



Public Defense Backup Center REPORT

VOLUME XV NUMBER 6

August 2000

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

Resolve and Resolutions: NYSDA Holds 33rd Annual Conference

Training sessions offered new ideas for resolving old issues, conversations and speeches about public defense problems demonstrated new resolve to fix current systemic problems, and a board meeting produced several resolutions on public defense. Highlights of the Association's 33rd Annual Meeting and Conference on July 27-20 follow.

Examining Eyewitness Evidence, Etc.

A CLE session on "The Science of Eyewitness Identification" enlightened conferees with a wealth of information. Studies on how false identification occurs—especially if derived from lineups—provided bases to challenge prosecution evidence that a client is the perpetrator. Presenters Prof. Gary L. Wells and Washington DC defense attorney David C. Niblack included both academic material and sample pleadings in the handouts for their session.

Conference participants closely questioned State Police Laboratory and Division of Criminal Justice Services personnel during a session on the New York State DNA Databank. Legislation just last year increased dramatically the number of convicted and imprisoned persons subject to having DNA samples taken for testing and placement in the databank. Defense lawyers addressed many policy and procedural questions to Inspector W. Mark Dale, Dr. Barry W. Duceman, and Criminal Justice Program Representative Frank Galerie. Time ran out on this dialogue, leaving many in attendance asking that it be continued at some future date.

Other CLE sessions included: updates on appellate decisions, legislation, immigration issues, and hearsay evidence; skills training on opening statements and common problems; and ethical questions that can arise in criminal cases. In total, 12½ MCLE credits were available at the conference. The training materials are available from the Backup Center for \$25.

Feted: Those Who Seek Justice for Immigrants, the Innocent, the Disadvantaged, and all Litigants

The Association bestowed its Service of Justice Award on Manuel D. Vargas, Director of the Criminal Defense Im-

migration Project, at the conference's Friday evening banquet. The award recognized his vision, dedication, and skill in bringing information about immigration consequences of criminal prosecutions to public defense teams across New York and the country. Tangible results of Vargas's work include the manual *Representing Noncitizen Criminal Defendants in New York State, 2nd edition* and periodic "Immigration Practice Tips" in the *Backup Center REPORT*. (See p. 6.)

The Association also saluted two community activists. Lenore Banks, Vice President, Public Education of the League of Women Voters of New York State, received one of the Special Awards. She is a continuing, major force in the League's work with NYSDA in gathering information concerning public defense in New York State and planning ways to improve it. (Visit the NYSDA web site at www.nysda.org to read testimony taken at joint League/NYSDA fact finding hearing on public defense. The text of Banks' prepared remarks for the awards banquet—in which she referred to individuals who provide public defense as under-appreciated and underpaid, overworked and overlooked at budget time—is also posted.)

Dr. Alice P. Green, Executive Director of Albany's Center for Law and Justice, received the other Special Award. The Center provides information on legal rights and criminal justice, assists with limited legal and criminal justice complaints, and advocates for the client and larger communities in many forums. Green is a long-time friend of the Association and a member of its Advisory Board. She is the co-author of *Law Never Here: A Social History of African American Responses to Issues of Crime and Justice*, reviewed in the *Backup Center REPORT* Vol XV, No. 2.

The New York State Bar Association's Denison Ray Indigent Criminal Defender Awards were also presented during the NYSDA conference. Michelle Fox of The Legal Aid Society's Criminal Appeals Bureau was recognized for her

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ultimately successful, six-year fight for the freedom of her client, Jeffrey Blake, who was imprisoned for a double murder he did not commit. (Read more about the case on the LAS web site, <http://www.legal-aid.org/ar2k/crimap.htm>.) Drew R. DuBrin's NYSBA award was presented by the head of his office, Edward J. Nowak, Monroe County Public Defender and President of NYSBA's Board of Directors. Nowak lauded DuBrin as the public defense lawyer every office needs—dedicated to the work, willing to spend time and energy helping colleagues, and providing high-quality representation in a system that offers few rewards and many barriers.

Collaboration is Key(note)

Deputy Chief Administrative Judge Juanita Bing Newton attended a Chief Defender Convening held during the conference, and also gave the keynote address at the awards dinner. She spoke positively of the "Indigent Defense 2000" conference in Washington DC, which she attended as part of a state team put together by NYSBA that included prosecution, defense, sentencing advocacy, and parole representatives (see *Backup Center REPORT* Vol XV, No. 5). She talked about the importance of collaboration, a current national buzzword among many policymakers dealing with problems in the provision of public defense. As someone whose life experiences have crossed economic and professional lines, she vowed to continue seeking improvement in access to justice for poor people in New York—and to work with the public defense community to that end. At the Convening, she listened to concerns expressed by the heads of public defense offices around the state, and responded in nuts and bolts terms about establishing a basis for inclusion of public defense managers and practitioners in policy-making efforts concerning them.

Board Resolutions Address Aid to Defense and Governance Issues

The Annual Meeting and Conference provided an opportunity for the NYSBA Board of Directors to meet and address issues regarding public defense governance. The Board passed several resolutions. One supported state aid to defense funding in all counties now that Aid to Prosecution funding has been expanded to cover all counties. Another encouraged public defense providers to seek the advice and continuing assistance of the client community. A third proposed an independent, unified public defense system committed to zealous, competent provision of public defense services. And a fourth resolution approved the *11 Governing Principles for Public Defense Services* that were adopted by the heads of public defense offices at a Chief Defender Convening last December. These resolutions may be read on the Association's web site at www.nysda.org, or a copy may be obtained from the Backup Center.

New Jury Instructions Proposed

A revised jury charge on the presumption of innocence, the burden of proof, and the need for proof beyond a reason-



NYSBA Board President Edward J. Nowak and Deputy Chief Administrative Judge Juanita Bing Newton at the Chief Defender Convening, July 27, 2000.

able doubt has been drafted by the Committee on Criminal Jury Instructions. Judicial comments on the charge, offered at the 2000 Judicial Seminars, are under active consideration. Comments from the bar were also solicited, due on or before Sept. 15, 2000.

The draft charge was published in the *New York Law Journal* on Aug. 3, 2000. A copy is also available from the Backup Center.

NYC Public Advocate Decries Cop Discipline

A report called the most extensive case-by-case probe ever into police abuse, *Disciplining Police: Solving the Problem of Police Misconduct*, was released by the New York City Public Advocate on July 27, 2000. The 147-page

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The *REPORT* is printed on recycled paper.

report analyzed 477 cases of substantiated misconduct involving 664 police officers over the past three years. Mark Green, the Public Advocate, called a press conference where he praised most police officers for their part in crime reduction but declared that, "Unfortunately, our report documents Police Department mismanagement that refuses to acknowledge the extent of misconduct, refuses to admit the resulting distrust between cops and minorities, refuses to adopt available reforms—and tolerates a culture that protects rather than punishes abuse as the accepted cost of fighting crime."

Key findings of the report included:

- The Department is much less likely to bring charges against superior officers
- The disciplinary process takes too long for victims and the accused
- Officers with substantiated complaints are more likely to be promoted than dismissed
- The Department fails to bring action against officers who lie to the CCRB
- Most incidents of misconduct are triggered by perceived or real signs of disrespect to police officers
- Most officers with substantiated complaints have a record of misconduct accusations
- Police witnesses failed to intervene or provide evidence when substantiated misconduct took place in precincts

Among the recommendations in the report—establish a uniform set of sanction guidelines, including a "three strikes and you're out" policy, require a college degree upon entry to the force or by the fourth year on the force and ongoing training and education of officers, and create a permanent Independent Police Oversight Board.

The full report is available online at www.pubadvocate.nyc.gov/documents/polfinal072700.pdf.

E-Brief Excoriates Appellate Ineffectiveness

The Association has produced the first electronic brief ever filed in the Court of Appeals under a new rule allowing this technological step. See 22 NYCRR 500.1(b) [available electronically at <http://www.courts.state.ny.us/ctapps/500rules.htm>.] The CD-ROM format is well suited to this first case, with a 600-page appendix and a brief citing a plethora of precedents. Hypertext links allow the judges to click on a reference and immediately read the cited decision or statute.

At issue in the e-brief (which is filed in addition to, not instead of, the usual number of print copies) is the failure of prior appellate counsel to file an advocacy brief in any format. A perfunctory, six-page "no merit" brief was filed in the Appellate Division on behalf of a defendant sentenced as a persistent felony offender to 15 years to life following a jury trial at which counsel made numerous objections, including one to having the defendant tried in shackles. The 3rd Department affirmed the conviction and granted the motion of the lawyer to be relieved of her assignment as counsel.

NYSDA's Court of Appeals brief details several errors of fact and law contained in the no-merit brief, as well as its overall deficiency. (Eg original appellate counsel's failure to note, when asserting that the weight of the evidence supported her client's conviction, that the defense had offered an eyewitness at trial who contradicted the only circumstantial identification of the defendant as the perpetrator.) The Court of Appeals brief also puts the no-merit brief in context—Stokes was one of 19 consecutive no-merit briefs filed by the lawyer, and one of 21 no-merit briefs she had filed out of 26 appeals handled since 1997.

Both the electronic format and substance of the Stokes brief were reported in the *New York Law Journal* on Aug. 1. The article noted that converting the brief from a standard word processing program to the PDF format used on the CD-ROM was simple, as was scanning in the record and (after obtaining permission from Westlaw) downloading relevant authorities. Most time-consuming was creating the hyperlinks. The brief, which was written by Backup Center Staff Attorney Al O'Connor, was converted by a team that included NYSDA's MIS Director David L. Austin, Librarian Kate Dixon, Managing Attorney Charles F. O'Brien, Information Systems Specialist James Pogozelski, and Legal Information Consultant Ken Strutin.

The *Law Journal* coverage related the case to ongoing efforts to raise assigned counsel fees in New York. While Stokes does not involve a challenge to current assigned counsel fees as yielding *per se* ineffective assistance of counsel, the role of low fees in driving attorneys out of assigned work—often leaving inexperienced lawyers to handle assigned cases—is briefly discussed. Also mentioned is the 3rd Department's lack of minimum qualifications for or monitoring of appointed counsel to ensure zealous advocacy.

A print copy of the brief is available from the Backup Center.

Government Misconduct Yields Varied Results

From the Federal Bureau of Investigation to the Los Angeles Police Department, claims of misconduct by law enforcement and related officials continue. Yet only a small percentage of criminal cases touched by such scandals are being reopened and overturned as a result.

FBI Lab Scandal Touches 3,000, Taints 0?

A special Task Force set up after the FBI Crime Laboratory scandal broke three years ago is winding down, and not one case has been overturned so far. A few cases remain under scrutiny, but most of the 3,000 cases suspected of being tainted by the sloppiness and misconduct of lab personnel remain closed files. Prosecutors in these cases were sent a one-page questionnaire. The main question on the form read: "Was the FBI lab work material to the verdict?" Fewer than 200 forms came back marked, "Yes."

(continued on page 23)

CONFERENCES & SEMINARS

Sponsor: Vermont Association of Criminal Defense Lawyers
Theme: Opening to Closing "Killer" Cross Examination
Dates: October 5-6, 2000
Place: South Burlington, VT
Contact: VTACDL/Virtual Office, PO Box 8503, Essex VT 05451. tel (802)879-0334; fax (802)879-2435; e-mail LW4Virtual@aol.com

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: October 14, 2000
Place: Utica, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Sponsor: New York State Bar Association
Theme: Local Criminal Court Practice: The Basics
Dates & Places: October 18, 2000 Buffalo
November 2, 2000 Uniondale, LI
November 3, 2000 New York City
November 15, 2000 Albany
Contact: NYSBA: tel (800)582-2452 (Albany area, [518]463-3724); fax (518)487-5618; fax on demand (800)828-5472; web site <http://www.nysba.org>

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Weapons for the Firefight
Date: October 21, 2000
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Sponsor: National Drug Court Institute
Theme: Comprehensive Drug Court Public Defenders' Training
Dates: October 30-November 2, 2000
Place: Williamsburg, VA
Contact: NDCA: 901 North Pitt Street, Suite 370, Alexandria VA 22314. tel (888)909-6324; fax (703)706-0577

Sponsor: National Association of Criminal Defense Lawyers
Theme: Seminar: The Masters: Advanced Trial Techniques
Dates: November 1-4, 2000
Place: New York City
Contact: NACDL: tel (202) 872-8600; fax (202) 872-8690; e-mail assist@nacdl.com; web sites www.criminaljustice.org / www.nacdl.org

Sponsor: Oregon Criminal Defense Lawyers Association
Theme: Finding the Lie—Battling Corruption
Dates: November 4-8, 2000
Place: Puerto Vallarta, Mexico
Contact: OCDLA: tel (541) 686-8716; fax (541)686-2319; web site www.ocdla.org

Sponsor: National Legal Aid and Defender Association
Theme: Appellate Defender Training
Dates: November 16-19, 2000
Place: New Orleans, LA
Contact: NLADA: tel (202)452-0620; fax: (202) 872-1031, e-mail: info@nlada.org; web site www.nlada.org

Sponsor: National Coalition to Abolish the Death Penalty, Many Others
Theme: Committing to Conscience: Building a Unified Strategy to End the Death Penalty
Dates: November 16-19, 2000
Place: San Francisco, CA
Contact: Conference Hotline (888)2-ABOLISH [(888)222-65474]; NCADP web site www.ncadp.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Mid-Hudson Trainer
Date: November 17, 2000
Place: Poughkeepsie, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Sponsor: National Legal Aid and Defender Association
Theme: 78th Annual Conference
Dates: November 29-December 2, 2000
Place: Washington, DC
Contact: NLADA: tel (202)452-0620; fax: (202) 872-1031, e-mail: info@nlada.org; web site www.nlada.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: December 8-9, 2000 (tentative)
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org> ☞

Job Opportunities

Neighborhood Defender Service, a unique public defender office in New York City's Harlem, seeks a **Litigation Attorney**. Required: admitted to practice in good standing, preferably in NY; 2 years experience, preferably in criminal defense; demonstrated commitment to interests such as criminal justice, public interest law, Harlem, or social services; computer literacy and word processing. Strong writing skills, experience in courtroom advocacy, bilingual (Spanish/English) strongly preferred. Full competitive benefits package. Salary CWE. EOE. Send resume and writing samples to: Rick Jones, Deputy Director, Neighborhood Defender Service, 2031 Fifth Avenue, New York NY 10027

The Hiscock Legal Aid Society in Syracuse, NY seeks a **Staff Attorney** to represent persons unable to afford counsel in non-felony cases. The position involves handling a high-volume caseload. Required: demonstrated commitment to public interest law and to serving the indigent. New York bar admission preferred. Salary \$26,500+ DOE. Generous benefits. EOE, committed to serving and employing a diverse population; persons of color and bilingual persons encouraged to apply. Send cover letter and resume, including 3 references, to: Executive Attorney, Frank H. Hiscock Legal Aid Society, 351 South Warren Street, Syracuse NY 13202

The federally funded Domestic Violence Project of the Hiscock Legal Aid Society also seeks a **Staff Attorney**. Responsibilities include: providing full service civil legal representation to victims of domestic violence, including orders of protection, divorce, custody, visitation, and support; conducting significant outreach and education, primarily within the African-American, Latina, and Southeast Asian communities. Salary, etc. same as above. Send cover letter and resume, including 3 references, to address above

The Rochester, NY division of the New York State Capital Defender Office (CDO) seeks a **Mitigation Specialist**. The CDO, created by statute, is charged with guaranteeing effective assistance of counsel in every capital eligible case throughout New York State. Mitigation Specialists conduct thorough social history investigations; identify factors in clients' backgrounds that require expert evaluations; assist in locating experts and provide background materials and information to experts; identify potential penalty phase witnesses; and work with

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the client and the client's family. Extensive travel is required. Excellent oral and written communication skills required. Fluency in Spanish desirable. Salary CWE. EOE. Please send resumes to: Ms. Cheryl Thompson, Capital Defender Office, 277 Alexander Street, Suite 600, Rochester NY 14607

The Wayne County Public Defender's Office seeks an **Assistant Public Defender**. The position involves handling felony and misdemeanor cases. Experience in criminal defense, including trial experience, preferred. EOE, minorities encouraged to apply. Send resume, writing sample and references to: Ronald C. Valentine, Esq., Wayne County Public Defender, 26 Church Street, 2nd Floor, Lyons NY 14489

The Brennan Center for Justice at NYU School of Law seeks a **Legal Policy Analyst** for its Poverty Program to work on a range of research, policy development, and advocacy projects. Required: strong writing and analytical skills, imagination, and versatility. Background in public policy analysis, development, or advocacy in areas of poverty, welfare, or employment highly desirable. Salary CWE, competitive benefits pkg. EO/AA employer, actively recruits women, people of color, persons with disabilities, and lesbians and gay men. Send cover letter, resume, and 2 or more writing samples to: Legal Policy Analyst, Poverty Program, Brennan Center for Justice, 161 Avenue of the Americas, 5th Floor, New York NY 10013. For more info: www.brennancenter.org

Prisoners' Legal Services of New York (PLS) seeks **Managing Attorneys** for its Buffalo and Plattsburgh offices, to manage the legal and administrative matters of each office's attorneys and paralegals. Required: admis-

sion to practice in NY or eligible for admission *pro hac vice* and to take next bar exam, 3-5 years legal practice experience. Preferred: civil legal service, civil rights, poverty law, or federal law experience, management and supervisory experience. PLS, with 24 attorneys statewide, provides civil legal services to incarcerated persons in state prisons. Outstanding benefit package including health, dental, disability, and life insurance, substantial leave time, and flexible leave policies. EEOE. Send resume, writing sample, and list of 3 references with phone numbers to: Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850. tel (607)273-2283; fax (607)272-9122

The Office of the Federal Public Defender for the Districts of Northern New York and Vermont is now accepting applications for an **Assistant Federal Public Defender** in Albany, NY. The Federal Public Defender provides legal services to indigent federal criminal defendants. Required: 3 to 5 years experience in federal criminal law, and significant trial experience. Integrity and a commitment to indigent criminal defense also valued. EEO. Salary scale equivalent to that of Assistant US Attorneys, with federal benefits. The position is available on 10/1/00, subject to funding. Applications must arrive 8/31/00. Send resume to: Alexander Bunin, Federal Public Defender, 39 North Pearl Street, 5th Floor, Albany NY 12207

St. Lawrence County seeks a **Public Defender**. The Public Defender provides representation to persons charged with crime unable to afford counsel, administers and supervises the functions of the office, supervises legal and clerical support staff, and coordinates with other criminal justice agencies to ensure effective, efficient operation of the program, which also initiates other proceedings and handles appeals if warranted and provides legal support to Family Court clients. The work is performed under guidelines provided by law and under the supervision of the County Administrator. NY license, 6 years of paid experience practicing law (at least 2 in criminal defense and/or Family Court or comparable); administrative and supervisory experience preferred. Salary CWE. EEO/AA employer. Send letter and resume to: St. Lawrence County Board of Legislator's Office, 48 Court Street, Canton NY 13617-1194. Applications due close of business 9/29/00. Start date Jan. 2001 ☞

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

News on what may be deemed convictions for immigration purposes

First-time simple drug possession guilty plea vacated or expunged under state law not deemed a conviction in the 9th Circuit

The United States Court of Appeals for the 9th Circuit held that the new definition of “conviction” for immigration purposes does not apply to state court dispositions that vacate or expunge first-time simple drug possession pleas or findings of guilt. *Lujan-Armenariz v INS*, __ F3d __, 2000 WL 1051858 (8/1/00).

The 9th Circuit’s decision overruled the 1999 precedent decision of the Board of Immigration Appeals (BIA) that found deportable a noncitizen who had had his guilty plea to possession of a controlled substance vacated and his case dismissed upon termination of his probation under the laws of Idaho. See *Matter of Roldan-Santoyo*, Int Dec #3377 (BIA 1999) [*Backup Center REPORT*, Vol XIV, #3, at p. 6]. The Board had held that such a disposition counted as a conviction for immigration purposes under the new federal statutory definition of conviction provided at section 101(a)(48)(A) of the Immigration and Nationality Act (8 USC 1101[a][48][A]). The statute includes state court dispositions where adjudication of guilt has been withheld but where there has been a plea or finding of guilt, and some penalty or restraint ordered by the court.

In *Lujan-Armenariz*, the 9th Circuit found that the new definition of conviction for immigration purposes does not repeal the Federal First Offender Act. That law provides that a first-time simple drug possession case expunged under its provisions shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. See 18 USC 3607. The 9th Circuit then found still in effect the rule requiring similar treatment for first-time simple drug possession offenses prosecuted and expunged under state laws. See *Gaberding v INS*, 30 F3d 1187 (9th Cir 1994), adopted by the BIA in *Matter of Manrique*, Int Dec 3250 (BIA 1995).

Noncitizen defendants should be warned, however, that immigration judges continue to be bound by the BIA’s decision in *Matter of Roldan-Santoyo* outside of the 9th Circuit. Therefore, New York State defense attorneys should continue to counsel noncitizen defendants that pleading guilty to a first-time drug offense—even if the plea may later be vacated under a drug treatment diversion program—continues to subject a noncitizen defendant to deportability or

* *Manuel D. Vargas* is the Director of NYSDA’s Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. Manny, who recently received NYSDA’s Service of Justice Award (see p. 1), wrote the Project manual, *Representing Noncitizen Criminal Defendants in New York State*, 2nd edition. He will be appearing at a number of local, regional, and national trainings in upcoming months. If you have questions about immigration issues in a criminal case, you can call the Project on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

inadmissibility under current law outside of the 9th Circuit. Nevertheless, noncitizens who have such dispositions in their past, as well as those who cannot avoid such a disposition in a present or future case, should be made aware that in future immigration proceedings they should pursue any argument that their state disposition is analogous to a disposition under the Federal First Offender Act and therefore not a conviction for immigration purposes.

BIA panel finds conviction vacated under NYCPL 440 not a “conviction”

In an unpublished non-precedent decision, a BIA panel gave effect to a New York State court vacatur under Criminal Procedure Law 440 of a conviction for sexual abuse in the third degree, and terminated removal proceedings. *Matter of Rodriguez-Rivas*, No. A74 726 833 (BIA 6/22/00).

The Immigration and Naturalization Service (INS) had argued that the conviction was vacated for the purpose of avoiding removal, and not for reasons relating to a constitutional or legal defect in the criminal proceedings. Therefore, the INS contended, the vacatur should not be honored under the BIA’s precedent decision in *Matter of Roldan-Santoyo*, discussed above. *Roldan-Santoyo* found that “no effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute.”

The BIA panel in *Matter of Rodriguez-Rivas* found, however, that CPL 440 is not an expungement statute or other rehabilitative statute. The panel would not go behind the state court judgment and determine whether the state court acted in accordance with its own state law. Rather, the BIA panel accorded “full faith and credit” to the state court judgment.

Some panels find certain youthful offender dispositions are not convictions

Another potential inroad into the BIA’s prior broad readings in *Matter of Roldan-Santoyo* of the new definition of conviction for immigration purposes is indicated by unpublished BIA decisions issued this year relating to certain New York youthful offender dispositions.

Based on *Matter of Roldan-Santoyo*, unpublished decisions issued by the BIA last year found New York youthful offender dispositions to be convictions for immigration purposes. See *Backup Center REPORT* Vol XIV #7, at p. 6. In *Matter of Roldan-Santoyo*, the BIA en banc had stated: “We . . . interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.” Int. Dec. #3377 at pp. 14-15.

Nevertheless, at least two unpublished BIA decisions this year have found New York youthful offender dispositions not to be convictions for immigration purposes where the disposition at issue was deemed analogous to a juvenile delinquency adjudication under the Federal Juvenile Delinquency Act (FJDA). *Matter of Pinzon-Fajardo*, No. A73 568 322

(BIA 3/30/00); *Matter of Das*, No. A73 500 147 (BIA 1/13/00) (client represented by NYSDA member George Terezakis; *amicus* brief filed by NYSDA and the New York State Association of Criminal Defense Lawyers). The FJDA defines “juvenile delinquency” as “the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult.” 18 USC 5031.

New York defense lawyers and their noncitizen clients should stay tuned on the issue of whether New York youthful offender dispositions may be deemed convictions for immigration purposes. We anticipate that the BIA may soon issue a published precedent decision that would resolve the differences in outcome on this issue between the unpublished decisions of its various panels. Watch future issues of the *REPORT* for developments.

Recent developments on retroactivity of harsh 1996 immigration amendments

DOJ proposed regulations follow court decisions that found AEDPA restrictions on relief from deportation not applicable to some cases pending in 1996

The U.S. Department of Justice has published a proposed rule acquiescing in the decisions of several federal circuit courts, including the U.S. Court of Appeals for the 2nd Circuit here in New York, finding harsh rules of the Antiterrorism and Effective Death Penalty Act (AEDPA) not retroactive to some cases. The circuit court decisions—and the proposed rules—say that lawful permanent resident immigrants whose deportation cases were pending when the AEDPA was enacted on April 24, 1996 should still be permitted to pursue relief from deportation under former section 212(c) of the Immigration and Nationality Act, as it existed pre-AEDPA. 65 Fed Reg 44476-44481 (7/18/00). For a discussion of the 2nd Circuit’s decision in *Henderson v INS*, 157 F3d 106, *cert den sub nom Reno v Navas*, 526 U.S. 1004 (1999), see *Backup Center REPORT*, Vol XIV, #2, at p. 9 and Vol XIV, #3, at p. 6.

The proposed regulations would create a procedure allowing a lawful permanent resident to move to reopen deportation proceedings within 90 days of the effective date of the final rule, where an individual establishes that the individual:

- Had deportation proceedings before the Immigration Court commenced before 4/4/96;
- Is subject to a final order of deportation;
- Would presently be eligible to apply for section 212(c) as in effect on or before 4/23/96; and

—Either:

- (i) Applied for and was denied section 212(c) relief by the BIA solely on the basis of the 1997 decision of the Attorney General in *Matter of Soriano* (or its rationale);
- (ii) Applied for and was denied section 212(c) relief by the Immigration Court, did not appeal the denial to the BIA (or withdrew an appeal), and would have been eligible to apply for section 212(c) relief at the

time the deportation became final but for *Soriano* (or its rationale); or

- (iii) Did not apply for section 212(c) relief but would have been eligible to apply for such relief at the time the deportation order became final but for *Soriano* (or its rationale).

The time for written comments was extended from August 17, 2000 to September 1, 2000. NYSDA was working with other advocates to develop and submit comments at the time this went to press.

Federal judges rule that AEDPA and IIRIRA restrictions on relief from deportation are not applicable to cases not yet pending in 1996 but involving pre-1996 criminal conduct or convictions

The federal government continues to apply the 1996 immigration laws—AEDPA and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—to deport without the possibility of relief lawful permanent resident immigrants convicted of crimes committed before the new laws took effect, where the INS had not initiated deportation proceedings prior to 1996. Several federal district judges in New York and Connecticut have issued additional decisions finding this retroactive application unlawful. See *Arias-Agramonte v Commissioner of INS*, 2000 WL 1059678 (SDNY 7/31/00) (Judge Sweet); *Santos-Gonzalez v Reno*, 93 FSupp2d 286 (EDNY 4/18/00) (Judge Sifton); *Zgombic v Farquharson*, 89 FSupp2d 220 (DCConn 3/22/00) (Judge Underhill); *Pena-Rosario et al v Reno*, 83 FSupp2d 349 (EDNY 2/22/00), *reconsid den* 2000 WL 620207 (EDNY 5/11/00) (Judge Gleason).

Meanwhile, this issue remains pending before the U.S. Court of Appeals for the 2nd Circuit in two separate groups of cases. The first group is *Pottinger v Reno*, *Maria v McElroy*, *Azcona v Reno*, and *Juin Yi Yu v Reno* (*amicus* brief filed by NYSDA and the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the New York State Association of Criminal Defense Lawyers (NYSACDL), and the Legal Aid Society of the City of New York on March 16, 2000)—federal government appeals of a group of district court habeas corpus decisions and orders issued by U.S. District Judge Jack Weinstein finding that the AEDPA restrictions on lawful permanent resident eligibility for deportation relief should not be applied to deportation cases based on pre-AEDPA criminal conduct and convictions. See *Pottinger v Reno*, 51 FSupp2d 349 (EDNY 1999) and *Maria v McElroy*, 68 FSupp2d 206 (EDNY 1999), reported in the *Backup Center REPORT* Vol XIV, #7 at p. 6, and Vol XV, #2, at pp. 6-7.

The second group of cases is *Calcano-Martinez v Reno*, *Madrid v Reno*, and *Khan v Reno* (*amicus* brief filed by NYSDA and NYSACDL, and the Legal Aid Society of the City of New York on 11/12/99) and *St. Cyr. v INS*—challenges to government application of the AEDPA and IIRIRA elimination of lawful permanent resident eligibility for relief in removal cases based on pre-IIRIRA and pre-AEDPA criminal conduct and convictions. See *Backup Center REPORT* Vol XIV, #9, at p. 4.

(continued on page 23)

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

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

United States Supreme Court

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

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

**Ohler v United States, No. 98-9828, 5/22/00,
120 Sct 1851**

The petitioner was arrested and charged with importation and possession of marijuana with intent to distribute. The court granted the government's motion *in limine* to admit evidence of her prior felony conviction as impeachment evidence. At trial the petitioner testified on direct examination about her prior felony conviction; the jury convicted her. The 9th Circuit affirmed.

Holding: A defendant who preemptively introduces evidence of a prior conviction on direct examination may not claim on appeal that admitting such evidence was error. Any possible harm flowing from an *in limine* ruling allowing impeachment by a prior conviction is wholly speculative. *Luce v United States*, 469 US 38, 41. Only when it is the government that exercises the option to elicit the testimony can the defendant claim a denial of a substantive right. Judgment affirmed.

Dissent: [Souter, J] *Luce* only recognized the inability of an appellate court to assess the significance of an *in limine* ruling when the defendant remained silent. Allowing a defendant to introduce on direct examination convictions ruled admissible tends to promote trial fairness without depriving the government of anything to which it is entitled. There is no reason to discourage defendants from introducing such convictions themselves.

Arson (General) **ARS; 40(37)**

Federal Law (Crimes) **FDL; 166(10)**

**Jones v United States, No. 99-5739, 5/22/00,
120 Sct 1904**

The petitioner threw a Molotov cocktail into his cousin's home causing a blaze that severely damaged the house. The defendant was convicted of arson under 18 USC 844(i), which makes it a federal crime to damage or destroy, "by means of fire or an explosive, any . . . property used in

interstate or foreign commerce." The 7th Circuit affirmed the conviction.

Holding: The statute does not make every arson in the country a federal offense. The "used in" language of the provision covers only property currently used in commerce or in an activity affecting commerce. Unlike rental property such as that in *Russell v United States* (471 US 858 [1985]), the home owned and occupied by the petitioner's cousin was a dwelling placed used for everyday family living. Congress left cases of this genre to state law enforcement authorities. Judgment reversed.

Concurrence: [Stevens, J] Federal criminal laws that overlap with state authority should be interpreted narrowly absent plain congressional intention to assert its jurisdiction. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance" in the prosecution of crimes. *United States v Bass*, 404 US 336, 349 (1971). [Thomas, J] Joining the court's opinion expresses no view on whether the federal arson statute is constitutional in its application to all buildings used for commercial activities.

Self-Incrimination (Conduct and Silence) (General) **SLF; 340(5) (13) (15)**
(Non-testimonial Evidence)

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

**United States v Hubbell, No. 99-166, 6/05/00,
120 Sct 2037**

The respondent, subpoenaed by an Independent Counsel to testify and provide various documents to a federal grand jury, invoked his 5th Amendment privilege against self incrimination. A court order issued pursuant to 18 USCS 6003(a) directed him to respond to the subpoena, and bring with him various documents described therein; it granted him immunity to the extent allowed by law. The government used the produced documents to prosecute the respondent for tax and fraud charges. The district court dismissed the indictment. The Court of Appeals vacated the judgment and remanded for consideration of whether the government knew of the documents' existence and authenticity, and of the respondent's possession of them. An agreement was reached in the lower court, which did not moot the question raised.

Holding: The act of producing subpoenaed documents may have a compelled testimonial aspect. Such production, and compelled testimony about whether everything demanded was produced, communicates information about the documents' existence, custody, and authenticity. Compelled testimony communicating information that may lead to incriminating evidence is privileged even if the information itself is not incriminating. *Doe v United States*, 487 US 201, 208 n6 (1988). When a person is prosecuted for matters related to immunized testimony, the prosecution has an affirmative duty to prove that the evidence it proposes to use

US Supreme Court *continued*

is derived from a legitimate source wholly independent of that testimony. *Kastigar v United States*, 406 US 441 (1972), upholding 18 USC 6002. The respondent had to use the contents of his own mind to produce these documents—responding to the subpoena was like providing a memorized safe combination, not like handing over strongbox keys. Since the government did not show any prior knowledge of the documents that the respondent produced, those documents could not provide the basis for the respondent’s indictment. Judgment affirmed.

Dissent: [Rehnquist, CJ] The Court of Appeals judgment should be reversed for the reasons given by Judge Williams in his dissenting opinion at 167 F3d 552, 597 (DC Cir 1999).

Juries and Jury Trials (Findings) JRY; 225(35)

Sentencing (Enhancement) SEN; 345(32)

**Castillo v United States, No. 99-658, 6/05/00,
120 Sct 2090**

The petitioners were convicted under 18 USC 924(c)(1). The statute called for persons who, during and in relation to any crime of violence, used or carried a firearm to be sentenced (in addition to the punishment for the underlying crime) to imprisonment for five years, and if the firearm was a short barreled rifle or short-barreled shotgun, for 10 years, and if the firearm was a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, for 30 years. The petitioners were sentenced to 30 years. The Court of Appeals affirmed.

Holding: Whether the firearms at issue were of a type statutorily requiring substantially greater punishment upon the petitioners’ convictions required a jury determination. The statute structure shows that the different weapons established different crimes, not just penalties. Firearm types have not been traditional sentencing factors. *See Jones v United States*, 526 US 227, 234 (1999). To have juries rather than judges decide whether a statutorily required weapon had been used would rarely complicate trials or risk unfairness, while the contrary rule could produce a conflict between judges and juries. The legislative history does not significantly support the government’s position. The length and severity of the added mandatory sentences weigh in favor of treating the weapons types as elements. Judgment reversed.

New York Court of Appeals

Juries and Jury Trials (Deliberation) JRY; 225(25)

People v Maragh, No. 49, 5/9/00

Medical issues involving the cause of death were vigorously contested at the defendant’s manslaughter trial. The

defendant was acquitted of manslaughter but convicted of criminally negligent homicide. After news accounts alerted defense counsel to possible jury misconduct, a hearing was held at which it was revealed that one juror, a registered nurse, had told the jury that in her medical experience the reported blood loss could have caused ventricular fibrillation and death. This contradicted expert testimony adduced by the defense. Another nurse-juror shared personal estimations of the blood volume loss with the other jurors. The court set aside the verdict. The Appellate Division reversed.

Holding: Even well-intentioned jury conduct that puts the jury in possession of evidence outside of that admitted at trial constitutes improper influence, which constitutes a necessary and narrow exception to the rule that a jury verdict may not be impeached by probes into the deliberative process. *See People v Brown*, 48 NY2d 388, 393. Having professionals become “unsworn witnesses” justifies a new trial where the conduct was prejudicial to the defendant’s right to confront and cross-examine witnesses. *See eg People v De Lucia*, 20 NY2d 275. Jury reforms have facilitated the selection of professionals for jury service, but such professionals may not step beyond the evidence presented in the case before them. It may be useful for trial courts to direct jurors not to use their professional expertise to insert evidence from outside the record. *See eg Fitzgibbons v New York State University Constr. Fund (Appeal No. 1)*, 177 AD2d 1033. The nurse-juror’s responses on *voir dire* that her professional experiences might affect her opinion of medical evidence did not immunize any misconduct at the deliberative stage. Order of Appellate Division reversed, order of County Court reinstated.

Federal Law (Procedure) FDL; 166(30)

Obscenity (General) OBS; 270(17)

Tunick v Safir, No. 86, 5/12/00

Holding: Certification of three questions was requested by the US Court of Appeals for the 2nd Circuit. The questions involved whether a photographic shoot of numerous nude bodies on a public street comes within the “play, exhibition” and other exceptions to Penal Law 245.01 and 245.02, whether those exemptions are limited to indoor activities, and whether, if the conduct is not exempt and/or the exemptions are limited to indoor events, the statutes as interpreted are valid under the state constitution. The case involves a preliminary injunction regarding an alleged prior restraint of artistic conduct. Even with an expedited schedule, the process of deciding the questions would add some months to the life of the case. While the presence of a state constitutional issue would weigh in favor of certification, the parties themselves did not raise such an issue. In light of that, an already lengthy delay in adjudicating the plaintiff’s civil rights claims, and the definite possibility of mootness before the questions can be answered, certification is declined.

NY Court of Appeals *continued*

Certification is an effective device that can benefit state and federal courts as well as litigants (*see eg Messenger v Gruner & Jahr Print. and Publ.*, 94 NY2d 436) as shown by actual experience—all but a few certified questions have been accepted. Here, however, the general benefits are outweighed by the confluence of factors as set out in the opinion. Certified questions declined.

Civil Practice (General) CVP; 67.3(10)

Civil Rights Actions (General) CRA; 68(20)

Lauer v City of New York, No. 59, 5/16/00

Holding: A New York City Medical Examiner’s report saying that a 3-year-old child’s death was a homicide led to a police investigation focused on the child’s father. The Medical Examiner and a neuropathologist did a more detailed study of the child’s brain weeks after the original autopsy and prepared a report stating that death was natural, caused by a ruptured brain aneurysm. The earlier autopsy report and death certificate were not corrected, nor was law enforcement notified. When this came to light 17 months later, the plaintiff father brought suit alleging civil rights violations, defamation, and negligent and intentional infliction of emotional distress. Supreme Court dismissed the defamation and civil rights actions. The Appellate Division agreed that those claims and others warranted dismissal, but divided as to whether a claim of negligent infliction of emotional distress would lie. “Ministerial negligence may not be immunized, but it is not necessarily tortious . . .” *See Tango v Tulevech*, 61 NY2d 34, 40. The Medical Examiner had no special duty to the plaintiff. Order reversed, complaint dismissed.

Dissent: [Smith, JJ] While the initial erroneous conclusion was cloaked with governmental immunity, the Medical Examiner’s duty to notify prosecuting authorities of an error in an autopsy diagnosis is based on the city charter. The plaintiff and society have the right to reasonably expect compliance. The plaintiff should be given the chance to present his negligent infliction of emotional distress claim to a trier of fact. [Bellacosa, JJ] To immunize the type of misconduct alleged here “would reward government agents who hide the truth and sweep wrongdoings under a rug of tort impunity.”

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

Guilty Pleas (General) GYP; 181(25)

Matter of Francois v Dolan, No. 46, 5/18/00

While the petitioner’s first-degree murder charges were pending, but before the prosecutor had announced an intention to seek or not seek the death penalty, a decision was

rendered in *Matter of Hynes v Tomei* (92 NY2d 613 *cert den* __ US __). *Tomei* declared unconstitutional the death penalty guilty plea provisions found in Criminal Procedure Law 220.10(5)(e) and 220.30(3)(b)(vii), and held that a guilty plea is prohibited while a death notice is pending. After *Tomei*, and before any death notice had been issued in this case, the petitioner sought to plead guilty to the indictment. When the plea was rejected, the petitioner sought relief in the nature of mandamus in an article 78 proceeding in the Appellate Division. The petition was dismissed.

Holding: Until completion of the statutorily provided deliberative process as to whether the death penalty is to be sought, a capital defendant has no unqualified right to plead guilty to the entire indictment. To the extent that a conflict exists between CPL 250.40 (giving the District Attorney authority to decide and time to deliberate about whether to seek the death penalty) and CPL 220.10(2) and 22.60(2) (general plea provisions), the death provision prevails. The petitioner’s interpretation, which would give an absolute right to plead to the entire indictment, would substantially undermine the current statutory framework and is unsupported by legislative history. Special or particular provisions of later statutes supersede unlimited or general provisions of earlier ones. *East End Trust Co. v Otten*, 255 NY 283, 286 (Cardozo, CJ). A contrary ruling would lead to an unseemly race to the courthouse between defense and prosecution. Judgment affirmed.

First Department

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

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

People v Sanchez, No. 239, 1st Dept, 3/02/00

Holding: The defendant unequivocally asserted his right to be present at all material stages of his trial and was deprived of that right. *People v Antommarchi*, 80 NY2d 247 *reconsid den* 81 NY2d 759. The court requested a sidebar with two potential jurors during *voir dire* concerning their prior jury service. This questioning occurred in the presence of counsel but in the absence of the defendant. One of the questioned jurors eventually served on the jury that convicted the defendant, and the other was peremptorily challenged by the defense. Therefore, the exception that exists for jurors peremptorily challenged by the prosecutor or removed for cause by the court (*People v Roman*, 88 NY2d 18, 26 *reh’g den* 88 NY2d 920) does not apply. The defendant’s input might have affected defense counsel’s discretionary decision to retain or remove the two jurors who survived the *voir dire*. *People v Maher*, 89 NY2d 318, 325. No preservation of this error by objecting to the exclusion was required. Reversed and remanded for new trial. (Supreme Ct, Bronx Co [Davidowitz, JJ])

First Department *continued***Forfeiture (General)**

FFT; 174(10)

**NYS Crime Victims Board v T.J.M. Productions,
No. 1380, 1st Dept, 3/7/00**

Holding: The New York State Crime Victims Board sought a judgment declaring that the money paid to Sammy Gravano for work on the book *Underboss* constitutes “profits of the crime” and that the defendants had violated the current “Son of Sam Law” by failing to notify the Board of the book agreement. Executive Law 632-a. The court granted the defendant’s motion to dismiss the complaint for failure to state a cause of action. The law in question provides for forfeiture predicated on a New York State offense. Gravano was convicted of the federal crime of racketeering. 18 USC 1962(c) and 3551 *et seq.* The Board has no statutory authority under Executive Law 632-a to state a claim. The right to a cause of action is only granted to a victim of a felony, not to the Board. The Board’s role is limited to acting on behalf of a plaintiff/victim and all other victims by applying for any and all provisional remedies that are available to the plaintiff once the Board receives a copy of a summons and complaint filed against a defendant. Judgment affirmed. (Supreme Ct, New York Co [DeGrasse, JJ])

Discovery (Prior Statements of Witnesses) DSC; 110(26)**Search and Seizure (Electronic Searches) (Search Warrants) SEA; 335(30)(65)****People v Giraldo, No. 555, 1st Dept, 3/14/00**

Holding: The defendant’s motion to suppress evidence obtained from eavesdropping was properly denied. The telephones and beeper of a senior manager of a major illegal drug operation were targeted on the basis of information provided to a confidential informant by two high-ranking members of the conspiracy. The conspirators’ declarations were highly reliable because they were made against penal interest. *People v Thomas*, __ AD2d __, 697 NYS2d 1. Police analysis of the telephone and beeper records provided sufficient corroborating evidence that the devices were being used for drug trafficking. *See People v Tambe*, 71 NY2d 492, 501. It can be inferred from the extensive detail provided that the two conspirators spoke from personal knowledge regarding the involvement of the senior manager. *See People v Rodriguez*, 52 NY2d 483, 493. The eavesdropping warrant applications made the particularized showing required under Criminal Procedure Law 700.15 (4). The prosecution satisfied their *Rosario* obligation (*People v Rosario*, 9 NY2d 286 *cert den* 368 US 866) by producing a hard copy of a report that was on a diskette. There is no basis other than speculation for finding that analysis of the diskette might have revealed prior versions or deleted material. Judgment affirmed. (Supreme Ct, New York Co [Wittner, JJ])

Discovery (Brady Material and Exculpatory Information)

DSC; 110(7)

Records (General) REC; 327(25)**People v Stern, No. 601, 1st Dept, 3/16/00**

Holding: The court was correct in denying the defendant’s motion under CPL 440.10 to vacate a judgment convicting him of second-degree murder. Ballistic and serology documents conducted on a certain vehicle were not *Brady* material (*Brady v Maryland*, 373 US 83 [1963]) because they were not in the prosecutor’s possession (*People v Vilardi*, 76 NY2d 67, 73) but in that of the Medical Examiner. *People v Wright*, 225 AD2d 430 *lv den* 88 NY2d 1026. The documents were not exculpatory, were consistent with the prosecution’s case, and did not contradict the defendant’s admissions. The redactions of tape-recorded conversations were properly admitted at trial. They were disclosed well in advance of trial. Order affirmed. (Supreme Ct, New York Co [Berman, JJ])

Evidence (Prejudicial)

EVI; 155(106)

Sentencing (Concurrent/Consecutive)

SEN; 345(10)

People v Franco, No. 674, 1st Dept, 3/23/00

Holding: The court properly convicted the defendant of second-degree attempted murder, two counts of first-degree robbery, and second-degree robbery. The robbery convictions were not against the weight of evidence and were legally sufficient. The court properly exercised its discretion in allowing the prosecution to exhibit to the jury the incapacitated complainant, who could not testify. *See Harvey v Mazal Am Partners*, 79 NY2d 218. The display of the complainant was not conducted solely to inflame the jury but was for the purpose of illustration and to conduct demonstrations establishing the complainant’s condition, as the defendant made no concession as to the injuries sustained. *See People v Robinson*, 93 NY2d 986. The court was correct in entering consecutive sentences. The attempted murder was not part of the robbery but was an “unnecessary afterthought.” *See People v Smiley*, 121 AD2d 274, 275-276 *lv den* 68 NY2d 817. Judgment affirmed. (Supreme Ct, Bronx Co [Straus, JJ])

Counsel (Choice of Counsel) (Competence/Effective Assistance/Adequacy) (Right to Self-Representation) (Standby and Substitute Counsel) COU; 95(9.5) (15) (35) (39)**Sentencing (Persistent Violent Felony Offender)**

SEN; 345(59)

People v Davis, No. 680, 1st Dept, 3/23/00

First Department *continued*

Holding: The court properly exercised its discretion by denying the defendant’s mid-trial request for new counsel. *See People v Tineo*, 61 NY2d 531, 536. The defendant’s disagreement with counsel’s strategy did not require assignment of new counsel. *Cf People v Colon*, 90 NY2d 824, 825. Counsel’s refusal to adopt the defendant’s “misidentification” defense did not render counsel ineffective where the defendant was apprehended by five police officers who never lost sight of him after he fled. *See People v Benevento*, 91 NY2d 708, 712-713. The defendant’s request for hybrid representation was rightly denied. *People v Garcia*, 69 NY2d 903. His decision to represent himself was knowingly and voluntarily made. The court adequately warned the defendant about the dangers of self-representation. *See People v Smith*, 92 NY2d 516, 520.

The defendant was not deprived of his right to confrontation. The court properly removed the defendant from the courtroom because he behaved in a disruptive manner designed to provoke a mistrial, including the hurling of racial epithets at the jury.

The court erred in sentencing the defendant as a persistent violent felony offender because the New York crime that is analogous to his Illinois conviction of unlawful use of a weapon is not a violent felony. The defendant must be resentenced; the prosecution is not foreclosed from seeking a sentence as a persistent violent felon. *See People v Hunt*, 162 AD2d 782 *affd* 78 NY2d 932 *cert den* 502 US 964. Judgment affirmed, sentence vacated and remanded for re-sentencing. (Supreme Ct, New York Co [Rothwax, JJ])

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

Sentencing (Second Felony Offender) SEN; 345(72)

People v Reyes, No. 695, 1st Dept, 3/28/00

Holding: The defendant’s ineffective assistance of counsel claim is without merit. The state is not charged with the responsibility of guaranteeing effective legal representation when counsel enters the proceedings at the preaccusatory, investigatory stage of a criminal trial. *People v Claudio*, 83 NY2d 76, 78. The attorney who represented the defendant at the preaccusatory stage was called as a prosecution witness concerning non-privileged matters; the defendant did not meet his burden of establishing that the attorney’s testimony revealed privileged communications as well. *See People v Orso*, 75 NY2d 80, 84-86. The defense did not preserve claims that testimony concerning a phone call and threats as well as testimony regarding the photo identification should not have been permitted.

The court improperly sentenced the defendant as a second felony offender. His seven-and-one-half-to-15-year sentence on second-degree robbery and first-degree assault must therefore be reduced so that the minimum is one-third

of the maximum. Judgment modified on the law and otherwise affirmed. (Supreme Ct, New York Co [White, JJ])

Discovery (Procedure [Motions]) DSC; 110(30)[j]

Witnesses (Cross Examination) WIT; 390(11)

People v Ramirez, No. 704, 1st Dept, 3/28/00

Holding: The court properly exercised its discretion in denying the defendant’s request to prevent the prosecution from cross-examining him about several items recovered from his person. The prosecution’s denial when responding to a discovery motion that they were aware of any physical evidence that had been recovered from the defendant did not qualify as a stipulation under CPL 710.60(2)(b) not to offer the evidence. The disclaimer did violate the prosecution’s discovery obligation under Criminal Procedure Law 240.20(1)(f). The sanction for violation of this law, if any, is left to the discretion of the court. CPL 240.70(1); *People v Kelly*, 62 NY2d 516. There was no bad faith on the part of the prosecution. The defense received police vouchers listing the items in question and made no motion to suppress them. His claim of prejudice is speculative. Judgment affirmed. (Supreme Ct, New York Co [McLaughlin, JJ])

Civil Practice (General) CVP; 67.3(10)

Counties and New York City (New York City [Miscellaneous]) CTY; 96(81)[d]

Santiago v Craigbrand Realty Corp. and New York City Department of Social Services, No. 2464, 1st Dept, 3/28/00

Holding: The court erred in holding that the New York City Department of Social Services (DSS) was not entitled to place a lien on a settlement from Craigbrand Realty Corp. that the infant plaintiff received for injuries resulting from lead poisoning. In contrast to the arguments advanced by the plaintiff, DSS is only barred from seeking recovery from an infant for services rendered if it is seeking recovery under Social Services Law 104(2). DSS is entitled to recovery from infants under SSL 366(4)(h)(1) and SSL 367-a(2)(b). *See Gold v United Health Servs. Hosps., Inc.*, _ AD2d _, 701 NYS2d 123. DSS may recover from any and all funds received in settlement, not just those intended specifically to cover a plaintiff’s medical costs. *Calvanese v Calvanese*, 93 NY2d 111 *cert den sub nom Callahan v Suffolk Co.*, 120 S Ct 323. Judgment reversed. (Supreme Ct, New York Co [Miller, JJ])

Dissent: [Mazzarelli, JJ] The majority’s reliance on SSL 366(4)(h)(1) and SSL 367-a(2)(b) as permitting DSS to recover from the infant plaintiff is incorrect. Under *Baker v Sterling* (39 NY2d 397) and its progeny, SSL 104(2) completely precludes DSS from recouping its expenses from settlement funds not specifically intended as reimbursement for past medical expenses from infants.

First Department *continued*

Sentencing (Resentencing) SEN; 345(70.5)

People v Allen, No. 2901, 1st Dept, 3/28/00

Holding: Although the court initially erred when it failed to sentence the defendant in accordance with Criminal Procedure Law 400.21 as a second felony offender, the court rectified its error on the same day when it recalled the matter for resentencing. At the second sentencing, the defendant was given a copy of the predicate felony statement and the opportunity to controvert his prior conviction, which he declined. The defendant's motion to overturn his conviction was properly dismissed. Judgment affirmed. (Supreme Ct, Bronx Co [Bamberger, JJ])

Civil Practice (General) CVP; 67.3(10)

Counsel (Malpractice) COU; 95(23)

Summerville v Lipsig, No. 746, 1st Dept, 3/30/00

Holding: The plaintiff was an innocent bystander to a bank robbery, shot by an off-duty police officer. The court properly dismissed the plaintiff's action for legal malpractice against the firm that represented him in a tort action against the City of New York. The firm is not liable to the plaintiff for the loss of the punitive damages that he might have recovered had the police officer who injured the plaintiff been joined in the suit. Punitive damages are imposed to punish tortfeasors and to deter similarly negligent conduct in the future. *Cappetta v Lippman*, 913 FSupp 302, 306. This purpose would not be served by holding the law firm that mishandled the case liable for the loss caused by the tortfeasor. *Cf Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196. Judgment affirmed. (Supreme Ct, New York Co [Huff, JJ])

Discovery (Brady Material and Exculpatory Information) DSC; 110(7)

Sentencing (Persistent Violent Felony Offender) SEN; 345(59)

People v Wright, Nos. 747-747A, 1st Dept, 3/30/00

The defendant pled guilty to attempted second-degree burglary and was illegally sentenced as a result of his use of an alias and denial of prior convictions. He was later convicted by a jury of several offenses that occurred after the illegal sentence in the plea case. A resentencing at which the illegality of the original plea-based sentence was cured occurred after the crimes for which he was tried and convicted.

Holding: The court improperly found the defendant to be a persistent violent felony offender after the jury trial. The post-trial resentencing for the guilty plea conviction dis-

qualifies the crimes for which he was resentenced as predicate convictions for a finding of persistent violent felony offender for the convictions that resulted from the trial. Penal Law 70.04(1)(b)(ii); 70.08(1)(b); *People v Bell*, 73 NY2d 153, 165. Although the defendant's own misconduct caused the resentencing, the plain language of the statute forbids courts from disregarding its provisions. *People v Tatta*, 196 AD2d 328 *lv den* 83 NY2d 972.

The court properly denied the defendant's motion requesting the disclosure of the names and addresses of 10 victims of other robberies who failed to identify the defendant at lineups. *See People v Andre W.*, 44 NY2d 179. This information was not *Brady* material because the other robberies were not so similar or otherwise connected to the charged crimes that proof of the defendant's innocence of the uncharged crimes would cast doubt on his guilt here. *See People v McMahon*, 180 AD2d 535. Judgment modified and remitted for resentencing as to all counts (Supreme Ct, New York Co [Solomon, JJ])

Prior Convictions (Evidence) PRC; 295(5)

Trial (General) (Joinder/Severance of Counts and/or Parties) TRI; 375(15) (20)

People v De Los Angeles, Nos. 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 1st Dept, 3/30/00

Eight defendants were tried jointly on multiple charges, including first-degree conspiracy.

Holding: Denial of defense motions for severance was proper where most of the prosecution evidence was offered to show a joint enterprise and applied to all the defendants. *See People v Mahboubian*, 74 NY2d 174. The strong public policy favoring joinder would have been violated by having several extended trials, with security problems resulting from disclosure of certain witnesses' identification due to repetitive appearances. *People v Mobley*, 162 AD2d 305 *lv den* 76 NY2d 895. No defendant took an aggressive adversarial stance against another, despite objections by some to elicitation of evidence by others. The court did not abuse its discretion by allowing the prosecution to reopen its case during one defendant's summation to introduce a pretrial photograph of that defendant to avoid an unfair impression about a witness's identification of him. *See People v Olsen*, 34 NY2d 349. The defense was allowed to cross-examine the witness and then comment on that testimony.

Defendant Collins challenged a "stipulation" telling the jury that he had been incarcerated from February 1992 until trial. The jury was not unduly swayed, failing to agree as to his guilt on two of three counts. Defense counsel rejected the court's offer to tell the jury that he did not agree to the "stipulation." Without the "stipulation," defense counsel's questioning of surveillance officers who did not see that particular defendant tended to mislead the jury into thinking that the defendant had voluntarily withdrawn from the conspiracy. *See People v Melendez*, 55 NY2d 445, 451. Judg-

First Department *continued*

ments affirmed. (Supreme Ct, New York Co [Globerman, J at suppression hearing; Snyder, J at trial and sentence])

Dissent: [Rosenberger, JP] Evidence of Collins' prior record was improperly admitted.

Second Department

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

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

People v Jackson, No. 98-10169, 2nd Dept, 4/3/00

Holding: The defendant was prejudiced by the court's failure to conduct further inquiry after a potential juror repeatedly indicated he would need to hear both sides. Where the juror never said he could render an impartial verdict based on the evidence (*see People v Blyden*, 55 NY2d 73), the defense exercised a peremptory challenge against the juror, and exhausted all peremptories, a new trial is required. *See People v Sumpter*, 237 AD2d 389. The unknown person who called 911 was not a trial witness, so failure to preserve an audiotape of the call was not a violation of *People v Rosario* (9 NY2d 286). *See People v Joseph*, 86 NY2d 565. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Finnegan, JJ])

Evidence (Business Records) EVI; 155(15)

Witnesses (Cross Examination) WIT; 390(11) (40)
(Police)

People v Hill, No. 97-00013, 2nd Dept, 4/10/00

Holding: The court refused to allow defense counsel to cross examine an undercover officer about a notation in his report that may have indicated an unsuccessful effort to make a drug "buy." The report was properly admitted into evidence as a document kept in the regular course of business, and counsel should have been allowed to question the witness about notations therein. *See People v Medina*, 249 AD2d 166. The error was not harmless. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Naro, JJ])

Defenses (Justification) DEF; 105(37)

Lesser and Included Offenses LOF; 240(10)
(Instructions)

People v Reese, No. 97-02916, 2nd Dept, 4/10/00

After three men forced the defendant into another's apartment where the defendant was tied up with others

while the apartment dweller was taken away at gunpoint, the defendant freed himself and ran, with others, through the grounds yelling, "They got Derrick." The defendant, who was seen firing an assault weapon, was convicted of second-degree murder for the killing of an unarmed security guard.

Holding: The court did not err in refusing to give jury instructions on first-degree manslaughter as a lesser included offense of intentional murder, or second-degree manslaughter as a lesser of depraved indifference murder. *See People v Shuman*, 37 NY2d 302, 304. No reasonable view of the evidence supports a finding that the defendant committed the lesser offenses but not the greater. If he was found to have acted recklessly, then—where he fired an automatic weapon—he evinced a depraved indifference to human life. Judgment affirmed. (Supreme Ct, Kings Co [Aiello, JJ])

Dissent: [Goldstein, JJ] One of the men who kidnapped the defendant's friend (whose body was later found) was a former security guard. The defendant testified that he heard gunshots when he encountered the decedent, who had carried guns on prior occasions. The court gave an erroneous justification instruction, saying that while use of deadly force was permitted against someone believed to be committing a kidnapping, it could not be used if the defendant could safely retreat. *People v Goetz*, 68 NY2d 96, 106 n 5. Instructions should have been given on second-degree manslaughter.

Motions (General) (Suppression) MOT; 255(17) (40)

Trial (Presence of Defendant) TRI; 375(45)
[Trial in Absentia]

People v Logan, No. 97-03559, 2nd Dept, 4/10/00

Holding: The defendant and counsel were in court on Aug. 31, 1995 for a scheduled *Wade/Mapp/Huntley* hearing. Counsel sought a short adjournment to take care of matters in other courts. When this case was recalled, the defendant failed to appear. He was returned to the court a year later on a bench warrant after being arrested on an unrelated matter. The court granted a prosecution motion to preclude the defendant from proceeding on pretrial motions. Near the end of the prosecution's case at trial, the defendant pled guilty. The defendant's forfeiture of his right to be present was not a waiver of his right to a hearing or a trial. *See People v Whitehead*, 143 AD2d 1066. A suppression hearing must be held. Appeal held in abeyance, matter remitted. (Supreme Ct, Queens Co [Rios, JJ])

Misconduct (Prosecution) MIS; 250(15)

Witnesses (Experts) WIT; 390(20)

People v Reinat, No. 97-05581, 2nd Dept, 4/17/00

Holding: The prosecution's first witness in this drug case was a supervising officer in charge of the buy-and-bust

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operation. He testified as an expert that prerecorded money is recovered in only 45-55% of such operations, that sellers do not always work alone but rely on "steerers," "lookouts," "money men" (who take money) and "re-up men" (who resupply the sellers with drugs), and that "men" could include women. A woman had been seen in close proximity to the scene. The arresting officer had no reason to believe she was working with the seller, and the supervisor doubted the woman was a "steerer," "point man," "money man," or "lookout." In summation, the prosecutor urged the jury to use their common sense as to what the woman may have possessed. It was noted that defense counsel had not asked if the supervisor thought the woman was a "re-up man." Where there was no evidence from which to infer that the woman was involved, it was error to admit the expert testimony regarding the percentage of cases in which buy money is found and the various roles common to street drug sales. *See People v Bethea*, 261 AD2d 629, 630. The prejudice was compounded by the prosecutor's summation. *See People v Figueroa*, 211 AD2d 811. Judgment reversed, new trial ordered. (Supreme Ct, Kings Co [Carroll, JJ])

Juveniles (Delinquency) JUV; 230(15)

Matter of Travis S., No. 99-05297, 2nd Dept, 4/17/00

Holding: When stopped for driving a car with broken taillights, the appellant gave an erroneous name, address, and birthday. At the police station, the officer again asked for pedigree information and told the appellant that if he was lying about any part of the pedigree information, "a new charge will be upon you." The appellant repeated the information he had given before and was found to be a juvenile delinquent for having committed the act of false personation. The Family Court properly found that the officer's warnings about the consequences of providing false pedigree information were in accordance with Penal Law 190.23. There is no support for the contention that the appellant did not understand the word "charge." Order affirmed. (Family Ct, Kings Co [Hepner, JJ])

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

People v Morton, No. 98-00558, 2nd Dept, 4/24/00

Holding: A prospective juror said, "Yes," when asked if learning about a prior conviction of the defendant might make her believe that, having done something once, he might do it again. This response indicated a state of mind likely to preclude the prospective juror from rendering an impartial verdict based only on the trial evidence. Criminal Procedure Law 270.20(1)(b); *see People v Johnson*, __ NY2d __

(4/13/00). Failure to grant the defense challenge for cause was reversible error, as the defendant exhausted his peremptory challenges. *See CPL 270.20(2); People v Torpey*, 63 NY2d 361. Judgment reversed. (Supreme Ct, Nassau Co [Honorof, JJ])

Counsel (General) (Malpractice) COU; 95(22.5) (23)

Ethics (Defense) ETH; 150(5)

Henry v Brenner, No. 99-04082, 2nd Dept, 4/24/00

Holding: Defendant Brenner was retained to handle, with the aid of defendant Weisenfeld, post-judgment proceedings in state court and a federal writ of *habeas corpus* for the plaintiff, who had been convicted of murder. After denial of a state writ of error *coram nobis*, before the filing of a federal writ, the plaintiff terminated the retainer agreement and asked for the return of part of the \$15,000 fee. Defendant Weisenfeld itemized the hours he had spent on the matter, which at his hourly rate exceeded the paid amount. The plaintiff sued for damages based on malpractice, breach of contract, and Judiciary Law 487(1). The court erred in denying Weisenfeld's motion to dismiss the complaint as to him, as no legal malpractice suit would lie where the plaintiff did not allege innocence or make a colorable claim of innocence of the underlying offense. *See Carmel v Lunney*, 70 NY2d 169. The cause of action for treble damages under the statute, based on allegedly false time records, should also have been dismissed as the itemized statement was presented after there was no longer a judicial proceeding pending. *See Staniski v Ezersky*, 228 AD2d 331.

The plaintiff's papers do establish a breach of contract claim as to recovery of a portion of the retainer fee. The defendants were discharged before filing a federal writ, which was one of the services to be performed under the agreement. While the defendants were entitled to recover in *quantum meruit* for services rendered, Weisenfeld failed to establish as a matter of law that his services exceeded \$15,000 in value. Order modified, and as modified, affirmed. (Supreme Ct, Westchester Co [Coppola, JJ])

Search and Seizure (Consent [Third Persons, by]) SEA; 335(20[p])

People v Coston, No. 99-05004, 2nd Dept, 4/24/00

Holding: The court suppressed physical evidence and statements the defendant made to law enforcement officials, and the prosecution appealed. The police entered the defendant's bedroom, with the consent of a person with whom he shared the room, and illegally seized a box. There was no proof of mutual use or joint access to show that the person consenting had "common authority" over the box. *See People v Gonzalez*, 88 NY2d 289, 293. Discovery of the box was not inadvertent and so cannot be justified under the plain view doctrine. *See eg People v Peralta*, 245 AD2d 573. Order

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affirmed as far as appealed from. (County Ct, Nassau Co [Jonas, JJ])

Guilty Pleas (Withdrawal) GYP; 181(65)

Narcotics (Sentencing) (Treatment) NAR; 265(59.5) (60)

People v Jackson, Jr., No. 96-10834, 2nd Dept, 5/1/00

Holding: The court erred in not allowing the defendant to withdraw his plea on the ground that the promised drug treatment program was found to be not suitable for him. A plea induced by an unfulfilled promise must either be vacated or the promise honored. *See People v Selikoff*, 35 NY2d 227, 241 *cert den* 419 US 1122. The defendant pled guilty to attempted criminal sale of a controlled substance in exchange for a promise that he would be placed in a particular Treatment Alternatives to Street Crime (TASC) drug treatment program. If the defendant successfully completed the program the current charges were to be dismissed. If he failed to complete the program he was to receive a sentence of imprisonment. When the defendant appeared for sentencing he was told that the TASC treatment program would not allow him to continue taking Prozac for his pre-existing psychiatric condition. The defendant was therefore terminated from the program and sentenced to an indeterminate term of imprisonment of three to six years. He should have been allowed to withdraw his plea. Judgment reversed, matter remitted. (County Ct, Suffolk Co [Corso, JJ])

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

People v Davis, No. 98-05254, 2nd Dept, 5/1/00

Holding: Although a trial court is generally in the best position to evaluate the explanation for a challenged peremptory challenge, the trial court erred in accepting the prosecutor's explanations for challenges to one Hispanic and two black prospective jurors. *See Hernandez v New York*, 500 US 352 (1991). The prosecutor's explanation for striking one of the jurors, that the juror only had a high school education, was pretextual under the circumstances. Judgment reversed, new trial is ordered. (Supreme Ct, Westchester Co [Perone, JJ])

Narcotics (Possession) NAR; 265(57)

Matter of Peralta v Artuz, No. 98-10985, 2nd Dept, 5/1/00

Holding: The defendant's privilege to visit inmates was improperly revoked by the New York State Department of Correctional Services (DOCS). The defendant allegedly brought cocaine into the correctional facility. DOCS regula-

tions, requiring that each person handling the suspected contraband document any action taken and chain of custody (7 NYCRR 1010.4[b]), were not adhered to. The chain-of-custody forms introduced into evidence did not account for the entire time from when the contraband was recovered to its subsequent identification. This determination cannot stand, because DOCS failed to comply with its own regulations in arriving at it. *Matter of Rollison v Scully*, 181 AD2d 734. Article 78 petition granted, determination annulled.

Discovery (Brady Material and Exculpatory Information) DSC; 110(7)

People v Tellier, No. 98-11052, 2nd Dept, 5/1/00

Holding: The trial court vacated the defendant's conviction. The defendant had contended that the prosecution failed to disclose that their witness was cooperating with federal authorities. The witness did not enter into a cooperation agreement with the United States Attorney's Office until six months after the defendant's trial. Even assuming the witness had an informal cooperation agreement with federal authorities at the time of trial, the defendant did not prove that there was a "reasonable possibility" that the outcome of the trial would have been different if the agreement had been disclosed. *See People v Wright*, 86 NY2d 591. There was overwhelming evidence of guilt and the jury knew of the witness's state cooperation agreement. As to an alleged *Rosario* violation claim (*Rosario v New York*, 9 NY2d 286 *cert den* 368 US 866), the court properly denied the defendant's motion. Although the prosecution did not disclose notes from a debriefing session the witness had with federal authorities (*see People v Moustakis*, 226 AD2d 401), there was no reasonable possibility that the failure to turn over the material contributed to a verdict against the defendant. *People v Jackson*, 78 NY2d 638, 650. Order reversed, judgment reinstated. (Supreme Ct, Queens Co [LeVine, JJ])

Dissent: [Friedmann, JJ] The court's order vacating the defendant's conviction should be affirmed and a new trial ordered. One of the prosecution witnesses had reached an agreement with federal prosecutors. Such an agreement should have been disclosed to the defendant. *See People v Novoa*, 70 NY2d 490, 497. It is possible that the result of the trial would have been different if the information had been disclosed. *See People v Vilardi*, 76 NY2d 67, 77.

Discovery (Procedure [Motions]) DSC; 110(30[j])

People v Rescigno, No. 99-00412, 2nd Dept, 5/1/00

Holding: Pursuant to CPL 440.10 the court applied a *per se* reversible error standard to the defendant's *Rosario* claim (*Rosario v New York*, 9 NY2d 286 *cert den* 368 US 866) because the motion was filed before the direct appeal had been concluded. Because there was no possibility that the failure to turn over the material contributed to the verdict against the

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defendant the court erred in reversing the judgment. A defendant seeking to vacate a judgment on *Rosario* grounds, either before or after the direct appeal was concluded, must demonstrate that nondisclosure of the subject material was prejudicial. *People v Machado*, 90 NY2d 187, citing *People v Jackson*, 78 NY2d 638. Order reversed, judgment reinstated. (Supreme Ct, Queens Co [LeVine, JJ])

Dissent: [Friedmann, JJ] The court properly granted the defendant's motion based upon the *Rosario* claim. The defendant established that the prosecution's failure to turn over certain material was prejudicial. Furthermore, the prosecution violated their obligation to disclose certain exculpatory evidence to the defendant. *See People v Novoa*, 70 NY2d 490.

Evidence (Hearsay) **EVI; 155(75)**

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

People v Gabbidon, No. 97-09867, 2nd Dept, 5/8/00

Holding: The court erred in determining that the sentences imposed on the defendant should run consecutively. The prosecution did not show anything in the record to support a finding that the offense of first-degree burglary involved separate acts from the assaults. The burglary sentence must run concurrently with those imposed for the assaults. *See People v Laureano*, 87 NY2d 640, 643. A statement made by a complainant at a hospital was properly admitted as an excited utterance and not the product of reflection. *People v Fratello*, 92 NY2d 565, 576. Judgment modified and as modified, affirmed. (Supreme Ct, Kings Co [D'Emic, JJ])

Evidence (Hearsay) **EVI; 155(75)**

People v Wimms, No. 98-07244, 2nd Dept, 5/8/00

Holding: The defendant was convicted of robbery. The court properly refused to permit the defendant's mother to testify to confessions the defendant's brother made to her. The defense did not demonstrate that the defendant's brother was unavailable. *See eg People v Anderson*, 153 AD2d 893. There was insufficient evidence to assure the trustworthiness and reliability of the brother's statements, so they do not qualify as declarations against penal interest and are inadmissible. *See People v Settles*, 46 NY2d 154. Judgment affirmed. (Supreme Ct, Queens Co [Spire, JJ])

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

People v Avellanet, Nos. 98-09147; 98-09149, 2nd Dept, 5/8/00

Holding: The defendant's concurrent sentences of probation for driving while intoxicated and aggravated unlicensed operation of a vehicle were revoked. The court was correct in imposing a sentence of imprisonment for the DWI conviction, as there was sufficient evidence adduced at the hearing to establish a probation violation. The court erred however in imposing a sentence of imprisonment for aggravated unlicensed operation of motor vehicle. The defendant was not informed that he was also being charged with violating the terms of probation for that crime. *See CPL 410.70(2)*. Affirmed in part and reversed in part. (County Ct, Dutchess Co [Dolan, JJ])

Harmless And Reversible Error (Harmless Error) **HRE; 183.5(10)**

Witnesses (Cross Examination) (Defendant as Witness) **WIT; 390(11) (12)**

People v Sperling, No. 99-02174, 2nd Dept, 5/8/00

Holding: A jury convicted the defendant of burglary and criminal possession of stolen property. The defendant's claim that the prosecutor made comments during summation that constituted reversible error is unpreserved for appellate review, and the remarks were a fair response to the comments that the defense counsel made during summation. It was improper for the prosecutor to cross-examine the defendant regarding a criminal charge of which he had been acquitted. *See People v Schwartzman*, 24 NY2d 241, 250. However, the error was harmless. Judgment affirmed. (Supreme Ct, Queens Co [McDonald, JJ])

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

Insanity (Civil Commitment) **ISY; 200(3)**

People v Stone, No. 99-03553, 2nd Dept, 5/8/00

Holding: The defendant was transferred to Mid-Hudson Forensic Psychiatric Center pursuant to Correction Law 404(1). The court erred in denying a writ of *habeas* where the record is not clear as to whether the petitioner received the notice required by 14 NYCRR 57.2(b). The writ is reinstated and sustained to the extent that within 15 days the court shall commence a hearing to determine whether the defendant was provided with the statutorily-required notice. If he was not, such notice should be provided and the defendant allowed to file objections pursuant to 14 NYCRR 57.2(c), and a determination made pursuant to 14 NYCRR 57.2(d). The court shall continue the hearing on successive court days without substantial interruption until concluded. Order reversed. (Supreme Ct, Orange Co [Berry, JJ])

Juries And Jury Trials (Sequestration) **JRY; 225(56)**

Matter of Bonton, No. 00-02025, 2nd Dept, 5/8/00

Second Department *continued*

Holding: The petitioner brought this proceeding pursuant to Judiciary Law 509 pending his first-degree murder trial. He asked that the New York State Office of Court Administration or the Commissioner of Jurors of Kings County be required to disclose materials relating to initial screening of potential jurors to the petitioner’s counsel or to the court for sealing for appellate review. Specifically sought were the jury qualification questionnaires and a record of those persons found not qualified or disqualified or who were exempted or excused. Relief is denied. *See Matter of Hale*, 239 AD2d 500. Petition denied.

Third Department

Accusatory Instruments (General) ACI; 11(10)

New York State Agencies (Law, Department of) NYA; 266.5(165)

People v Stuart, No. 11505, 3rd Dept, 4/6/00

Holding: The court erred by dismissing the indictment against the defendant. The investigation by the Attorney General’s office leading up to the charge was properly authorized pursuant to Executive Law 63(3). The investigation into theft of timber from private land was commenced upon the request of the General Counsel for the Department of Environmental Conservation (DEC). The law regarding the authorization required for the Attorney General to begin an investigation specifically refers to requests made by the heads of departments. Here, unlike the case of *People v Fox* (253 AD2d 192 *lv den* 93 NY2d 1018), there was a letter from the DEC Commissioner deputizing the General Counsel to act on the Commissioner’s behalf. The Commissioner validly delegated his authority to call for an investigation to the General Counsel. *See People v Liebowitz*, 112 AD2d 383 *lv den* 65 NY2d 928. Judgment reversed. (County Ct, Schoharie Co [Bartlett III, JJ])

Guilty Pleas (General) (Withdrawal) GYP; 181(25) (65)

People v Hawkins, No. 11090, 3rd Dept, 4/13/00

Holding: The defendant’s original plea allocution cast doubt on his complicity in the crime—when approached by an undercover officer and asked for drugs, he had said another person present had some, took the officer’s money and gave it to that person, and gave drugs from that person to the officer. At a subsequent plea hearing, he answered “yeah” when asked if he and the person with the drugs were partners. A sworn statement saying the defendant was not advised about the obvious defense of agency was supported by a letter from the defendant’s former counsel acknowledging the defendant’s assertion and failing to refute it. This is one of the rare occasions on which a hearing should be

granted upon a motion to withdraw a plea. *See eg People v Davis*, 250 AD2d 939. That the court asked the defendant whether he was aware that he was waiving the right to offer any defense by pleading guilty was not sufficient to make this plea knowingly and intelligently entered into. It is not suggested that a court must advise a defendant of particular defenses; the court in denying the motion to withdraw seems to have grounded its refusal on the belief that the court had done so. Decision withheld, matter remitted for further proceedings. (County Ct, Broome Co [Smith, JJ])

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

Speedy Trial (General) SPX; 355(30)

People v Edwards, No. 11459, 3rd Dept, 4/20/00

Holding: That the defendant was indicted almost two years after the commission of the felony of which she was convicted, and that defense counsel did not make a motion to dismiss because of the delay, justifies granting a hearing regarding the effectiveness of trial counsel. At the time of the indictment, it was obvious that unreasonable delay in prosecuting a defendant could amount to a denial of due process. *See eg, People v Lesiuk*, 81 NY2d 485, 490. At the time this prosecution began, case law existed indicating that trial courts should hold a hearing regarding the reasonableness of preindictment delay exceeding 14 months. *See People v Lush*, 234 AD2d 991. No tactical reason exists for failing to seek dismissal under the circumstances. Counsel should be assigned and a hearing held regarding whether the preindictment delay violated the defendant’s right to due process. *See People v Townsend*, __ AD2d __ (3/23/00). Appeal held in abeyance, matter remitted. (County Ct, Broome Co [Mathews, JJ])

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

Narcotics (Defenses) (Instructions) (Sale) NAR; 265(8) (33) (59)

People v Henning, No. 77336, 3rd Dept, 4/20/00

Holding: The court should have meaningfully responded to the jury’s request for a clearer explanation as to what acts met the legal definition of a “sale” under the state’s drug laws. *See People v Steinberg*, 79 NY2d 673, 684. The sufficiency of a court’s response is judged on the basis of the form of the jury’s inquiry, the issue for which clarification is sought, the supplemental instruction given, and any prejudice that results to the defendant. *See People v Almodovar*, 62 NY2d 126, 131-132. The questions this jury asked obviously required clarification by the court of the legal issue of the defendant’s mere presence at the scene, an instruction that defense counsel repeatedly requested. Prejudice resulted to the defendant from the court’s refusal to respond directly to

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the jury's inquiry. A new trial should be granted. *See eg People v Cataldo*, 260 AD2d 662 *lv den* 93 NY2d 968. Judgment reversed, matter remitted. (County Ct, Albany Co [Breslin, JJ])

Accusatory Instruments (Sufficiency) ACI; 11(15)

Contempt (Elements) CNT; 85(7)

People v Kirkham, Jr., No. 11672, 3rd Dept, 6/8/00

Holding: The indictment count that charged the defendant with first-degree criminal contempt failed to allege that the statutory labor dispute exception to that crime was inapplicable. *See* Penal Law 215.50. An indictment is required by Criminal Procedure Law 200.50(7) to contain factual allegations of every element of the charged crime. The court properly granted the defendant's motion to dismiss count one of the indictment as defective. *See People v Bingham*, 263 AD2d 611 *lv den* 93 NY2d 1014. Judgment affirmed. (County Ct, Madison Co [Di Stephano, JJ])

Arson (Defenses) (General) ARS; 40(20) (37)

Guilty Pleas (General) GYP; 181(25)

People v Makas, No. 11764, 3rd Dept, 6/8/00

Holding: The court should have granted the defendant's motion to set aside his guilty plea due to the insufficiency of his plea allocution. Where the defendant's recitation of the facts clearly negates a necessary element of the crime being pled to, and the court fails to insure that the plea is being entered knowingly and voluntarily, acceptance of the plea is an abuse of discretion. *See People v Etoll*, 57 AD2d 973. The sufficiency of the plea allocution can be challenged on direct appeal. *See People v Lopez*, 71 NY2d 662, 666. The defendant acknowledged that he set fire to an unoccupied building that was connected by a breezeway to an occupied building. The court did not find that the two units constituted one building, and elicited no admission to that effect. Because the defendant did not admit to a necessary element of the crime of second-degree arson under Penal Law 150.15, his guilty plea must be set aside. It is unnecessary to address other contentions raised on appeal as to the court's failure to consider the defendant's psychotic mental state or his attorney's failure to pursue a defense invoking the defendant's mental state. Judgment reversed and matter remitted for further proceedings. (County Ct, Ulster Co [Czajka, JJ])

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

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

**Sentencing (Resentencing)
(Second Felony Offender)** SEN; 345(70.5) (72)

People v Perron, No. 11467, 3rd Dept, 6/15/00

Holding: Defense counsel admitted that she misinformed the defendant about the maximum sentence that he could face if he refused to accept an offered plea bargain. The court should have granted the defendant's request for a hearing on his motion to have his conviction set aside. *See* Criminal Procedure Law 440.30(5); *United States v Gordon*, 156 F3d 376; *People v Ferreras*, 70 NY2d 630, 631. The court should also have had a hearing on the defendant's CPL 440.20 motion to set aside his sentence. He presented sufficient evidence indicating that a sexual assault conviction that he received in Vermont at age 19 involving his 15-year-old girlfriend would be considered only a misdemeanor in New York. *See* Penal Law 130.20(1). Therefore, it could not have served as a predicate felony mandating a longer sentence under Penal Law 70.06. Judgment reversed, matter is remitted for further proceedings. (County Ct, Washington Co [Berke, JJ])

**Confessions (Advice of Rights)
(Counsel) (Miranda Advice)** CNF; 70(10) (23) (45)

**Counsel (Advice of Right to
(Attachment) (Right to Counsel)** COU; 95(5) (9) (30)

People v Harvey, No. 10354, 3rd Dept, 6/22/00

Holding: The defendant's motion to suppress incriminating statements was properly denied. After he had been arrested for one crime, he was released on his own recognizance to permit police to ask him to consent to talk about an unrelated homicide. He had not been assigned counsel on the first charge. He had been advised of his right to counsel and had refused the opportunity to obtain counsel. This constituted a waiver. *See People v Brown*, 216 AD2d 670, 672, *lv den* 86 NY2d 791. He then made statements about the homicide and other crimes. The defendant's claim that he was denied effective assistance of counsel is without merit. *See People v Flores*, 84 NY2d 184, 187, 189. Judgment affirmed. (County Ct, Ulster Co [Bruhn, JJ])

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

Forgery (Elements) FOR; 175(10)

People v Thomas, No. 10565, 3rd Dept, 6/22/00

Holding: The defendant was informed of his *Miranda* rights, and initially refused to sign a waiver of those rights. He then made an oral statement to the police. *See People v Ross*, 158 AD2d 560, 560-561 *lv den* 76 NY2d 795. The record indicates nothing to show that he did anything but knowingly and intelligently waive his rights. His statement was

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admissible at trial. The defendant's contention that the evidence presented by the prosecution was insufficient to establish his guilt beyond a reasonable doubt is without merit. The defendant testified that he did not strike the complainant with a bat, but seven witnesses testified that he did. It is the province of the jury to weigh the credibility of the evidence before them. See *People v Rose*, 215 AD2d 875, 876, *lvs den* 86 NY2d 793, 801. Each crime was established beyond a reasonable doubt. See *People v Bleakley*, 69 NY2d 490, 495. It is well established that signing a fingerprint card with a false name satisfies the required elements of the crime of second-degree forgery. See *People v Van Schoick*, 198 AD2d 907 *lv den* 83 NY2d 811. Judgment affirmed. (County Ct, Rensselaer Co [Sheridan, JJ])

Fourth Department

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

People v Arnold, KA 97-5268, 4th Dept, 5/10/00

Holding: The court erred when it refused to excuse a prospective juror who had expressed doubt about her ability to refrain from acting as an unsworn expert witness during jury deliberations, or to render an unbiased verdict in the case because of her research on domestic violence. It was incumbent upon the court, upon being notified of the possibility that this juror might be biased, to further investigate whether the juror's past experiences would influence her verdict. See *People v Blyden*, 55 NY2d 73, 77-78. Because the court failed to conduct such an investigation, the indictment must be dismissed without prejudice to the state to re-present appropriate charges (as the defendant was acquitted of the charged counts but convicted of lesser-included offenses under two counts). Judgment reversed, indictment dismissed without prejudice. (County Ct, Monroe Co [Maloy, JJ])

Dissent: [Hayes and Kehoe, JJ] The trial court's refusal to discharge the challenged juror was not erroneous, because the prospective juror who admitted that she might have difficulty remaining impartial in the case later gave adequate assurances of her ability to render a verdict based solely on the evidence. See *People v Torpey*, 63 NY2d 361, 366-367 *rearg den* 64 NY2d 885.

Extradition (General) **EXT; 160(24)**

Parole (Revocation Hearings) **PRL; 276(45[f])**
[Timeliness]

People ex rel Matthews v NYS Division of Parole,
KAH 98-5162, 4th Dept, 5/10/00

The petitioner appealed to the 2nd Circuit his federal bank robbery conviction for conduct occurring while he was on parole in New York. The sentence was struck down. The petitioner, who had been incarcerated in Pennsylvania, spent 28 months in a series of New York county jails before being resentenced and returned to Pennsylvania. Before his release from federal custody, he unsuccessfully sought state habeas corpus relief, claiming that the Division of Parole should not be permitted to proceed with its revocation hearings, because they would be untimely.

Holding: Whether the state Division of Parole had actual or constructive notice that the petitioner was in New York for 28 months is not the key question. The state failed to show, as is required, that the petitioner was not subject to its convenience and practical control while in New York. See *People ex rel Walsh v Vincent*, 40 NY2d 1049, 1050. Judgment reversed, petition granted, and the petitioner restored to parole supervision. (Supreme Ct, Onondaga Co [Brunetti, JJ])

Dissent: [Pigott and Kehoe, JJ] The court did not err in dismissing the petition. Under Executive Law 259-i (3)(a)(iv), the time limit did not toll while the petitioner was in federal custody. See *People ex rel. Brown v New York State Bd. of Parole*, 139 AD2d 548, 550. The time limits in the statute do not begin to run until the violator is retained exclusively on the basis of the violation warrant and the necessary notification of extradition has been received. See *People ex rel. Johnson v Warden of Manhattan House of Detention*, 178 AD2d 331.

Sentencing (Second Felony Offender) **SEN; 345(72)**

People v Coffie, KA 97-5031, 4th Dept, 5/10/00

Holding: The court erred when it sentenced defendant as a second felony offender after he pled guilty to first-degree robbery. Although the pre-sentence investigation revealed that the defendant had a prior felony conviction, the prosecution did not file a predicate felony statement and the court neither inquired about the conviction nor expressly adjudicated the defendant a second-felony offender before sentencing. Penal Law 70.06(6)(a). These omissions were not harmless error. Cf *People v Bouyea*, 64 NY2d 1140, 1142. Judgment modified and as modified, affirmed, sentence vacated, matter remitted for resentencing. (County Ct, Monroe Co [Bristol, JJ])

Prisoners (Good Time) **PRS I; 300(20)**

Matter of Pfeifer v Goord, CA 99-03502,
4th Dept, 5/10/00

Holding: The court properly dismissed the petition challenging the Department of Correctional Services (DOCS) Commissioner's determination, upon the recommendation of the Time Allowance Committee (TAC), to withhold 13 months of the petitioner's good behavior allowance. DOCS decisions about good time allowances shall not

Fourth Department *continued*

be reviewed as long as they are made in accordance with the law. *See* Correction Law 803(4); *see also* *Matter of Staples v Goord*, 263 AD2d 943, 944, *lv den* 94 NY2d 755 *rearg den* _ NY2d _ (2/17/00). The petitioner's argument that his failure to participate in "recommended" treatment programs was not a valid ground for withholding good behavior allowance was properly rejected. *See Matter of Ferry v Goord*, _ AD2d _ (1/13/00). That a TAC member had previously recommended a reduction in the petitioner's good behavior time did not disqualify that member from ruling on the current petition. *Cf Matter of Pelaez v Waterfront Commn. of N.Y. Harbor*, 88 AD2d 443, 447-48. Judgment affirmed. (Supreme Ct, Wyoming Co [Dadd, JJ])

Witnesses (Sequestration)

WIT; 390(60)

People v Palmer, KA 99-1276, 4th Dept, 5/10/00

Holding: The defendant should have been allowed to call a witness who was present in the courtroom during testimony in the prosecution's case. The court precluded the testimony based on a standing order of mutual sequestration that never appeared in the record. The defendant's fundamental right to call witnesses in his own defense was violated. *See People v Lloyd*, 106 AD2d 405 citing *Chambers v Mississippi*, 410 US 284. The prosecutor failed to show how the prosecution would have been prejudiced by allowing the witness to testify. Where the defendant was acquitted of 11 of 14 charges, it cannot be said that the error was harmless beyond a reasonable doubt. *See People v Crimmins*, 36 NY2d 230, 237. The verdict convicting the defendant of two counts of rape with respect to the complainant while acquitting him of two others was not repugnant. The complainant testified as to four specific acts and the defendant was found guilty of the first two acts in the sequence. Judgment reversed, new trial granted on specified counts. (County Ct, Monroe Co [Bristol, JJ])

Appeals and Writs

(General) APP; 25(35)

Guilty Pleas (Errors Waived By) (General)

GYP; 181(15) (25)

People v Pastorius, KA 99-5659, 4th Dept, 5/10/00

The defendant agreed to cooperate with the state in the prosecution of another crime and to waive his right to appeal. In exchange he was guaranteed two concurrent sentences of 7-14 years for two counts of second-degree robbery in this case. At sentencing, before signing the waiver of his right to appeal, the defendant asked the court to reduce his sentence in the interest of justice because of the assistance that he had furnished the state, and that he be allowed to appeal his sentences. The court refused modify the sentence or modify the agreement, and, interpreting the defendant's

request as a refusal to sign the waiver as required by the plea agreement, sentenced the defendant to two consecutive terms of 7-14 years. When the court began to pronounce sentence, defense counsel said the defendant was signing the waiver.

Holding: When defense counsel said the defendant had signed the waiver, the court responded "Take it up with the Appellate Division." The defendant's appeal was valid as the court had explicitly granted him the right to appeal. *See People v Letterlough*, 86 NY2d 259, 262. In the interest of justice, the judgment of the lower court is modified by directing that the terms of imprisonment run concurrently. Although the defendant's objections regarding the denial of his motion to suppress survived his guilty plea, none of his arguments on this matter had merit. Judgment modified, and as modified, affirmed. (County Ct, Oneida Co [Donalty, JJ])

Counsel (Right to Counsel)

COU; 95(30)

Juveniles (Parental Rights)

JUV; 230(90)

Matter of Meko M., CAF 99-7195, 4th Dept, 5/10/00

Holding: The Family Court erred when it denied the respondent's request for an adjournment of a hearing concerning the termination of her parental rights, after the respondent's counsel moved to withdraw. A parent has a fundamental right to counsel in legal proceedings where parental rights are at stake. *See Matter of Ella B.*, 30 NY2d 352, 356-357; *see also* Family Ct. Act 261, 262(a). The right may be waived (*see Matter of Child Welfare Admin. v Jennifer A.*, 218 AD2d 694, 696-697 *lv den* 87 NY2d 804) but was not waived here. That the respondent eventually agreed to represent herself after discussion with the court was not a valid waiver of her right to an attorney. Counsel may only withdraw upon reasonable notice to the client, and a purported withdrawal without proof that reasonable notice was given is not valid. *See Matter of Williams v Lewis*, 258 AD2d 974. No matter what the facts of case, the finding of the court may not stand if the respondent was not afforded due process. *See Matter of Dominique L. B.*, 231 AD2d 948. Judgment reversed, case remitted for a new hearing. (Family Ct, Erie Co [Dillon, JJ])

Prisons (Programs)

PRS II; 300.5(60)

Sentencing (Youthful Offenders)

SEN; 345(90)

People v Demetrius J., KA 99-5378, 4th Dept, 5/10/00

Holding: The fact that the County Court informed the defendant that he was eligible for the shock incarceration program did not mean that his guilty plea was not entered knowingly and voluntarily. Although the defendant pled guilty to a violent felony, for which he would have been ineligible for shock (*see* Correction Law article 26-A), he was

Fourth Department *continued*

adjudicated as a youthful offender. Such adjudication is not a judgment of conviction for a crime or any other offense (CPL 720.35[1]), making the defendant “an eligible inmate” as that term is defined in Correction Law 865[1]. Judgment affirmed. (County Ct, Jefferson Co [Clary, JJ])

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

Electronic Information Retrieval and Processing (General) **EIR; 137(10)**

People v Palmeri, KA 99-1252, 4th Dept, 5/10/00

Gambling-related charges were brought following an investigation by the Organized Crime Task Force Division (OCTF) of the New York State Attorney General’s Office. After pleading guilty to various offenses, the defendants appealed.

Holding: The court properly denied the defendants’ motion to suppress evidence obtained pursuant to wiretapping and search warrants. Applications for warrants under Criminal Procedure Law 700.20 (2)(f) and 705.15 (2)(d) are supposed to list all known prior applications involving the same persons under investigation. The purpose of such statutes is to ensure that courts have knowledge on which to determine whether there is a need for further interception. *United States v Turner*, 528 F2d 143, 153 *cert den sub nom Lewis v United States*, 423 US 996. Here, the prior surveillance was not relevant to a determination regarding the need for surveillance in the present investigation. The applications for the eavesdropping warrants described a sophisticated operation for which conventional investigative techniques would be insufficient, so that electronic surveillance was needed. *See People v Fonville*, 247 AD2d 115, 118-119. The search warrants described with sufficient particularity the property to be seized, *ie* gambling-related paraphernalia. *See People v Nieves*, 36 NY2d 396, 401. The court did not need to hold a hearing under *People v Basilicato* (64 NY2d 103) regarding evidence not authorized by the eavesdropping warrants, since the prosecution agreed not to introduce such evidence. Nor was a *Bialostok* hearing required (*see People v Bialostok*, 80 NY2d 738) where it is undisputed that the procedures prescribed by CPL 705 were followed, as was true in this case. One defendant’s motion for a sentence reduction due to ill health was properly rejected. Judgment affirmed. (County Ct, Niagara Co [Fricano, JJ])

Subpoenas and Subpoenas Duces Tecum (Issuance) **SUB; 365(10)**

New York State Agencies (Law, Department of) **NYA; 266.5(165)**

People v Marketing and Advertising Services Center Corp., CA 00-00181, 4th Dept, 5/10/00

Holding: The court properly refused to quash grand jury subpoenas issued to eight employees of the Marketing and Advertising Services Center Corp. (Buffnet). Executive Law 63 (3) gives the Attorney General authority to investigate and prosecute the alleged commission of any indictable offense in violation of state law, upon the recommendation of any state agency responsible for executing the law or connected to the law allegedly violated. This statute properly authorized the Superintendent of the New York State Police to request that the Attorney General investigate the transmission of child pornography over the Internet by identified individuals. The Attorney General’s broad powers of investigation authorized the investigation into Buffnet’s activities, despite the fact that the Superintendent did not specifically identify Buffnet as a target. *See Matter of Mann Judd Landau v Hynes*, 49 NY2d 128, 137-138. Judgment affirmed. (County Ct, Erie Co [DiTullio, JJ])

Appeals and Writs (Judgments and Orders Appealable) **APP; 25(45)**

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

People v Thomas, KA 99-5247, 4th Dept, 5/10/00

Holding: Because the court failed to properly advise the defendant of the potential periods of incarceration, including the period of post-release supervision, the defendant’s waiver of appeal at his guilty plea did not preclude an appellate challenge to the severity of his sentence. *See People v Cormack*, __ AD2d __ (2/16/00). However, the five-year period of post-release supervision was not excessive. Judgment affirmed. (Supreme Ct, Erie Co [Tills, JJ])

Sentencing (Restitution) **SEN; 345(71)**

People v Williams, KA 99-5347, 4th Dept, 5/10/00

Holding: The court erred in imposing a 10% surcharge on the restitution that the defendant was ordered to pay to reimburse the state for expenditures to purchase controlled substances from him. *See Penal Law 60.27(9); People v Majestic*, __AD2d __ (3/29/00). The surcharge must be vacated. The defendant’s argument that the sentence was unduly harsh or severe was without merit. Judgment modified, and as modified, affirmed. (County Ct, Genesee Co [Noonan, JJ])

Evidence (Hearsay) **EVI; 155(75)**

People v Combo, KA 99-1452, 4th Dept, 5/10/00

Holding: The court erred when it admitted at trial the testimony of a police officer from an earlier proceeding.

Fourth Department *continued*

Although at the time of the trial the officer was in a foreign country on personal business and his exact location was not known, the prosecution failed to make the required showing of due diligence in attempting to locate the officer. *See People v Arroyo*, 54 NY2d 567, 571 *cert den* 456 US 979. The prosecu-

tion did not attempt to find the witness or show that possibilities of producing him had been thoroughly investigated. *People v Broome*, 222 AD2d 1094. Because the prior testimony of the officer was the only evidence presented at the trial that placed the defendant at the scene of the crime, admission of the prior testimony was not harmless error. Judgment reversed, new trial granted. (Supreme Ct, Monroe Co [Mark, JJ]) ☞

Defender News

(continued from page 3)

Allegedly independent reviews were done of the laboratory evidence in those cases—and prosecutors then decided whether the results constituted information that had to be turned over to defense counsel. The press has reported that Frederic Whitehurst, the former FBI lab examiner who first disclosed problems at the lab, believes that the Justice Department “should have notified defense attorneys.” (Los Angeles Times [online] 8/17/00.)

Rampart Scandal Remains Under Scrutiny

In California, almost 100 wrongful convictions have already been overturned in the wake of a Los Angeles Police Department (LAPD) corruption scandal. That would be a high percentage of the initial estimate that 3,000 cases—the same number said to have been reviewed following the FBI scandal—would require review. However, that number has now grown to 20,000 or 30,000 cases. Michael Judge, head of the Los Angeles County Public Defender’s Office, told CNN (<http://www.cnn.com/2000/LAW/08/10/lapd.review/>) that 20 full-time lawyers are working on cases potentially tainted by corruption in the Rampart Division of the LAPD, costing taxpayers \$4.5 million a year. He said it will take “many years” to review the thousands of cases in question. The U.S. Justice Department is still investigating a pattern of police misconduct. (CNN.com, 8/10/00.)

NY Parole Scandal Yields A Conviction

No New York prisoner has successfully challenged a denial of parole on the basis that continuing allegations of parole-for-campaign corruption tainted parole panel decisions. (See Backup Center REPORT Vol XV, No 5.) But a busi-

nessman and political fundraiser caught up in the scandal could be on his way to prison. Yung Soo Yoo was convicted on July 28 of obstruction of justice. However, the jury was unable to reach a verdict on the counts directly charging Yoo with soliciting contributions for the governor’s 1994 campaign by promising parole for donors’ offspring in prison. Yoo is to be retried on those counts in September. Press accounts of his July trial indicated that a campaign aide to the governor is also under investigation in the matter. The governor has denied any knowledge of improper parole promises. (Daily News, Times Union, 7/29/00.)

Attica Lawyers Finalists for Trial Lawyer of the Year

It took a 26-year fight, but lawyers won an \$8 million settlement for over 1,200 Attica prisoners who were shot, beaten, and brutalized by prison guards after the 1971 inmate uprising over unsanitary and unsafe conditions. It is the largest settlement of a prisoners’ rights case in U.S. history. In recognition of their contribution to the public interest, the prisoners’ lawyers were among the finalists named by Trial Lawyers for Public Justice (TLPJ) for its prestigious 2000 Trial Lawyer of the Year award.

The lawyers include: NYSDA member Daniel Meyers, New York, NY; Elizabeth M. Fink of Brooklyn, NY; Joseph J. Heath, Syracuse, NY; Ellen M. Yacknin, Greater Upstate Law Project, Rochester, NY; Michael E. Deutsch, People’s Law Office, Chicago, IL; and Dennis Cunningham, San Francisco, CA.

The 2000 Trial Lawyer of the Year winner was the team of lawyers who prevailed in *Hartman v Albright*, the landmark gender discrimination class action against the U.S. Information Agency and the Voice of America. For more information, see the TLPJ web site at www.tlpj.org. ☞

Immigration Practice Tips

(continued from page 7)

2nd Circuit finds noncitizen deportable for pre-1988 aggravated felony conviction

The 2nd Circuit has found that an immigrant convicted of an aggravated felony prior to the Anti-Drug Abuse Act of 1988 (ADAA) is deportable even though the ADAA provided that the then new aggravated felony deportation ground applied only to individuals convicted on or after the statute’s enact-

ment on November 1, 1988. *Bell v Reno*, 218 F3d 86 (2d Cir 5/31/00). The Court found that the restriction on retroactive application of the aggravated felony deportation ground to pre-11/1/88 convictions was rendered obsolete by the Immigration Act of 1990 (IMMACT), which redesignated the aggravated felony deportation ground and included effective date provisions that the Court said applied to the aggravated felony deportation ground in its post-IMMACT form. See ADAA 7344(b); IMMACT 602(d). Petitioner Bell’s lawyers, the Legal Aid Society of the City of New York, plan to petition the Supreme Court for writ of certiorari. ☞

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