rd Dept, 1/14/99

The defendant was convicted of first-degree criminal possession of a controlled substance.

Holding: The denial of the defendant's motion to suppress all statements and evidence seized was proper. The border patrol officer had sufficient reasonable suspicion to stop the car for backing up on a highway. The defendant's statement that his wife was an illegal alien justified the request to go to the police station, to which the defendant voluntarily acceded. *See People v Edmund*, 169 AD2d 195, 202 *lv den* 78 NY2d 1075. Consent was given to search the trunk where cocaine was found. The defendant signed a form stating that he understood his *Miranda* rights, and that he had not been threatened or coerced. He then made spontaneous admissions relating to his purchase of the cocaine. Later, he agreed to cooperate with the police, receiving no promises except an agreement not to bring drug charges against his wife. That cooperation agreement with the police was properly excluded, since it was irrelevant to the voluntariness of the statements made seven hours earlier. The court instructed the jury that the burden of proof as to whether the statements were made, and whether they were voluntary, rested on the prosecution, and the defendant was permitted to introduce evidence of alleged coercion.

The \$25,000 fine was not improper; the claim that the court failed to set forth its reasons for imposing that amount fails in light of the court's statement that it had read the letter and presentence report detailing the defendant's financial status. Judgment affirmed. (County Ct, Clinton Co [Hallowan, J])

Confessions (*Miranda* advice) CNF; 70(45)

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

People v Pulliam, No. 76752, 3rd Dept, 2/4/99

Holding: The questioning of the defendant did not constitute a custodial interrogation for which *Miranda* warnings were required where five law enforcement personnel went to the defendant's home and requested to speak with him about the death of a former girlfriend, he voluntarily accompanied the police to the police station, and no physical restraints were placed on him. He never requested to leave the station. Four hours into the interview in which he voluntarily participated, the defendant admitted to stabbing the decedent. He was then read his *Miranda* warnings, which he waived. Given these facts, the defendant's suppression motion was properly denied. *See People v Hayden*, __AD2d__,

672 NYS2d 538, 540-541 *lv den* 92 NY2d 879. The fact that he was a suspect in the homicide when questioned does not, by itself, establish that he was in custody (*see People v Basso*, 140 AD2d 448, 449-50), nor does the fact that four hours elapsed between his arrival at the station and his oral admission.

There was no violation of CPL 710.70(3) where the court permitted the jury to assess the voluntariness of both the oral and written statements. The court properly refused to charge the jury with criminally negligent homicide as a lesser-included offense, because no reasonable view of the evidence could support a finding that the defendant was unaware of the substantial and unjustifiable risk of death caused by his actions. *See People v McFadden*, 246 AD2d 558 *lv den* 91 NY2d 927. Judgment affirmed. (County Ct, Albany Co [Sheridan, J])

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

Sentencing (Restitution) SEN; 345(71)

People v Martinich, No. 10909, 3rd Dept, 2/11/99

The defendant pleaded guilty to larceny and forgery and was sentenced to five years probation and payment of restitution. When he violated the terms of his probation by failing to make the monthly restitution payments, the court revoked the probation and sentenced the defendant to a term of imprisonment with continued payment of restitution.

Holding: No further inquiry was needed regarding the ability and efforts of the defendant to pay restitution. The court expressly invited the defendant to submit evidence explaining the facts underlying his nonpayment, but the defendant declined the offer. Having sufficiently developed the facts regarding the defendant's ability to render restitution, the court had the discretion to determine whether the defendant's admitted violation warranted revocation of his probation. *See gen People v McCloud*, 205 AD2d 1024 *lv den* 86 NY2d 738. The court also had the discretion to revoke the defendant's probation and impose a term of imprisonment. *See People v Battaglia*, 179 AD2d 841 *lv den* 79 NY2d 943. Revocation for the defendant's failure to abide by the restitution condition of his probation was not an unconstitutional imprisonment for indigence. *See People v Felman*, 141 AD2d 889, 890. Judgment affirmed. (County Ct, Columbia Co [Leaman, J])

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

People v Bailey, Sr., No. 10054, 3rd Dept, 2/25/99

The defendant was convicted of manslaughter and acquitted of second-degree murder by a jury that found he was acting under the influence of extreme emotional disturbance (*see Penal Law 125.25(1)*) in fatally shooting a co-worker.

Holding: After being informed by several jurors that one juror was behaving oddly and at times appeared confused, the court conducted *in camera* interviews with each of the

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concerned jurors and the juror in question. That juror was not "grossly unqualified to serve" under CPL 270.35(1). During the court's inquiry, the juror assured the court that he had no trouble "remembering the testimony or the law that the court gave," and there was no indication that he was incapable of continuing to deliberate. The court's findings are to be given great deference. *See People v Matiash*, 197 AD2d 794, 795 *lv den* 82 NY2d 899. Furthermore, to ensure that the jury's deliberations proceeded properly, the court instructed the foreperson to advise if the problems respecting the juror's conduct continued. No such advice was forthcoming. Judgment affirmed. (County Ct, Tompkins Co [Sherman, J])

Discovery (Prior Statements of Witness) DSC; 110(26)
Trial (Public Trial) TRI; 375(50)

People v Fields, No. 10057, 3rd Dept, 2/25/99

After remand, the court held a hearing to determine whether the prosecution could make the necessary factual showing justifying the closure of the courtroom at the prior *Wade* hearing.

Holding: While the procedure was not held in accordance with the appellate court's prior directive that a new suppression hearing be held, counsel for the defendant, who had represented the defendant at the prior proceedings, made no objection to the hearing as held and participated fully therein. The undercover officer provided sufficient evidence to justify the court's previous finding that the prosecution made the factual showing necessary to warrant closure of the prior *Wade* hearing.

The prosecution violated an order of discovery by failing to provide the defendant with statements made by the defendant following her arrest during an interview with the undercover officer. The prosecution erroneously contended that the order related only to statements to which CPL 710.30 applies. The order tracks the language contained in CPL 240.20(1)(a), which is not limited to statements intended to be offered by the prosecution at trial. The defendant's objection to the proffered evidence should have been sustained, as preclusion would appear to be the only reasonable sanction for the discovery violation. *See* CPL 240.70; *cf People v Kelly*, 62 NY2d 516, 521. Judgment reversed. (County Ct, Sullivan Co [La Buda, J])

Admissions (General) (Miranda Advice) ADM; 15(17) (25)

Impeachment (Of Defendant) IMP; 192(35)
People v Cruz, No. 10472, 3rd Dept, 2/25/99

The defendant was convicted of first-degree promoting prison contraband.

Holding: Following a *Huntley* hearing, the court held that the defendant's statement could not be used in the prosecution's case-in-chief because it was obtained without

Miranda warnings. The statement was admitted to impeach the defendant's trial testimony. Where the court made a finding that the statement was voluntary, such use was not improper. *See eg People v Maerling*, 64 NY2d 134, 140. The court properly admitted evidence of the existence of cups of feces and urine found in the defendant's cell, where the testimony was admitted to demonstrate the reason for the search of the defendant which revealed a single-edged razor, and to counter the defendant's assertion that he was framed. Judgment affirmed. (County Ct, Chemung Co [Buckley, J])

Fourth Department

Discovery (General) DSC; 110(12)

People v Maddox, No. 1316, 4th Dept, 12/31/98

Holding: The record did not demonstrate that the prosecution acted in bad faith in failing to preserve the \$10 bill that was used as "buy money," or that the defendant was prejudiced thereby (*see People v Brister*, 239 AD2d 513 *lv den* 90 NY2d 938). Testimony regarding a prior uncharged crime involving a drug sale made immediately before the drug sale involved here was properly admitted as evidence that the defendant possessed cocaine at the time in question with the intent to sell. *See People v Alvino*, 71 NY2d 233, 245-46.

The court properly denied the defendant's motion for a mistrial based upon the prosecutor's conduct during summation where such conduct was not so egregious or prejudicial as to deprive the defendant of a fair trial. *See People v Galloway*, 54 NY2d 396, 401. The court properly denied the defendant's motion for a missing witness charge where the prosecution established that the testimony of the officer would have been cumulative. *See People v Gonzalez*, 68 NY2d 424, 428.

It is not clear from the record whether notes of an officer who did not testify at trial, made while a description of the drug buy was being broadcast over police radio, included a description of the defendant. If the notes contained a description, they may be regarded as a written statement directly relating to the testimony of the officers at trial; and would constitute *Rosario* material that "might have assisted counsel in cross examining the undercover officer." *See People v Smith*, 182 AD2d 787, 787-88 *lv den* 80 NY2d 910. Case held and remitted for a determination regarding the contents of the contested notes. Judgment reserved. (Supreme Ct, Monroe Co [Galloway, J])

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

People v Burgun, No. 1484, 4th Dept, 12/31/98

Holding: The defendant received meaningful representation where defense counsel moved for pretrial hearings, obtained discovery information, interviewed witnesses, and obtained a favorable sentence as part of the plea agreement. *See People v Baldi*, 54 NY2d 137, 147. Because

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of the defendant's failure to move to withdraw the plea or to vacate the judgment of conviction on that ground, his contention that his plea was not voluntary was not preserved for appellate review. *See People v Lopez*, 71 NY2d 662, 665-66.

The defendant was denied effective assistance of counsel at sentencing. The defendant retained new counsel three days before sentencing, and defense counsel's request for adjournment on the grounds that he had not yet received the case file from the previous attorney was denied. Defense counsel was unable to advise the defendant as to whether to accept the conditions of probation. Because the defendant did not receive the opportunity to be represented by counsel sufficiently familiar with his case and background (*see People v Edmond*, 84 AD2d 938), the sentence was vacated. The court's direction to have the defendant submit to the use of an electronic monitoring device was imposed as a condition of probation, not an enhancement of the sentence. *See Penal Law 65.10[4]*. Matter remitted to court for re-sentencing. Judgment affirmed as modified. (County Ct, Chautauqua Co [Ward, J])

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

People v Matthews, No. 1502, 4th Dept, 12/31/98

The defendant's original judgment of conviction was affirmed (*People v Matthews*, 198 AD2d 849 *lv den* 82 NY2d 927). The defendant's subsequent motion for a writ of error *coram nobis* was granted on the ground that he was denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal that would have resulted in reversal. The prior order that affirmed the judgment was vacated and the appeal was to be considered *de novo* (*People v Matthews*, 242 AD2d 974).

Holding: The record establishes that the defendant was absent from the in-chambers *Sandoval* conference. His presence at the conference would not have been superfluous, so reversal is required. *See People v Favor*, 82 NY2d 254 *rearg den* 83 NY2d 801. Judgment reversed, new trial ordered. (County Ct, Onondaga Co [Cunningham, J])

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

People v Visser, No. 1544, 4th Dept, 12/31/98

The defendant agreed to a plea of guilty to a charge of forgery, subject to the agreement that, if he paid full restitution by the sentencing date, the court would impose a sentence that would run concurrently with another sentence imposed in another county on an unrelated matter. After the plea, defense counsel gave the court a range of monies that might be due in restitution on unrelated checks.

Holding: The court should have determined the amount of restitution that the defendant was required to pay before the sentencing date. However, even had the agreement in-

cluded the amount of other bad checks, the court could not make the sentence dependent on the defendant's paying the amount of those checks. Restitution may be based only upon the offense for which a defendant was convicted, as well as any other offense that is part of the same criminal transaction. *See Penal Law 60.27 [1], [4][a]*; *People v Bertolino*, 199 AD2d 715 *lv den* 83 NY2d 849. The record does not contain evidence of the exact losses of other victims, so the amount of restitution could not have exceeded the amount of the single victim's loss as reported in the presentence report.

The court's failure to determine the specific amount of restitution as a condition of the imposition of a concurrent sentence constitutes a departure from the defendant's right to be sentenced. "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 court must either sentence the defendant in accordance with the plea agreement or allow the defendant to withdraw his plea. Judgment modified. (County Ct, Onondaga Co [Burke, J])

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

People v Williams, No. 1548, 4th Dept, 12/31/98

Holding: The issue of whether a prosecution witness was an accomplice whose testimony required corroboration (*see CPL 60.22[2]*) should have been submitted to the jury. *See People v Sweet*, 78 NY2d 263, 266. Different inferences might have been drawn from the proof at trial concerning the participation of that witness in the events from which the charges arose.

The court's denial of the defendant's request for a missing witness charge with respect to a passenger who was present in the vehicle during the incident and who had cooperated with the investigation also warranted reversal. The uncalled witness was on the prosecution's witness list, and the defendant made the request for the charge when the prosecution rested without calling him. The defendant's request was made "as soon as practicable" (*People v Gonzalez*, 68 NY2d 424, 428), and his burden of demonstrating that the uncalled witness was under the control of the prosecution and could be expected to give testimony favorable to the prosecution on a material issue (*see People v Vasquez*, 76 NY2d 722, 723-24), was met. The prosecution's speculative assertions that the uncalled witness would not be expected to give favorable testimony and might invoke his 5th Amendment privilege because of pending unrelated charges was insufficient to demonstrate that the charge would be inappropriate. *See People v Horn*, 217 AD2d 406 *lv den* 86 NY2d 843. Judgment reversed. (Supreme Ct, Monroe Co [Kramer, J])

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

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

People v Campbell, No. 1549, 4th Dept, 12/31/98

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Holding: The court properly refused to accept the defendant's guilty plea in the first instance after he initially denied that he intended to kill his girlfriend. "It was only after defendant conferred with his attorney and the case was recalled that defendant admitted that he stabbed his girlfriend with a knife with the intent to kill her." Thereafter, the record demonstrates that his plea was knowingly, intelligently and voluntarily entered. The defendant was not denied effective assistance of counsel. Defense counsel was not compelled to take a position adverse to the defendant, even though the court asked defense counsel to explain certain remarks that he had made to a court clerk. *See People v Welsh*, 207 AD2d 1025.

The prosecution conceded that the defendant was improperly sentenced as a predicate felon on the basis of a prior federal conviction. The sentence was vacated and the matter remitted for re-sentencing. Judgment affirmed as modified. (County Ct, Onondaga Co [Fahey, J])

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

Matter of Kellam v Walker, No. 1562, 4th Dept, 12/31/98

Holding: The petitioner failed to exhaust his administrative remedies with respect to his contention that no extension of time was granted for his Tier III hearing, and the Appellate Division has no discretionary power to review that contention. *See Matter of Nelson v Coughlin*, 188 AD2d 1071 *app dismd* 81 NY2d 834. The record does not support the contention that the hearing officer was biased or acted in an arbitrary and capricious manner. *See Matter of Hooper v Goord*, 247 AD2d 884, 884-85.

The misbehavior report contains substantial evidence to support the determination that the petitioner violated inmate rules 104.10 (7 NYCRR 270.2[B][5][i]) and 104.12 (7 NYCRR 270.2 [B][5][iii]). *See People ex rel Vega v Smith*, 66 NY2d 130, 139. The determination that the petitioner violated inmate rule 104.11 (7 NYCRR 270.2 [B][5][ii]) must be annulled because the misbehavior report does not contain facts indicating that the petitioner engaged in conduct that would violate that rule (*see Matter of Urgitano v Coughlin*, 191 AD2d 1047, 1048), nor is there otherwise any proof in the record to support that determination. Because one penalty was imposed, the penalty was vacated and the matter was remitted to respondent for imposition of an appropriate penalty on the remaining violations. *See Matter of Brooks v Coughlin*, 182 AD2d 1115, 1116. (CPLR art 78 Proceeding transferred by Order of Supreme Ct, Cayuga Co [Corning, J]).

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

Matter of Hendrix v Williams, No. 1563, 4th Dept, 12/31/98

Holding: The determination that the petitioner violated inmate rule 180.11 (7 NYCRR 270.2 [B][26][ii]) is not supported by substantial evidence where the petitioner's receipt of correspondence from another inmate's aunt does not violate any of the policies or procedures governing the inmate correspondence program. See 7 NYCRR part 720; *Matter of Montgomery v Jones*, 88 AD2d 1003. Substantial evidence was also lacking to support the determination that the petitioner violated inmate rule 180.17. 7 NYCRR 270.2 [B][26][vii]. The petitioner's possession of legal documents belonging to another inmate, without more, does not establish that the petitioner provided unauthorized legal assistance to another inmate. *See Matter of Tate v Senkowski*, 215 AD2d 903, 904 *lv den*, 86 NY2d 708. The petition was granted, the determination annulled, and all references thereto were expunged from the petitioner's institutional record. (CPLR art 78 Proceeding transferred by Order of Supreme Ct, Erie Co [Burns, J])

Counsel (Conflict of Interest) COU; 95(10)

Instructions to Jury (Missing Witnesses) ISJ; 205(46)

People v Zanghi, No. 1570, 4th Dept, 12/31/98

Holding: The defendant's motion for a mistrial because of remarks by a juror and a prosecution witness concerning the defendant's criminal history was properly denied because the information was volunteered and not made in response to an inquiry by the prosecution. *See People v Holton*, 225 AD2d 1021 *lv den* 88 NY2d 986. The court properly denied the defendant's request to charge the jury that the two potential defense witnesses had invoked their 5th Amendment privilege in place of the neutral charge that the witnesses were unavailable, because the requested charge would have invited the jury to engage in unwarranted speculation concerning the wrongdoing of those witnesses. *See People v Thomas*, 51 NY2d 466, 473-74.

The testimony concerning an incident that occurred prior to the shooting was admissible to establish the defendant's motive for the shooting (*see People v Alvino*, 71 NY2d 233, 241-42), and to complete the story to assist the jury in its understanding of the crime. *See People v Hamid*, 209 AD2d 716, 717 *lv den* 87 NY2d 973. The defendant was advised that his attorney had a potential conflict of interest and the defendant knowingly and voluntarily chose to continue to be represented by him. *See People v Gomberg*, 38 NY2d 307, 313-14. The court properly refused to admit the hearsay statement of a witness to the crime where the statement concerned the shooting, was largely exculpatory, and was not contrary to the declarant's penal interest. *See People v Settles*, 46 NY2d 154, 167. Judgment affirmed. (County Ct, Erie Co [McCarthy, J])

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

People v Wilson, No. 1585, 4th Dept, 12/31/99

The defendant attempted to rob an apartment with the aid of two others. During the commission of the offense, the

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defendant carried an unloaded shotgun in a black plastic bag and had shells for the gun in his pocket.

Holding: The court improperly charged the jury on the “deadly weapon” element of first-degree burglary and attempted first-degree robbery (see, Penal Law 140.30[1]; 160.15[2]). The court erred in borrowing the definition of a “loaded firearm” (Penal Law 265.00 [3][15]) and engrafting it onto the definition of a “deadly weapon” (Penal Law 10.00[12]) because the defendant was neither charged with possessing a “loaded firearm” nor charged with violating any provision of Penal Law article 265. The concepts of “deadly weapon” and “loaded firearm” do not overlap and were intended to serve discrete functions. *See People v Tucker*, 55 NY2d 1039 *rearg den* 55 NY2d 1039). In order to be a “deadly weapon,” a gun must actually be “loaded,” as the term is commonly understood. *See People v Shaffer*, 66 NY2d 663, 664 *modfg* 105 AD2d 863. The concept of “loaded” in Penal Law 10.00(12) is narrower than the concept of “loaded” in Penal Law 265.00(15). The evidence is also insufficient to support the conviction of attempted first-degree robbery under Penal Law 160.15(3). Lack of proof that a gun was loaded will render the evidence insufficient to establish that it is a “dangerous instrument.” *See Matter of Angel Q.*, 194 AD2d 793. The convictions were reduced accordingly to conform to the evidence adduced at trial. Judgment affirmed as modified. (County Ct, Niagara Co [Hannigan, J])

Juveniles (Delinquency) JUV; 230(15)

People v Greiner, No. 1588, 4th Dept, 12/31/98

Holding: The court’s finding that the defendant violated a condition of probation was not supported by a preponderance of the evidence (see, CPL 410.70[3]) where the prosecution failed to establish that the defendant operated his employer’s motor vehicle in violation of the limitations of Vehicle and Traffic Law 1198(9). Furthermore, the record fails to establish that the court, in granting the defendant’s request for a post-revocation conditional license, did not intend that the defendant be given the benefit of section 1198(9). Accordingly, the declaration of delinquency is dismissed. Judgment reversed. (Supreme Ct, Erie Co [Tills, J])

Evidence (Other Crimes) EVI; 155(95)

Search and Seizure (Consent [Coercion and Other Illegal Conduct]) SEA; 335(20[f])

People v James, No. 1613, 4th Dept, 12/31/98

Holding: The court’s submission of an annotated verdict sheet to the jury was proper where defense counsel was provided with the verdict sheet prior to its submission to the jury. Although defense counsel pointed out a perceived deficiency in the verdict sheet, it was discussed, and defense counsel did not object to its submission to the jury. Under

these circumstances, the failure to object constitutes implicit, if not explicit, consent to the submission of an annotated verdict sheet. *See People v Fecunda*, 226 AD2d 474, 475 *lv den* 88 NY2d 936.

The defendant was not denied effective assistance of counsel where he failed to establish actual prejudice as a result of defense counsel’s misunderstanding. *See People v Daley*, 172 AD2d 619, 621.

The court should have suppressed the fruits of the search of the defendant’s truck because the police exceeded the scope of the defendant’s consent during the search. The inevitable discovery exception to the exclusionary rule applies only to secondary evidence and does not justify admission of the very evidence that was obtained as the immediate consequence of the illegal police conduct. *See People v Stith*, 69 NY2d 313, 317-319. Evidence of two prior assaults was properly admitted on the issue of count one of the indictment charging intentional murder. *See People v Sutton*, 220 AD2d 705 *lv den* 90 NY2d 864. Judgment affirmed. (County Ct, Ontario Co [Henry, Jr, J])

Post-Judgment Relief (CPL §440 Motion) PJR; 289(15)

People v Drake, No. 1633, 4th Dept, 12/31/98

Holding: The court properly denied the defendant’s CPL 440.10 motion to vacate the judgment where there is nothing in the record indicating that the prosecution was aware, or should be charged with knowledge that their expert was misrepresenting his credentials. *See People v Irvin*, 180 AD2d 753, 754 *lv den* 79 NY2d 1002. Further, there is no reasonable probability that the verdict would have been different had the evidence been available to the defendant and used by him to impeach the expert. *See People v Vasquez*, 214 AD2d 93, 101-102 *lv den* 88 NY2d 943. Judgment affirmed. (County Ct, Niagara Co [Fricano, J])

Admissions (Voluntariness) ADM; 15(35)

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

People v Hoffstetter, No. 1653, 4th Dept, 12/31/98

During the court’s preliminary examination of jurors, a juror identified himself as a police officer and acknowledged that he knew some of the prospective witnesses. The defendant’s challenge for cause based upon those facts was denied.

Holding: Because defense counsel exhausted his peremptory challenges before the completion of jury selection, the issue of whether the denial of the challenge for cause constitutes error was preserved for appellate review. *See CPL 270.20[2]*; *People v Torpey*, 63 NY2d 361, 365 *rearg den* 64 NY2d 88. The court erred in denying the defendant’s challenge for cause where the evidence in support of the charge would be based upon testimony from police officers with whom the juror had a professional relationship. This relationship was likely to preclude the juror from rendering an impartial verdict. CPL 270.20[1][c]; *see People v Branch*, 46 NY2d 645, 651-652.

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The court also erred in failing to submit the issue of whether the defendant's statement to the police was voluntary. *See* CPL 710.70[3]; *People v Cefaro*, 23 NY2d 283, 286. Judgment reversed. (Supreme Ct, Erie Co [Sheridan, J])

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

Matter of Ramos v Herbert, No. 1692, 4th Dept, 12/31/98

Holding: Although the petition does not raise a substantial evidence question as required pursuant to CPLR 7804(g), the matter is decided in the interest of judicial economy. *See Matter of Moulden v Coughlin*, 210 AD2d 997. The Hearing officer provided the petitioner with a written statement of disposition, as required by due process and the regulation. *See Matter of Wolff v McDonnell*, 418 US 539, 563-565 (1974). The completed form attached to the answer sets forth the evidence relied upon and the reasons for the penalties imposed. *See Matter of Bernacet v Coughlin*, 145 AD2d 802, 804 *lv den* 74 NY2d 603. There is no support for the petitioner's contention that the form is a forgery. Determination confirmed. (CPLR art 78 Proceeding Transferred by Order of Supreme Ct, Erie Co [Fahey, J])

Juveniles (Detention) JUV; 230(35)

Matter of Jennifer B., No. 1700, 4th Dept, 12/31/98

On February 24, 1997, based upon the admission of the respondent that she committed acts, which if committed by an adult, would constitute a misdemeanor, the court directed that the respondent be placed in the custody of the Department of Social Services (DSS) for one year. The respondent was also to complete a 28-day inpatient substance abuse program. After absconding without completing the program, the respondent was picked up on a warrant in August of 1997. In October of 1997, after completion of the program, counsel for DSS petitioned the court for a 12-month placement at St. Anne's Institute, arguing that the prior order of disposition was intended to be temporary. The court agreed and placed the respondent in custody of DSS for 12 months.

Holding: The record establishes that the original order placing the respondent for a period of one year, was a permanent order of disposition. A modification of that order must comply with Family Court Act 355.1(3), which provides that a new order of disposition under this section shall not have an expiration date later than the expiration date of the original order. Order reversed. (Family Ct, Monroe Co [Miller, J])

Evidence (Sufficiency) EVI; 155(130)

Homicide (Manslaughter [Vehicular]) HMC; 185(30[v])

People v Roth, No. 1719, 4th Dept, 12/31/98

Holding: The proof was legally insufficient to support the conviction of second-degree manslaughter. When viewed in a light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), the evidence established that the defendant operated an all-terrain vehicle (ATV) at dusk on a downhill curved dirt roadway and lost control of the vehicle. Although the defendant's ability to operate the ATV was impaired by the effects of alcohol and marijuana, a witness testified that the defendant was not driving at an excessive speed. There is no evidence that the defendant drove the ATV erratically or unreasonably two to three hours earlier when he drove with his girlfriend as a passenger. The proof was legally insufficient to establish that the defendant operated the ATV recklessly. *See* Penal Law 15.05[3]; *People v Taylor*, 31 AD2d 852, 853-854. The proof was sufficient to establish that the defendant acted with criminal negligence. *See People v Van Sickle*, 120 AD2d 897 *lv den* 68 NY2d 760. This was enough to support the conviction for second-degree vehicular manslaughter. (Penal Law 125.12).

The defendant's failure to \ his contention that the guilty verdicts with respect to manslaughter and vehicular manslaughter are inconsistent with his acquittal of criminally negligent homicide was not preserved for review. *See* CPL 470.05[2]; *People v Satloff*, 56 NY2d 745, 746 *rearg den* 57 NY2d 674. Conviction of second-degree manslaughter reversed. As modified, judgment affirmed. (County Ct, Steuben Co [Purple, Jr, J])

Sentencing (Excessiveness) SEN; 345 (33)(55) (Modification)

People v Eberling, No. 1736, 4th Dept, 12/31/98

Holding: The court did not abuse its discretion in refusing to sentence the defendant as a youthful offender and in enhancing the terms of incarceration imposed on the convictions of robbery and conspiracy based on the defendant's failure to appear for his scheduled interview with probation. Because the term of incarceration of two to six years imposed on the conviction of fourth-degree grand larceny exceeded the maximum term authorized by statute, that portion of the sentence was reduced to a term of one and a third to four years. Judgment affirmed as modified. (County Ct, Monroe Co [Connell, J])

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

Misconduct (Prosecution) MIS; 250(15)

People v Carvalho, No. 1742, 4th Dept, 12/31/98

During summation, the prosecutor commented over 20 times that the testimony of various prosecution witnesses was undisputed and uncontested. Defense counsel's objection that the comments violated the defendant's right against self-incrimination was overruled.

Holding: The comments made throughout the prosecutor's summation placed an improper emphasis on the defendant's decision not to testify. *See People v Mott*, 94 AD2d 415,

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418-419. Because there was a reasonable possibility that the offensive comments might have contributed to the conviction, the error was not harmless and reversal was required. *See People v Crimmins*, 36 NY2d 230, 240-41. The court erred in *sua sponte* instructing the prospective jurors during *voir dire* regarding the defendant's right not to testify and that no favorable inference was to be drawn therefrom. CPL 300.10(2). It was also error for the court to ask defense counsel in the presence of the jury whether he wanted the court to give a no unfavorable inference charge. Judgment reversed. (County Ct, Oneida Co [Mulroy, JJ])

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

People v Person, No. 1762, 4th Dept, 12/31/98

Holding: The record does not support the defendant's contention that his waiver of indictment was ineffective because he had not been held for grand jury action at the time he executed the waiver. *See* CPL 195.10[1][a]. Where the record indicates that the court was satisfied with the sufficiency of the waiver and that it executed an order to that effect (*see* CPL 195.30), the appellate court may presume that the matter was properly before it. *See People v McCarthy*, 186 AD2d 1067 *lv den* 81 NY2d 843. By failing to move to withdraw the plea or to vacate the judgment of conviction, the defendant failed to preserve for review his challenge to the factual sufficiency of the plea allocation. *See* CPL 470.05[2]; *People v Lopez*, 71 NY2d 662, 665.

The defendant's contention that he is entitled to credit for jail time served on his probation violation is not properly raised on direct appeal. The appropriate procedural vehicle to review the prison authorities' calculation of the defendant's jail time credit is a petition pursuant to CPLR article 78. *See People v Searor*, 163 AD2d 824 *lv den* 76 NY2d 896. Judgment affirmed. (County Ct, Steuben Co [Bradstreet, JJ])

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

Matter of Fournier, Jr. v Herbert, No. 1783, 4th Dept, 12/31/98

At the Tier III disciplinary hearing, the petitioner was precluded from being present when his witness testified. The Hearing Officer did not allow the petitioner to be present because he was confined.

Holding: The Hearing Officer's reason, by itself, does not support the conclusion that the petitioner's presence would have threatened "institutional safety or correctional goals" (7 NYCRR 254.5[b]). There was nothing in the record to suggest that the petitioner's exclusion was warranted by either of those considerations. *See Matter of Bowen v Coombe*, 239 AD2d 960. Also, the Hearing Record Sheet provides that "if any witness is denied or if a requested witness testifies

outside the presence of the inmate charged, [a] Form 2176, explaining the reason for that determination, must be given to the inmate and included as part of the record." Because the only Form 2176 in the record concerns another witness and does not explain the reason for the hearing officer's decision, the hearing was conducted in violation of the Commissioner's rules and regulations. *See Matter of Garcia v LeFevre*, 64 NY2d 1001, 1003.

Determination annulled, petition granted, and all references thereto were expunged from the petitioner's record. (CPLR art 78 Proceeding transferred by Order of Supreme Ct, Erie Co [O'Donnell, JJ])

Misconduct (Prosecution) MIS; 250(15)

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

People v Cox, No. 1805, 4th Dept, 12/31/98

Holding: The prosecutor's comment during summation that the jury could infer that one victim was injured by a bullet that ricocheted was not improper. Although other comments made by the prosecutor during summation improperly appealed to the jury's sympathies and fears, they were not so egregious that they denied the defendant a fair trial. *See People v Bell*, 234 AD2d 915, 916 *lv den* 89 NY2d 1009. The minimum term of incarceration on three counts of second-degree assault (*see* Penal Law 70.02[1][a]; [3][a]; [4]) was reduced to 12½ years because the defendant's initial minimum sentence of incarceration of 17½ years was illegal. Since the two counts of criminal use of a firearm and one count of criminal possession of a weapon arose out of the same criminal act as the assault counts, the court erred in ordering that the sentences imposed thereon run consecutive to the sentences imposed on the assault counts. *See* Penal Law 70.25[2]; *People v Jabbar*, 166 AD2d 904, 906 *lv den* 78 NY2d 955. Judgment modified by providing that those sentences run concurrently with the sentences imposed on the assault count. Judgment affirmed as modified. (County Ct, Niagara Co [Hannigan, JJ])

Assault (Serious Physical Injury) ASS; 45(60)

Defenses (Justification) DEF; 105(37)

People v Nieves, No. [not assigned], 4th Dept, 12/31/98

Assigned counsel moved to be relieved of her assignment and filed a brief in which it was asserted there were no non-frivolous issues of law or questions of fact meriting the appellate court's consideration.

Holding: A review of the plea colloquy reveals the issue of whether the defendant raised a possible justification defense, which is not frivolous as that issue was not addressed by the lower court. Furthermore, the lower court made no inquiry concerning the injury to the correction officer to establish the physical injury element of attempted second-degree assault. (Penal Law 120.05[7]). Accordingly, counsel

Fourth Department *continued*

was relieved of her assignment and new counsel was assigned to brief those issues and any other issues a new review of the record may disclose. Case held, decision reversed. (County Ct, Livingston Co [Cicoria, J])

Guilty Pleas (Vacatur) **GYP; 181(55)**
Sentencing (Excessiveness) **SEN; 345(33)**

People v Rumrill, No. 131, 4th Dept, 2/10/99

The defendant pleaded guilty to first-degree robbery and first-degree reckless endangerment. During the plea colloquy, the defendant informed the court that the pistol or firearm that he displayed during the robbery was a toy gun.

Holding: The court erred in accepting the defendant's plea of first-degree robbery without conducting further inquiry. The defendant's assertion that he used a toy gun should have alerted the court to the fact that the defendant might have a valid defense to the charge of first-degree robbery. See Penal Law 160.15[4]; *People v Lopez*, 71 NY2d 662, 666. The prosecution conceded that the sentence imposed upon the conviction of first-degree reckless endangerment was illegal because the minimum term exceeds the legally permissible minimum. See Penal Law 70.00[2][d]; [3][b]. Plea vacated and matter remitted to the court for further proceedings on the superior court information. Judgment reversed. (County Ct, Onondaga Co [Burke, J])

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

People v Tovar, No. 0180, 4th Dept, 2/10/99

Holding: As a matter of discretion in the interest of justice (see CPL 470.15[6][b]), the judgment convicting the defendant of two counts each of criminal sale of a controlled substance and criminal possession of a controlled substance was modified by providing that the terms of imprisonment run concurrently. The 33-year old defendant had no prior criminal convictions, and the charges arose from the sale of two small quantities of cocaine to an undercover State Trooper. The defendant expressed remorse for the crimes, which stemmed from her involvement with a drug-dealing boyfriend, a relationship that the defendant ended following her arrest. Judgment affirmed as modified. (County Ct, Oswego Co [McCarthy, J])

Juries and Jury Trials (Selection) **JRY; 225(55)**
Search and Seizure (Entries and Trespasses) **SEA; 335(35)**

People v Garner, No. 0207, 4th Dept, 2/10/99

Holding: Reversal was required because the trial judge was not present in the courtroom during a portion of the jury selection. See *People v Toliver*, 89 NY2d 843. "Where as here 'a Judge's absence from trial proceedings prevents performance

of an essential nondelegable judicial function reversal is required' (*People v Monroe*, 90 NY2d 982, 984), even in the absence of an objection (see, *People v Perkins*, 229 AD2d 981, *lv denied* 88 NY2d 1023)." The warrantless police entry into the defendant's house was justified under the emergency doctrine. See *People v Mitchell*, 39 NY2d 173, 177-78, *cert den* 426 US 953. Judgment reversed. (Supreme Ct, Erie Co [Cosgrove, J])

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

Matter of Mercer, Jr. v Goord, No. 0225, 4th Dept, 2/10/99

The petitioner, an inmate, applied for and was accepted into the facility's Family Reunion Program (FRP) pending his enrollment in a sex offender program. He filed a CPLR article 78 proceeding seeking review of the condition, which the Supreme Court upheld.

Holding: The decision of the facility to condition the acceptance of the petitioner into the program upon participation in a recommended program based upon his criminal convictions was rational. "Participation in the FRP is a privilege, not a right, and acceptance into the program lies within the discretion of the prison authorities." See 7 NYCRR 220.2; *Matter of Doe v Coughlin*, 71 NY2d 48, 54-56 *rearg den* 70 NY2d 1002, *cert den*, 488 US 879. The fact that the petitioner participated in FRP at another facility gave him no legitimate expectation of continued participation once he transferred to a new facility. See 7 NYCRR 220.4(a). Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, J])

Discovery (Brady Material and Exculpatory Information) (Right to Discovery) **DSC; 110(7)(33)**

Post-Judgment Relief (CPL §440 Motion) **PJR; 289(15)**

People v Di Giulio Marvin, No. 0250, 4th Dept, 2/10/99

Holding: There was no *Rosario* violation for the failure of the prosecution to turn over alleged *Rosario* material in the possession of the Federal Bureau of Investigation (FBI). The alleged *Rosario* material was an internal FBI document that was never in the possession or control of the prosecution or any State law enforcement agency. See *People v Kronberg*, 243 AD2d 132, 152 *lv den* 92 NY2d 879. The court properly determined that the prosecution's failure to turn over *Brady* material did not require reversal because there was no reasonable possibility that, had that material been disclosed, the result would have been different. See *People v Vilardi*, 76 NY2d 67, 77.

The defendants' contention that the court erred in denying their CPL article 440 motion was previously determined on the merits on the direct appeal of each defendant from his or her judgment of conviction. See *People v Marvin*, 216 AD2d 930 *lv den* 86 NY2d 844. Accordingly, the court could not grant the defendants motion based on that issue. See CPL 440.10(2)(a). Order affirmed. (Supreme Ct, Erie Co [Forma, J]) ⚖️

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