



Public Defense Backup Center REPORT

VOLUME XIV NUMBER 10

December 1999

A P U B L I C A T I O N O F T H E D E F E N D E R I N S T I T U T E

Defender News

Old News Isn't New Info in Parole Consideration

The publicized release of Albert Victory on parole followed a successful *habeas corpus* action focused on the meaning of "substantial new information." Victory had been granted an "open date" for parole following a January 1999 release hearing. In March, that finding was rescinded, with the Parole Board saying that new information—Victory's successful 1978 escape—had come to light. A parole commissioner who was involved in both decisions had said at a third hearing in July that the escape was "not actually known" in January. However, Victory showed, in the words of the Wyoming County Supreme Court, that the escape "was repeatedly referred to in parole files and had actually been discussed at previous hearings." (The escape had been a news topic when it occurred, and led to a 1981 report by the state Commission of Investigation entitled "Corruption and Abuses in the Correctional System: The Green Haven Correctional Facility.") The appeals unit of the Division of Parole found that Victory's due process rights were violated by the participation of the same commissioner in both the January and March hearings, and by the fact that his statement that the escape was "not known" was unsworn and was the only evidence that the ubiquitous topic of Victory's flight had escaped the attention of the January board. The Supreme Court agreed, and found that Parole had improperly held the July hearing, which "verified" the March rescission of Victory's parole. The state has appealed the ruling. Victory is represented by the Wyoming County-Attica Legal Aid Bureau and Beldock, Levine & Hoffman of New York City. A copy of the Supreme Court decision (12/15/99) is available from the Backup Center.

Albany PLS Office Accepting Limited Cases

The Albany office of Prisoners' Legal Services of New York is now accepting some cases. For the time being, only two categories of legal problems will be reviewed for inmates in the prisons served by the Albany office:

- (1) Disciplinary proceedings resulting in loss of at least one year of good time and/or at least one year of confinement in a Special Housing Unit.

- (2) Allegations of serious threats to health and safety.

The office will announce sometime in the year 2000 when it is able to accept additional kinds of cases. Beginning in 2000, the office will respond to requests for materials to help inmates understand their rights and responsibilities.

PLS already represents some prisoners on cases pending when the organization was forced to close in 1998 due to defunding by the state. There is not enough staff at this time to review pending *pro se* court cases.

The following prisons are served by the Albany PLS office: Central New York Psychiatric Center; Coxsackie; Great Meadow; Greene; Hudson; Hale Creek ASACT; Marcy; Mid-State; Mohawk; Mt. McGregor; Oneida; Summit Shock; Walsh Medical Center; and Washington.

Other PLS offices are not yet open (*see e.g.* Job Opportunities, p. 5), and inmates should not send requests to them. Announcements will be made when offices in Buffalo, Ithaca, Plattsburgh, and Poughkeepsie begin accepting cases.

FOIL Exception Bars Disclosure for Criminal Case

On behalf of a client with a pending criminal case, the Westchester Legal Aid Society sought, under New York's Freedom of Information Law (FOIL), documents relating to the client's arrest and prosecution. FOIL (Public Officers Law 87[2][e][i]) requires that government records be open for public inspection and copying, except for material covered by specific exemptions. In August, the 2nd Department ruled that the requested records were exempt from disclosure under one of the statutory exemptions—*i.e.* that disclosure would "interfere with law enforcement investigations or judicial proceedings." *Matter of Pittari v Pirro*, 696 NYS2d 167 [see Case Digests, p. 10]. Leave to appeal the decision was denied by the Court of Appeals on Nov. 30, 1999.

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Kaye Hears Chiefs' Concerns

Thirty chiefs of public defense offices across New York came to Albany for the Dec. 16, 1999 Chief Defender Convening to inform Chief Judge Judith Kaye about what they need to properly represent their clients. Kaye and Juanita Bing Newton, Deputy Chief Administrative Judge for Justice Initiatives, listened as public defense leaders, most with decades of experience, described problems ranging from the familiar to the unique. Repeated themes included overwhelming caseloads, difficulty in attracting and keeping competent, motivated attorneys, and lack of resources. The chiefs set out a variety of procedural and attitudinal hurdles they find placed in the path of justice, such as deficient discovery policies, plans for instituting unnecessary video appearances that will serve only to further distance courts from the poor people represented by public defense providers, and inadequacies and injustices in certain local justice courts. Judge Bing Newton accepted a suggestion to create a committee of chiefs to advise the Court about public defense effects of court procedures and plans.

Recent NYSDA Training Programs Successful

Accredited by the New York State Continuing Legal Education Board since the advent of mandatory CLE, and committed to affordable, high-quality defense CLE long before that, NYSDA continues to provide local, regional, and state-wide trainings for public defense providers. For example, the Association presented a Monroe County Trainer in Rochester on Nov. 20, and NYSDA Board President Edward Nowak and Staff Attorney Al O'Connor were the presenters for the 1999 Criminal Law Update Trainer in Syracuse on Dec. 9. In addition, training programs developed by NYSDA have been in demand at other organizations' programs. A PowerPoint™ presentation on Internet Resources for Defense Attorneys, developed and presented by Managing Attorney Charles F. O'Brien and Information Consultant Ken Strutin, has been highly praised at a number of venues. Following its presentation at the Annual Meeting in July, Charlie and Ken's show traveled to Poughkeepsie for the NYS Association of Criminal Defense Lawyers' Mid-Hudson Trainer on Nov. 5 and to Long Beach, CA, for the National Legal Aid and Defender Association's Annual Conference on Nov. 10.

Other NYSDA trainings have included presentations on immigration consequences of criminal law, by NYSDA's Criminal Defense Immigration Project Director Manuel D. Vargas, as chronicled in past *REPORTs* (e.g. Vol. XIV, No. 7). For information on future events such as the annual NY Metropolitan Trainer, watch the *REPORT* (see p. 4) and the NYSDA web site: www.nysda.org. For information about possible local or regional trainers in your area, call the Backup Center.

Manhole Equals Building

A manhole is now a "building" for purposes of New York's burglary statute, according to the First Department. The court rejected the defendant's argument for reversal, finding that "[t]he evidence established that a Con Edison manhole is a "building" as defined in Penal Law section 40.00 (2) in that such a structure is a work area in which Con Edison workers remain while performing various maintenance and repair functions." *People v Edmonds*, No. 2627 (12/7/99).

Justices Disciplined

The Commission on Judicial Conduct has determined Stafford Town Court Justice Frederick H. Muskopf should be admonished for automatically setting bail in 52 cases in 1997 in an amount corresponding to, and used to secure payment of, subsequent fines and surcharges. In making its findings, the Commission noted that Muskopf did not set bail for defendants who pled not guilty by mail, failed to make the inquiry required under CPL 510.30, and was aware of a report in which the Commission had criticized the practice of automatically setting bail in traffic cases.

James H. Shaw, Jr., a justice of the Supreme Court, 2d Judicial District, was censured by the Commission on Nov. 8, 1999 for uninvited touching of a woman in a professional setting and continual remarks of a personal and sexual nature. Removal was found not to be warranted given that Shaw must retire at the end of 1999.

These and other determinations are available at the Commission's web site: www.scjc.state.ny.us. The site is one of many state and other legal resources that can be reached through "Research Links" at NYSDA's internet web site, www.nysda.org. ↵

Public Defense Backup Center *REPORT*

A PUBLICATION OF THE DEFENDER INSTITUTE

Volume XIV Number 10 December 1999

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

The *REPORT* is printed on recycled paper.

Book Review

New York Criminal and Civil Forfeiture

By Michael L. Kessler

Gould Publications

998 pages

by Stephanie J. Batcheller*

This volume could prove quite a useful handbook for anyone who has a brush with forfeiture issues in the course of representing clients, whatever the nature of the lawyer's practice.

Although eminently readable in hornbook style, the book is also conveniently structured by statutory chapters. After brief discussions of the historical and legal progression of forfeiture laws, author Kessler addresses at great length forfeiture laws and procedures under the Civil Procedure Law and Rules. He follows this section with several chapters that deal with forfeiture proceedings as applied under the Penal Law, Public Health Law, Administrative Code, Vehicle & Traffic Law, and Landlord-Tenant Law as related to narcotics evictions. Each of these chapters sets forth in detail the procedural practice and issues that must be addressed. Thus, this publication presents a handy step-by-step guide that winds through the various forfeiture proceedings. I would suggest applying some tabs to clearly designate the different sections of the book for future reference.

Following the approximately 400 pages of text are Appendices that include a plethora of forms to be used in all of the proceedings discussed, as well as relevant statutory sections and pivotal decisions relating to forfeiture issues. These make the book a ready practice and court companion, well beyond a simple monograph on forfeiture law.

As noted previously, the text is written in an immensely readable, even engaging style, containing anecdotal vignettes to illustrate issues that can arise in these cases. At times, some of former prosecutor Kessler's editorialized conclusions run counter to a defense oriented perspective. However, this does not in anyway detract from the usefulness of the book from a practitioner's standpoint. Indeed, to a certain extent, this perspective is useful in plotting out a comprehensive defense strategy that confronts the criminal and civil aspects of pending charges. While our instincts might wail at the moral double jeopardy and due process implications, rest assured that the political ramifications of seizing "ill gotten gain" are on the rise and, in this sense, an ounce of prevention is a pound of cure. To be sure, Kessler's

* **Stephanie J. Batcheller** is a Staff Attorney at the Backup Center. She has been a chief Public Defender in a rural south Georgia circuit, a private practitioner primarily accepting assigned cases, an assistant Federal Public Defender in Maryland, and an assistant Public Defender in Monroe County, New York, where she was assigned first to the misdemeanor and felony litigation units, then to the Appeals Bureau.

own apparent disdain for the blatant employment of legal hyperbole by the United States Supreme Court in ruling that there were no double jeopardy implications in forfeiture proceedings points up that forfeiture will undoubtedly mature into the 21st century means of avenging criminal conduct [see *Hudson v US*, 522 US 93 (1997)].

Check the NYSDA Web Site for Information on **Resources Sighted** (in other publications), **Cited** (in defense pleadings in New York or elsewhere), and **Sited** (on the Internet):
<http://www.nysda.org>

Although, to a certain extent, forfeiture matters are labeled quasi-criminal, they are civil proceedings governed by the CPLR and have no bearing on a contemporaneous criminal proceeding. Therefore, being aware of the many aspects of forfeiture should be a fairly critical defense concern because the ramifications of criminal dispositions can weigh heavily on the forfeiture proceedings at a later time. For example, pleas of guilty may have an impact on issue resolution at subsequent forfeiture proceedings through the application of those ancient rules of *collateral estoppel* or *res judicata*. [See *Himelein v Frank*, 141 Misc2d 416 (Cattaraugus Co 1988) (*in dicta*); consider reciprocal application of *Dillon v Bialostok*, 136 Misc2d 695 (Nassau Co 1987)].

Moreover, like immigration and deportation issues, the failure to advise a criminal client as to forfeiture ramifications will not be found by courts to have a bearing on the legality of pleas and other dispositions. In *Holtzman v Roman*, 141 AD2d 601 (1988), the 2nd Department held that the prosecutor was under no obligation to inform a defendant as part of a plea bargain that forfeiture proceedings may be subsequently instituted. *Roman* was later cited as authority in the 2nd Circuit that there was no general requirement that a defendant be informed by the court that forfeiture proceedings may arise in the future. [*US v Currency in the Amt.* \$228,536, 895 F2d 908 (1990)]

All of this means that criminal defense providers can no longer ignore issues relating to forfeiture. To protect our clients we must be particularly sensitive to the potential issues that may arise relating to forfeiture. This will allow us to assist our clients in making well-informed decisions and perhaps enhance our negotiating positions where forfeiture may come into play.

All criminal defense advocates would be well advised to have access to this book in order to ensure the proper protection of our client's property interests and livelihoods. This applies equally to retained and assigned cases; whether it is the family home, the scarce urban apartment, or the tiny nest egg, forfeitures based on alleged misconduct can have devastating consequences on a client's future that may far surpass any criminal sanction. ♪

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Interactive *Voir Dire*
Date: January 22, 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 Association of Criminal Defense Lawyers
Theme: Advanced Criminal Law Seminar
Dates: January 30-February 4, 2000
Place: Aspen, CO
Contact: NACDL: tel (202) 872-8600 x236; fax (202)872-8690; web site www.criminaljustice.org

Sponsor: California Attorneys for Criminal Justice and California Public Defenders Association
Theme: Life Over Death: The 2000 Capital Case Defense Seminar
Dates: February 18-21, 2000
Place: Monterey, CA
Contact: CACJ/CPDA Capital Case Defense Seminar: tel (323)933-9414; fax(323)933-9417

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Appellate Trainer
Date: February 26, 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: New York State Defenders Association
Theme: 14th Annual New York Metropolitan Trainer
Date: March 4, 2000
Place: New York City
Contact: NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site <http://www.nysda.org>

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

Sponsor: Chicago-Kent College of Law
Theme: 17th Annual Conference on Sec. 1983 Civil Rights Litigation
Dates: March 16-17, 2000
Place: Chicago, IL
Contact: Continuing Legal Education (312)906-5090

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

Sponsor: Brennan Center for Justice at NYU School of Law
Theme: Conversations on Poverty: Solo Practitioners as Public Interest Lawyers
Dates: March 30, 2000
Place: New York City
Contact: (212)998-6282

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: April 7, 2000
Place: Mineola, 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 Association of Sentencing Advocates
Theme: NASA Conference 2000
Dates: April 12-15, 2000
Place: San Diego, CA
Contact: NASA, c/o The Sentencing Project: tel (202)628-0871; fax (202)628-1091; e-mail staff@sentencingproject.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Annual Syracuse Trainer
Date: April 29, 2000
Place: Syracuse, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; web site <http://www.nysacdl.org>

Conferences & Seminars

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Cross to Kill
Date: May 20, 2000
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212)532-4668; e-mail nysacdl@aol.com; <http://www.nysacdl.org>

Sponsor: Trial Lawyer's College
Theme: Become A Winning Trial Lawyer for People
Dates: June 14-July 1, 2000; October 10-27, 2000
Place: Dubois, WY
Contact: Trial Lawyer's College, PO Box 548, Jackson WY 83001. tel (307)739-1870; web site <http://www.tlcwyo.com>

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

Job Opportunities

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

gion, PO Box 2113, Albany New York 12220. tel 518-473-9521; fax 518-473-9438

PRISONERS' LEGAL SERVICES OF NEW YORK (PLS), which provides civil legal services to incarcerated persons in state prisons, seeks **Staff Attorneys** for their Plattsburgh and Poughkeepsie offices. Staff attorneys handle a wide variety of individual and impact litigation. Previous legal service is preferred; recent law grads with an interest in public interest law are encouraged to apply. Types of cases include medical and mental health care, conditions of confinement, prison discipline, excessive force, and sentence correction. PLS seeks to be a well-balanced, diverse organization; Spanish-speaking staff are especially needed. EOE, minorities encouraged to apply. Benefits provided include free health insurance, substantial leave time and flexible leave policies. Send resume, writing sample and three references with phone numbers to: Cheryl Maxwell, Managing Attorney, Prisoners' Legal Services of New York, 121 Bridge St., Ste. 202, Plattsburgh, NY 12901 for the Plattsburgh position, and to Tom Terrizzi, Executive Director, Prisoners' Legal Services of New York, 118 Prospect St., Ste. 307, Ithaca, NY 14850 for the Poughkeepsie opening.

The CENTER FOR COMMUNITY ALTERNATIVES, INC. (CCA), a not-for-profit agency serving adults and juveniles involved with the criminal justice system, has the following positions in its New York City HIV/AIDS services programs:

Clinical Supervisor, Women's CHOICES (harm reduction, recovery readiness, and relapse prevention program). MSW with 3

years post-graduate work, prior supervisory and program administration experience required. CASAC and extensive experience could substitute for degree. Salary range \$35-40,000.

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

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

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

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

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

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

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

New York State Court of Appeals

Civil Practice (General)

CVP; 67.3(10)

Juveniles (Delinquency) (General)

JUV; 230(15) (55)

Sebastian v State of New York, No. 141, 10/21/99

The Appellate Division affirmed a Court of Claims rejection of the appellants' claim for damages from injuries inflicted by an escaped juvenile delinquent.

Holding: The placement of juveniles in public confinement, done at least in part for the protection of society (Family Court Act, L 1976, ch 878, sec. 2), is a quintessentially governmental activity. The state's acts and omissions with regard to a youth who escaped from a Division for Youth (DFY) facility "manifestly implicate functions 'undertaken for the protection and safety of the public' (*Balsam v Delma Eng'g Corp.*, 90 NY2d [966] at 968 . . .)." Precedents subjecting the state to ordinary tort liability for negligence in permitting the release or escape of mental patients from state hospitals (*see eg Schrempf v State of New York*, 66 NY2d 289) does not mandate similar liability for injuries inflicted by an escaped juvenile. Psychiatric services are traditionally supplied by the private sector, while placement of juvenile delinquents is a distinctly governmental activity with no private sector counterpart. Allowing ordinary tort liability for injuries resulting from the juvenile's escape might "deter prevailing rehabilitation-release goals in juvenile delinquency adjudications (*compare Williams v State of New York*, 308 NY [348], at 557. . .; *Excelsior Ins. Co. v State of New York*, 296 NY 40, 46). Liability, policy and fiscal fears and considerations might tilt the State's balanced objectives in the direction of stricter and longer modalities in juvenile adjudications, instead of mainstreaming rehabilitatable youths along to less secure DFY facilities—or officials may just act more tepidly or hesitantly towards that important goal. . ." Order affirmed.

Ethics (Judicial)

ETH; 150(10)

Misconduct (Judicial)

MIS; 250(10)

Matter of Assini, Jr., No. 147, 10/21/99

Holding: Petitioner Charles J. Assini, Jr., Justice of the East Greenbush Town Court, was the subject of a full evidentiary hearing before a Referee, after which the State Commission on Judicial Conduct determined that he should be removed from office. While performing official duties, although never from the bench, the petitioner repeatedly made inappropriate, obscene, and sexist remarks about a judicial colleague. He neglected more than 100 cases over an eight-month period because he was "piqued" about the suspension of his court clerk following an audit. Despite a May 1995 Letter of Dismissal and Caution from the commission concerning the petitioner's practice of giving the director of a private defensive drivers school unwarranted powers in the petitioner's court, the petitioner continued some of these practices at least until March, 1996. Thereafter, he continued to distribute pamphlets of that person's training program in traffic cases, advising only those defendants who specifically asked that any course approved by the Department of Motor Vehicles was acceptable if they were required to take a course. The petitioner represented his former clerk in a lawsuit against the town over her dismissal. When warned that this constituted a blatant conflict of interest, he arranged for an attorney with whom he shared office space to become attorney of record, while the petitioner continued to work on the matter. The petitioner's conduct was not the result of negligent oversight or unawareness of appropriate judicial norms, but of deliberate evasion and violation of his ethical responsibilities. Removal, which must be for "truly egregious" conduct (*Matter of Collazo*, 91 NY2d 251, 255), was appropriately imposed. Determined sanction accepted.

**Sentencing (Resentencing)
(Youthful Offenders)**

SEN; 345(70.5) (90)

People v Minott, No. 162, 10/21/99

Holding: After a manslaughter conviction, the defendant sought to be adjudicated a youthful offender (YO). The prosecution objected on the basis of alleged conduct in another county, where a robbery victim had identified the defendant, whose jacket was recovered at the scene. Defense counsel said that the defense position was that another person took the defendant's jacket and committed the robbery. Counsel said that the defendant "had a 'valid alibi under my standards, although it hasn't been tested yet. . .'" The defendant was then sentenced as a YO to five years probation. The court said that if the defendant were convicted of the other crimes, the court would consider that and resentence him accordingly. When the defendant pled guilty to third-degree attempted possession of a weapon in satisfaction of all charges in the other county, the court in this matter sought to treat the conviction as a violation of probation. Once the judge realized that that was not possible because the other case had been brought prior to sentencing in this case, the

court resentenced the defendant as an adult to three to nine years on the ground that the YO adjudication had been obtained by fraud. The Appellate Division affirmed. But counsel's qualified statements did not constitute fraud or misrepresentation. Equivocal, subjective language about a theory of defense cannot here be deemed misrepresentation sufficient to vacate the YO adjudication. Order reversed, original adjudication reinstated.

Forgery (Evidence) FOR; 175(15)**People v Asaro, No. 151, 10/26/99**

Holding: The defendant misrepresented his date of birth on a driver's license renewal application form. He was convicted by jury of second-degree forgery (Penal Law 170.10[2]), second-degree possession of a forged instrument (Penal Law 170.25), and first-degree offering a false instrument for filing (Penal Law 175.35). The proof is legally insufficient to support the forgery conviction, as the defendant signed his own name, gave his own social security number, and did not represent himself to be anyone else. He did not "falsely make" the application. *See People v Johnson*, 96 AD2d 1083 *aff'd for reasons stated below* 63 NY2d 888 *rearg den* 64 NY2d 647. Nor does the proof support possession of a forged instrument. The false information in the application did not affect its genuineness for purposes of Penal Law 170.10(2) and 170.25; the Department of Motor Vehicles was authorized to issue the license. *See People v Cannarozzo*, 62 AD2d 503, at 504-506 *aff'd for reasons stated below* 48 NY2d 687. Order modified, matter remitted for resentencing.

**Probation and Conditional Discharge PRO; 305(30)
(Revocation)****People v Douglas, No. 134, 11/18/99**

Holding: Three and a half years into a five-year probationary term imposed in Sept. 1987, the defendant violated his probation. He pled guilty to robbery in another county and was sentenced to prison in 1992. Meanwhile, in Nov. 1991, the court issued a declaration of delinquency as to the probation, and issued a warrant. Not until 1996 did the court hold a violation of probation hearing and impose a consecutive prison sentence, which the Appellate Division affirmed. The 1991 declaration of delinquency tolled the expiration of the defendant's probationary sentence (Penal Law 65.15[2]). The defendant failed to raise the issue of untimeliness under CPL 410.30 at the violation hearing, so that issue is unpreserved for review. Order affirmed.

**Homicide (Manslaughter HMC; 185(30[d]) (45)
(Evidence) (Negligent
Homicide)****Reckless Endangerment (Evidence) RED; 326(15)****People v Reagan, Jr., No. 181, 11/18/99**

The defendant and the general contracting company of which he is president were indicted for second-degree manslaughter, criminally negligent homicide, and second-degree reckless endangerment. A subcontractor was also indicted on the latter two charges. Excavation for a water and sewer line had uncovered a six-inch, pressurized water line that was not noted on any map, or marked on the pavement. After precautions were taken, work proceeded without incident until the trench wall collapsed, the pipe burst, and two workers were drowned. The trial court dismissed the manslaughter and reckless endangerment counts, upholding the other counts, and the Appellate Division affirmed.

Holding: The defendant consulted with the city plumbing inspector, who knew prevalent safety practices at city excavation sites, and in that inspector's presence instructed workers to resume excavating and to take certain precautions. The trench was moved several inches ("as far away from [the pipe] as conditions permitted"), and workers hand-dug every few feet so that the pipe was not disturbed. The proof does not suggest that the defendants "'consciously disregard[ed] a substantial and unjustifiable risk' of death or serious physical injury sufficient to sustain a charge" of recklessness under Penal Law 15.05(3). *See* Penal Law 125.15(1), 120.20; *People v Montanez*, 41 NY2d 53, 56. Rather, they took steps to avert the risk. The deaths were an unforeseeable consequence of the defendants' actions. *See People v Warner-Lambert*, 51 NY2d 295. Order affirmed.

**Search and Seizure SEA; 335(15)
(Automobiles and Other Vehicles)****Matter of Muhammad E, Nos. 160, 161, 11/30/99**

Two consolidated cases concern the legitimacy of New York City police stops of livery vehicles as part of a response to taxi robberies. The Appellate Division reversed the adjudication of Muhammad E. as a juvenile delinquent because the evidence against him was seized by members of the Taxi-Livery Task Force after stopping the cab in which he was riding. Appellant Boswell successfully sought suppression of the evidence against him after a similar stop, but that order was reversed by the Appellate Division.

Holding: While not all suspicionless patrol stops of vehicles are constitutionally banned (*see eg People v John BB.*, 56 NY2d 482), they must meet several tests. Here, there is no doubt that the governmental interest in protecting cab drivers "from a crime wave of violent robberies and homicides" is of great magnitude. *See Brown v Texas*, 443 US 47, 50 (1979).

NY Court of Appeals *continued*

City law enforcement officials are entitled to decide among reasonable alternative law enforcement measures to deal with the danger. *Michigan Dept. of State Police v Sitz*, 496 US 444, 450 (1990). But the state failed to provide any empirical evidence that the type of patrol stops used here, rather than the preferred fixed-checkpoint stops, were a reasonably effective means of furthering the governmental interest. These stops were excessively and unjustifiably intrusive. The “safety checks” described in Mohammad F.’s case routinely involved directing passengers to get out of the cab while it was searched. The nighttime stops by unmarked police cars would generate fright or concern on the part of lawful travelers. The only restraint on the officers was that they were given “verbal instructions to stop taxis ‘in a set basis and not just arbitrarily.’ ” There were no particularized guidelines with criteria for site selection, lighting and signs, avoidance of discrimination by stopping all or every certain number of vehicles, etc. that would have assured uniform procedures affording little discretion to the operating personnel. *People v Scott*, 63 NY2d 518, 522-523. Because the officers were not even required to make a written record of stops, reviewing courts have only “the self-verifying evidence from the officers whose conduct is being challenged.” Order in Muhammad F. affirmed, order in Boswell reversed.

Dissent: [Smith, J] While a written policy would be more susceptible to review, the unwritten policy to stop every third cab to inquire as to the safety of cab drivers was uniform and nondiscriminatory. Passengers and drivers have different interests—for the drivers, the stops were akin to requests for information as in *People v DeBour* (40 NY2d 210). The discovery of contraband was due to the defendants’ suspicious conduct, not the stops of the cabs. There was no showing that the defendants had reasonable expectations of privacy in the cabs. See *Rakas v Illinois*, 439 US 128 (1978). Standing is central to both cases, despite the majority’s reluctance to address it.

Statute of Limitations (Tolling of) SOL; 360(20)

People V Knobel, No. 167, 12/2/99

The defendant moved to dismiss a 1998 indictment for first-degree criminal mischief stemming from an alleged 1988 act. He asserted that the five-year statute of limitations had been violated. Criminal Procedure Law 30.10(2)(b). The prosecution relied on the defendant’s absence from the state to toll the statute of limitations. CPL 30.10(4)(a)(i). County Court dismissed the indictment. The Appellate Division reversed.

Holding: The Criminal Procedural Law does not define “continuously” or “continuously outside the state,” unlike the Civil Procedure Law and Rules, under which tolling requires a continuous absence of at least four months. CPLR

207. To be “continuous” within the meaning of CPL 30.10(4)(a)(i), an absence need not be one uninterrupted period of time. The focus of the tolling provision is “the difficulty of apprehending a defendant who is outside the State’ (*People v Seda*, 93 NY2d 307, 312).” All periods of a day or more that a nonresident defendant is outside New York should be totaled, and toll the statute. The defendant’s brief and sporadic trips to New York, after which he always returned to his Virginia home, totaled no more than 219 days in the state. He was continuously outside the state for sufficient periods to make the instant prosecution timely commenced. Order affirmed.

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

Guilty Pleas (Errors Waived by) (General) GYP; 181(15) (25)

People v Kemp, No. 180, 12/2/99

Holding: The Appellate Division affirmed the defendant’s plea-based conviction, declining to address the merits of his claims concerning a denied motion to suppress. Where a waiver of the right to appeal is included in a guilty plea, the better practice is to specify if the waiver includes appeal from the denial of a suppression motion. See *People v Williams*, 36 NY2d 829 *cert den* 423 US 873. However, no particular litany is required in order to encompass the suppression ruling. *People v Moissett*, 76 NY2d 909, 910. Here, the defendant’s plea came one day after the suppression hearing. His plea, and waiver of the right to appeal (which was manifestly intended to cover all aspects of the case), were knowingly, voluntarily and intelligently made, with the advice of counsel. Order affirmed.

Second Department

Audio/Video Materials (General) AVM; 52(10)

Sentencing (General) SEN; 345(37)

People v Utenyshev, No.96-04082, 2nd Dept, 8/2/99

Holding: After the defendant was convicted on a number of charges, the trial judge sentenced him to 1½ to 4½ years imprisonment. The sentence imposed for first-degree unlawful imprisonment and attempted first-degree sexual abuse was illegal. See Penal Law 70.00[2][e], [3][b]). It is clear that the Supreme Court intended to impose upon the defendant the maximum sentence for those offenses, which was appropriate. The sentence is reduced to indeterminate terms of 1½ to 4 years imprisonment. Had the issue of admission of a videotape to rebut an insanity defense been preserved, the tape’s admission would have been found error. See *People*

Second Department *continued*

v Ricco, 56 NY2d 320. However, the error would not have required reversal, as there is no reasonable possibility that the videotape affected the verdict. *See People v Rivera*, 57 NY2d 453. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

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

Prior Convictions (Evidence) **PRC; 295(25)**

People v Hardy, No. 96-05892, 2nd Dept, 8/2/99

Holding: As the prosecution correctly concedes, it was error for the trial court to admit evidence of the defendant's two previous convictions arising from the sale of cocaine in 1988 and 1989. Such evidence did not refute the defendant's claim that he had been framed by the police, but merely tended to show criminal propensity. *See People v Crandall*, 67 NY2d 111. The error was not harmless. Reversed and a new trial granted. (County Ct, Nassau Co [Calabrese, JJ])

Search and Seizure (Warrantless Searches) **SEA; 335(80)**

People v Bost, No.98-03908, 2nd Dept, 8/9/99

The defendant was implicated in an evening drive-by shooting. The next morning an officer learned where the defendant lived with another man allegedly connected with other unrelated homicides. The man was not known to be connected with the drive-by shooting. Without obtaining any type of warrant, the officer waited until 5 p.m. the following day, then went to the defendant's apartment to arrest him. The defendant was arrested in his backyard after answering the door and coming out as requested. The officer then entered the dark apartment with a flashlight, and allegedly found drugs in plain view. The trial court denied defendant's motion to suppress.

Holding: The record is devoid of exigent circumstances justifying the warrantless apartment search. The police had an opportunity to obtain a warrant. *See People v Burr*, 70 NY2d 354, 360 *cert den* 485 US 989. The police were not justified in entering the apartment pursuant to a "protective sweep" based on speculation that the defendant's roommate might be home and pose a threat to the officers' safety. *See Maryland v Buie*, 494 US 325, 334 (1990). The warrantless entry was not justified where there was no factual predicate from which the officer could reasonably infer that the apartment contained a third person. *See People v Henandez*, 218 AD2d 167. Reversed, suppression granted, matter remitted. (Supreme Ct, Queens Co [Lewis JJ])

Ethics (General) **ETH; 150(7)**

Misconduct (General) **MIS; 250(7)**

**Matter of Katcher & Laufer, No. 98-04230,
2nd Dept, 8/9/99**

Holding: Each respondent was charged with unlawful duplication of computer-related material, criminal possession of computer-related material, and third-degree grand larceny. Both pled guilty to an amended and reduced charge of fourth-degree computer tampering. A Special Referee then sustained a charge of professional misconduct against the attorney respondents, and the Grievance Committee moved to confirm. The respondents argued that the sanction imposed should be limited to a public censure.

Considering the respondents' unblemished records, the character letters submitted by them, their candor and expressed remorse, their acknowledgments of guilt, and the fact that the section of the Penal Law that they violated was relatively recently enacted (1986), the respondents are censured for their professional misconduct.

Civil Practice (General) **CVP; 67.3(10)**

Parole (General) (Officers) **PRL; 276(10) (25)**

**Best v State of New York, No. 98-06342,
2nd Dept, 8/9/99**

While under the supervision of the NYS Division of Parole, the claimant was twice incarcerated for allegedly violating his parole conditions. In both instances he obtained release by successfully petitioning the Supreme Court for a writ of habeas corpus. The claimant sought to recover damages from the State on the ground that the parole officers who applied for warrants authorizing the revocation of his parole "falsely incriminat[ed]" and "illegally imprison[ed]" him. The Court of Claims denied the State's motion for summary judgment.

Holding: The State enjoys immunity "for those governmental actions requiring expert judgment or the exercise of discretion" and this immunity is absolute "when the action involves the conscious exercise of discretion of a judicial or quasi-judicial nature . . ." *Arteaga v State of New York*, 72 NY2d 212, 216. A parole officer who recommends the issuance of a revocation warrant is performing an investigatory rather than a prosecutorial function, comparable to a police officer's application for an arrest warrant. The parole officers are entitled to qualified rather than absolute immunity. *See Scott v Almenas*, 143 F3d 105, 112-113. Since the State sought summary judgment upon absolute immunity the motions were properly denied. Order affirmed. (Court of Claims [Marin, JJ])

Second Department *continued*

Freedom of Information (General) FOI; 177(20)

**Matter of Pittari v Pirro, No. 98-09795,
2nd Dept, 8/16/99**

Counsel for a client against whom criminal charges were pending filed a request under the Freedom of Information Law (FOIL) for disclosure of documents relating to the client's arrest and prosecution. After the respondents failed to comply with the request, counsel brought an article 78 proceeding to compel disclosure. The Supreme Court dismissed the proceeding.

Holding: The petitioner had standing under FOIL (Public Officer's Law 87) to seek disclosure based upon his client's status as a member of the public, regardless of the client's status as a litigant. *See Matter of John P. v Whalen*, 54 NY2d 89,99. However, the records came within an exemption from FOIL for records compiled for law enforcement purposes which, if disclosed, would interfere with law enforcement investigations or judicial proceedings. FOIL and law enforcement was addressed in *Matter of Gould v NYC Police Dept.* (89 NY2d 267), which found that complaint follow-up reports and police activity logs were subject to disclosure. But the criminal proceedings against the petitioner in *Gould* had concluded by the time the FOIL request was made. Where the criminal action against the petitioner's client was pending, a generic determination can be made that disclosure of documents related to arrest and prosecution comes within the statutory exemption. Mandating FOIL disclosure here would interfere with the orderly process of disclosure set forth in CPL article 240. During the course of a criminal action, it is not within the authorized powers of the courts to compel disclosure, which is not provided for in CPL article 240. *See, Matter of Catterson v Jones*, 229 AD2d 435. Allowing a defendant to obtain via FOIL material not provided for in CPL article 240 would render many of its provisions meaningless. Affirmed. (Supreme Ct, Westchester Co [Angiolillo, J])

Admissions (Miranda Advice) ADM; 15(25)

**Sentencing (Concurrent/Consecutive) SEN; 345(10) (30)
(Determinate Sentencing)**

**People v Acevedo, No. 97-10603, 2nd Dept,
8/23/99**

The defendant was convicted of first- and third-degree criminal possession of a controlled substance, third-degree criminal sale of controlled substance, and third-degree criminal possession of a weapon.

Holding: The determinate sentences imposed for the weapon possession convictions were not "definite sentences" (see Penal Law 70.15) within the meaning of the

statute providing that service of an indeterminate or determinate sentence will satisfy a definite sentence imposed for an offense committed before the indeterminate or determinate sentence was imposed. Penal Law 70.35. The trial court had discretion to run the defendant's indeterminate sentences on his drug-related convictions consecutively to, rather than concurrently with, the determinate sentences for the weapon possession convictions. *See* Penal Law 70.04(1)(3), 70.25(1); *cf People v Leabo*, 84 NY2d 952.

The defendant's statement to police that he sometimes lived in the apartment from which drugs were recovered was pedigree information given in response to routine questioning, and the fact that it was obtained before the defendant was given his *Miranda* rights did not require its suppression. Judgment affirmed. (County Ct, Dutchess Co [Marlow, J])

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

**Lesser and Included Offenses LOF; 240(7) (10)
(General) (Instructions)**

**People v Reyes, Nos. 90-08429; 95-10142,
2nd Dept, 8/30/99**

Holding: The defendant sought to appeal from 1990 and 1995 judgments. He had been convicted on five counts of drug and weapons offenses following a jury trial. The appeal from the purported judgment of 1995 must be dismissed because it is nothing more than a proceeding to cause the 1990 judgment to be brought to execution. *See People v Crawford*, 239 AD2d 515. The conviction under count two of the indictment must be reversed and dismissed. *See People v Labay*, 208 AD2d 954, 955. That count charged the defendant with third-degree criminal possession of a controlled substance based on his possession of more than one-half ounce of cocaine. *See* Penal Law 220.16(12). It was an inclusory concurrent offense of count one charging him with first-degree possession of a controlled substance based on his possession of more than four ounces of cocaine (*see* Penal Law 220.21[1]) because both counts were based on the same substance.

The jury had been directed not to consider counts three and four; the court's instructions said: "[i]f you find the defendant guilty of Count 1, proceed to Count 5." Those counts are therefore reversed and dismissed in the interest of justice. Judgment modified, and as modified, affirmed. (Supreme Ct, Kings Co [Kramer, J])

Grand Jury (General) GRJ; 180(3)

**People v Hemmings, No. 98-08223, 2nd Dept,
8/30/99**

The defendant was arrested on charges that he had sexually abused and harassed a minor. At arraignment, assigned

Second Department *continued*

counsel informed the prosecutor of the defendant's intention to testify at the grand jury. Two months later the defendant was arrested on charges that he had sexually abused and harassed another minor. The attorney assigned to the second case informed the prosecutor that the defendant did not wish to testify at that grand jury. The prosecutor contacted the first attorney and notified him that both cases would be presented to the same grand jury and the defendant might be questioned on both charges. Counsel withdrew the defendant's notice of intent to testify. The Supreme Court granted the defendant's subsequent motion to dismiss the indictment.

Holding: It was not improper for the prosecution to present evidence relating to both sets of charges to a single grand jury. The defendant was not deprived of his right to testify before the grand jury by the prosecutor's decision to present joinable charges to the same panel. *See People v Edwards*, 240 AD2d 427. A prospective defendant who exercises the statutory right to testify before the grand jury usually waives the privilege against self-incrimination, and may be cross-examined about prior criminal or immoral acts affecting credibility. While an exception exists with regard to unrelated pending charges (*see People v Smith*, 87 NY2d 715, 718-719), it does not apply here. Order reversed, matter reinstated. (Supreme Ct, Kings Co [Firetog, JJ])

Freedom of Information (General) **FOI; 177(20)**

Johnson v Hynes, No. 98-04478, 2nd Dept, 9/20/99

The petitioner filed an unsuccessful article 78 proceeding to compel the production of certain documents pursuant to the Freedom of Information Law (FOIL). He was seeking disclosure of the statements of witnesses who did not testify at his trial, as well as the eyewitness's cooperation agreement.

Holding: Contrary to the petitioner's contention, the statements of nontestifying witnesses are confidential and not disclosable under FOIL. *See Public Officers Law 87(2)(e)(iii); Matter of Moore v Santucci*, 151 AD2d 677. Judgment affirmed. (Supreme Ct, Kings Co [Greenstein, JJ])

Search and Seizure (Motion to Suppress) **SEA; 335(45)**

People v Leon, No. 98-08739, 2nd Dept, 9/20/99

Holding: The arresting officer said that he observed a metal plate over the trunk lock of a vehicle driven by the defendant, which led the officer to believe that the vehicle might be stolen. The license plate number was assigned to a 1990 vehicle and the car looked "much newer." This provided reasonable suspicion of criminal activity. *See People v Sobotker*, 43 NY2d 559, 563-654. When the defendant was

pulled over, the officer noticed there was no identification number. This provided probable cause to arrest the defendant. *See People v Safoschnik*, 238 AD2d 448. The defendant's spontaneous statements were therefore not fruits of an illegal arrest. Nor were they the products of police interrogation. *See People v Rivers*, 56 NY2d 476, 479.

The court improperly granted the defendant's motion to suppress. It was improper for the court to hold a hearing pursuant to *Mapp v Ohio* (367 US 643 [1961]) after another justice of coordinate jurisdiction had denied a defense request for such a hearing. *See People v Guin*, 243 AD2d 649. Order reversed. (Supreme Ct, Queens Co [Browne, JJ])

Juveniles (Delinquency) **JUV; 230(15) (20)** (Delinquency—Procedural Law);

Matter of Jessica N., No. 99-01493, 2nd Dept, 9/20/99

Holding: Family Court found the appellant had violated the conditions of a term of probation and placed her in the custody of the Office of Children and Family Services for a year. The presentment agency's petition alleged, upon information and belief, that the appellant had been discharged from "Project Outreach," and was therefore in violation of a condition of probation. The petition failed to meet the sufficiency requirements of Family Court Act 360.2; it failed to provide a reasonable description of the time, place, and manner of the violation and was not supported by non-hearsay allegations. *See Matter of Steven DD.*, 243 AD2d 890. Amended order of disposition vacated and violation petition dismissed. (Family Ct, Suffolk Co [Freundlich, JJ])

Prisons (Disciplinary Proceedings) **PRS I; 300(13)**

Matter of Milland v Goord, No. 98-02637, 2nd Dept, 9/27/99

Holding: After a hearing, the petitioner was found guilty of having violated a prison disciplinary rule prohibiting inmates from leading, organizing, or participating in work stoppages. He sought review in an article 78 petition. Prison disciplinary determinations may be predicated solely upon hearsay evidence where such evidence is sufficiently reliable. But " 'a Hearing Officer in a prison disciplinary proceeding may not rely on information provided by confidential informants unless the Hearing Officer first makes an independent assessment of the informant's reliability.' " *Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 119. The *in camera* testimony of the correction officer who interviewed the confidential informants was not sufficiently detailed and specific to allow the Hearing Officer here to independently assess the informants' credibility and reliability. Petition granted. ⚖

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