NEW YORK STATE DEFENDERS ASSOCIATION

Public Defense Backup Center

REPORT

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Defender News

Juror Rap Sheets Rapped

A prosecutorial practice in Nassau County of running criminal background checks on potential jurors has met strong criticism from 2nd Department Appellate Division Justice Gloria Goldstein. In a September concurring opinion joined by Justice Daniel F. Luciano, Goldstein said that, "although apparently legal," the practice "warrants further regulation, either by legislation or court rule." *People v Burris*, 713 NYS2d 552.

The opinion did not discuss whether the "background checks" at issue involved a search of official New York State Department of Criminal Justice Services (DCJS) records, use of which is regulated by statute. In press coverage of the practice, the Nassau County prosecutor's office claimed that no such "rap sheets" were used to check up on jurors, but only in-house prosecution files. The prosecutor in neighboring Suffolk County declined to comment, but the press account indicated that former Suffolk prosecutors said that they had run checks on jurors in some major cases. (*Newsday*, 12/13/00.)

The Backup Center has in the past received inquiry about the legality of prosecutors using rap sheets of potential jurors or their relatives during *voir dire*. Despite Justice Goldstein's conclusion that the practice is "apparently legal," that has not been specifically decided.

One argument against the practice is its invasion of juror privacy. The importance of juror privacy has been addressed in other contexts. For example, the Court of Appeals has held that the news media is not entitled use the Freedom of Information Law to obtain criminal histories—or even the names and addresses—of jurors or their families. *See Newsday, Inc. v Sise*, 71 NY2d 146.

Of perhaps even greater importance to the defense bar is the unfairness of allowing the prosecutor to *voir dire* jurors based on information unavailable to the defense. Recently, the 2nd Department upheld a trial court's refusal to accede to a defendant's request in a capital murder case to direct the Office of Court Administration and the local Commissioner of Jurors to disclose to defense counsel "all juror qualification questionnaires and a record of persons who are found not qualified or disqualified or who are exempted or excused, and the reasons therefor, for Queens County, from 1986 to the present . . ." *Matter of Taylor v People*, No. 2000-09638 (2nd Dept, 11/13/00). There was no discussion of balancing the defendant's need for a constitutionally composed jury with the law holding inviolate the confidentiality of jury information.

Nor have defendants fared well in challenging their convictions when juror ineligibility has been discovered post trial. *See eg People v Childs*, 56 Misc2d 581 (Seneca County Court, 1968) [juror failed to reveal the murder convictions of his uncles, defendant's conviction upheld]. It appears that while some prosecutors are checking the criminal records of jurors whom they would prefer not sit on a given jury, the defense is unable to do so.

Any defense attorney with information on this practice—and any challenges to it—in their jurisdiction are asked to provide that information to the legal staff at the Backup Center.

DATE: March 24, 2001

EVENT: NYSDA's 15th Annual Metropolitan New York Trainer

WHERE: NYU Law School

Watch for the brochure—in the mail and in the 'Training' area of www.nysda.org

New CJI on Reasonable Doubt, Other Fundamentals, Approved

A new pattern criminal jury instruction has been approved by the

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Office of Court Administration's Committee on Criminal Jury Instructions on the fundamental principles of the presumption of innocence, burden of proof and reasonable doubt. One new charge replaces three former separate charges on these legal concepts.

Last fall, the Committee published a proposed charge and solicited comments and suggestions to aid in developing a more clear, concise and jury friendly definition of these core terms. NYSDA and other components of the criminal justice community submitted comments, and the end product was introduced on Dec. 11, 2000.

Compared to the former CJI charges and the initial draft proposal, the new charge is much shorter and simpler. It does not attempt to define a reasonable doubt in the negative (*i.e.* "a reasonable doubt is not . . ."). It uses regular English rather than the legal jargon of the past that picked up on phrases adopted by jurists for jurists. Reports from other defenders around the state indicate an overall favorable opinion of the new charge.

The new instruction is available on the Internet on the Unified Court System site. A link to that site is available on the Association's web site—go to the NYSDA Resources page, click on Research Links, then on Legal Research, and scroll down to New York Law, Pattern Jury Instructions: www.nysda.org/NYSDA_Resources/Research_Links/research_links.html. For those without Internet access, a copy of the new charge is available from the Backup Center.

Issues Emerge Around DNA and Innocence

The use of DNA testing to address concerns about the conviction of innocents remains a hot topic. On the anniversary of New York's expanded DNA data-banking law, Governor George Pataki observed, while extolling the act's power as a law enforcement tool that, "Our quest for justice also extends to those who have been falsely accused." (*New York Post*, 12/10/00.) The Governor did not discuss the issue of paying for the expensive tests when a defendant seeks to use DNA to prove innocence, an issue that is now arising in New York state as discussed below.

Meanwhile, in a rare public statement, US Supreme Court Justice Stephen Breyer has asked the scientific community to help educate judges on issues related to genetic research, including "storing genetic information on databases to convict criminals and *free the innocent*." (emphasis added) (*USA Today*, 11/24/00.) But while DNA can "free the innocent," there has yet to be invented a science that can undo the trauma and stigma of an unjust conviction. And legal exoneration cannot prevent speculation that the wrongly accused defendant is still guilty.

Prosecutors May Reject or Embrace Innocence Investigations

In some instances, continuing speculation about guilt is fed by the prosecution. Upon dismissing the case of a Staten Island man convicted of sodomy, imprisoned for two years, and exonerated by DNA testing, District Attorney William L. Murphy was quoted as saying, "we are not convinced he is innocent, but we're not convinced of our ability to convict him and sustain our burden of proof." Such continued prosecutorial focus on an individual leaves the former defendant marked and largely powerless to challenge continuing suspicion. In the Staten Island case, a dubious police sketch and jailhouse admissions to "two confidential witnesses" cited by the prosecutor should not be considered a convincing rejoinder to irrefutable DNA results excluding the defendant as the attacker. Lori Shellenberger of The Legal Aid Society of New York, who handled the Staten Island appeal, reacted to the prosecutor's remarks by saying "This is frightening . . . They should be looking to find out who really did this rather than sully my client's reputation. They are more concerned with winning than justice." The linchpin in this case was a rape kit that sat untouched in a police evidence locker for three years until the appeal. Today, the policy in the prosecutor's office is to conduct DNA tests on all rape kits. (*Staten Island Advance*, 12/14/00.)

Outside Staten Island, prosecutors are taking the lead in responding to the needs of the "wrongfully convicted." This month, the Suffolk County District Attorney's office announced a plan to "review the cases of prisoners who might be cleared by DNA evidence, speeding up a state effort to use new technology to investigate criminal convictions that have been called into question." The first in New York State to offer such a program, Suffolk County

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will pay for the DNA tests. According to District Attorney James M. Catterson, his program "was intended to accelerate the process of clearing prisoners who were wrongly convicted." He went on to add, "There are so many defendants sitting in jail that have been claiming innocence and who do not take advantage of it one way or other and I could sit back and wait for them to make their motions, but here's a process where once and for all we can clear up the backlog." (*New York Times*, 12/20/00.)

A prosecutor's office across the continent was the first to initiate a policy of free DNA testing for inmates. "We decided we were not to wait for them to come around to us," stated San Diego County Deputy District Attorney George Clarke. "We decided we were going to take a proactive approach." Although DNA testing is expensive, the prosecutors in Southern California reportedly said "cost would not be a factor because of the importance of the effort to clear those wrongfully convicted." (*New York Times*, 7/28/00.)

In Travis County, Texas, the prosecutor's office started a similar review. It began after Carlos Lavernia, a man in prison for 16 years, was released based on DNA evidence. "This is a great tragedy for Mr. Lavernia, but also for this community," according to Ronnie Earle, the district attorney involved in the case. He went on to add, "Austin has always prided itself on its values, and there is no higher value than justice." Barry C. Scheck, co-director of the Innocence Project at the Benjamin N. Cardozo School of Law, responded, "This shows that there are prosecutors who are willing to seek the truth and correct injustices, no matter how embarrassing it might be." (*New York Times*, 10/20/00.

Funding Denied in Albany Case

New York is among a handful of states that authorizes post-conviction DNA testing. However, access to DNA analysis in New York remains a right without a remedy in cases when neither the court nor the prosecutor is willing to pay for the tests.

Supreme Court Justice Joseph Teresi ruled that the Albany County District Attorney's office is not required to pay for DNA testing at a prisoner's request. Michael Strong, who is serving a 50-years-to-life sentence for rape and robbery, successfully petitioned for a new Y-chromosome test, which he expects will prove his innocence. Originally, Justice Teresi ordered the prosecutor to pay for it. Upon reconsideration, the judge stated that the order "creates an appearance that the prosecutor is supporting the defendant's case financially." He further added, "I do not believe that appearance is appropriate or in the best interests of justice." Strong's attorney, Kathryn Kase, has said that her client cannot afford the test. She was quoted as saying about funding of the test that the prosecution's job "is not to obtain convictions, it's to ensure that justice is done." (Albany *Times Union*, 12/9/00.)

Prosecutors Find Funding

Outside the issue of DNA testing, prosecutors are busy securing funds for the coming year. Albany County's budget for 2001 is taking shape around a transition to full-time prosecutors. "The move to full-time positions, with two exceptions, will cost the county nearly $221,000" according to District Attorney-elect Paul Clyne. The pay scheme for district attorneys will mean raises from a "high of $23,050 to a low of $260." A new hire to prosecute gun-related offenses will be paid a salary of $50,000. Lastly, $30,000 in additional funding has been requested for a new case-tracking system. (Albany *Times Union*, 11/30/00.)

A grant from the US Department of Justice's Community Prosecution Program means an additional $200,000 for the Staten Island District Attorney's office. The program is aimed at "quality-of-life" offenses on the South Shore. Two assistant prosecutors will be hired under this grant to "investigate incidents, complaints and arrests; direct and review the processing of search warrants; track criminal activity; monitor troublemakers; participate in neighborhood and school associations, and work with residents to address issues of concern and mediate disputes." (*Daily News*, 12/12/00.)

In an unprecedented move, Chenango County initially rejected a $50,000 grant from the Division of Criminal Justice Services that might have contributed to raising salaries in the District Attorney's office. The grant approval arrived after the 2001 compensation schedule had already been set. In addition, an increase in prosecutor's salaries requires a public hearing. According to District Attorney Joseph A. McBride, the grant ultimately will be accepted to pay for non-salary items such as laptop computers, stenography and transcript work, drug purchases, and sound proofing new offices. (*Press & Sun-Bulletin*, 12/12/00.)

Lawyers React to Low Assigned Counsel Rates

18-b Counsel to Turn Down Assignments Because of Low Rates

While prosecutors appear flush, assigned counsel rates remain at bankruptcy levels. The need for a fee increase has been widely recognized for some time. Last year, for example, a New York City Family Court Judge criticized a city agency's refusal to bear the costs of photocopying a case file for assigned counsel. The judge said: "Requiring respondent's counsel to underwrite this expense places an undue burden on an 18-b attorney who receives only $40 an hour for court appearances and $25 an hour for out-of-court representation, and is, to a great extent, *volunteering his legal services*." (emphasis added).

In Matter of Linden H., *New York Law Journal*, 9/18/99, at p. 25 (NYC Fam. Ct.). Low rates for assigned cases have resulted in shrinking Family Court panels in Nassau, Suffolk and Westchester Counties. (*New York Law Journal*, 7/24/00; *Newsday*, 9/27/00.) Earlier this year, the Office of Court Administration issued a report, *Assigned Counsel Compensation in New York: A Growing Crisis*, which began, "The reason for this crisis is clear — the compensation paid to attorneys for assigned counsel work is now woefully inadequate."

Before the end of the year, some Brooklyn, Manhattan and possibly Bronx Family Court attorneys indicated that they anticipated refusing assignments of cases in 2001. Undervalued and under-appreciated, these lawyers hope the Legislature and the Governor will recognize the impossibility of effectively representing indigent clients at 1986 bargain-basement prices. Gary Schultz, spokesman for an *ad hoc* group of Family Court panel attorneys in Manhattan and Brooklyn, said, "The system is bleeding to death." He added, "The only thing that might get their attention is if the system comes to a grinding halt." The group hopes to show that private attorneys cannot afford to operate law practices and subsidize the public defense budget of the state at the same time.

City Family Courts Unstaffed

Several New York City Family Court Intake Parts that were expecting a low number of attorneys from the assigned counsel panel to be present the day after New Years were instead without any 18-b lawyers. The Supervising Judge of Bronx Family Court, Clark V. Richardson, said that having no assigned counsel lawyers show up is not unusual. However, Brooklyn Family Court Judge Philip C. Segal, said that the situation there is worse than usual. (*New York Law Journal* [online], 1/3/01.)

Evan Davis, President of the Association of the Bar of the City of New York, had observed a month earlier that "New York top lawyers make $500 an hour and more, while assigned counsel still gets $25 and $40 an hour." He described the situation by saying: "The visitor from Mars would say the right to counsel has become a cruel joke. It's illusory when you pay those rates." Mina MacFarlane, President of the Bronx Family Court Panel, summed up the situation of assigned counsel as follows, "When you see the people who come in, we're the first line of defense. We all know this is a problem. But if the State of New York says we're this important, they should be giving us a bit more." (*New York Times*, 12/9/00; *New York Law Journal*, 12/8/00 and 12/18/00.)

French Defenders Strike

Across the Atlantic, a second national strike by assigned lawyers has occurred in a country that pays its public advocates the equivalent of $75 per hour. According to a recent article, some 700,000 people used state-funded legal aid services in France last year, with attorneys assigned to represent them barely earning the equivalent of the legal minimum wage. (*Agence France-Presse*, 12/12/00.) Sentiment to change this situation has been so strong that it galvanized a nation of lawyers. "In an unprecedented strike that drew thousands of attorneys from all of the nation's 181 local bar associations, black-robed lawyers protesting in Paris and other major French cities, threatened to continue striking if demands for higher pay went unmet." (Associated Press, 12/12/00.) Even in defeat, our French counterparts will earn a modest due that is being denied to New York assigned counsel.

Chief Defender Convening

Twenty public defense office heads from around the state gathered in Albany on Dec. 15, 2000. In the morning, they heard updates on a variety of efforts to improve New York State's public defense. Guests Kathryn Kase, President of the New York State Association of Criminal Defense Lawyers (NYSACDL), and Lenore Banks, League of Women Voters of New York State Vice President, Public Education, described the efforts of their respective groups. Public hearings in the client community, litigation on assigned counsel fees, and other measures were discussed.

Chiefs who had attended a recent Washington DC meeting of the American Council of Chief Defenders (ACCD) presented ACCD's draft of Ten Tenets of Fair and Effective Problem Solving Courts. The tenets were referred to a committee of the Chief Defenders working on specialty court issues. The ACCD is a section of the National Legal Aid and Defender Association.

The chiefs also agreed to participate in a Standards for Provision of Public Defense Project. With a new national compendium of public defense standards about to be released under a federal Justice Department grant, the time is ripe for preparation of standards specific to New York State that draw from best practices around the country.

Gradess Provides Senate Task Force Testimony

The New York State Senate Democratic Task Force on Criminal Justice Reform held public hearings in December on Special Housing Units, the Rockefeller Drug Laws, and Transitional Services for Inmates. Jonathan E. Gradess, Executive Director of the Association, appeared at the Albany hearing and submitted written testimony setting out recommendations. Among those recommendations were: abolish long-term solitary confinement in special housing units (SHUs), increase programming for those prisoners in SHUs, and increase oversight of SHUs to improve the current conditions; repeal mandatory sentencing drug (and other) laws and pass sentencing laws

that require individualized sentencing, imposition of the least-restrictive sentence necessary to protect the public, and objective standards for sentencing; and spend state money on programs to prevent reincarceration, including work release for serious offenders, expungement of criminal records, and reduction of collateral consequences of criminal convictions, which interfere with the resumption of a normal life after incarceration.

Task Force members are Senators Thomas K. Duane, Co-Chair, Velmanette Montgomery, Co-Chair, Suzi Oppenheimer, and Toby Ann Stavisky. A copy of NYSDA's testimony is available from the Backup Center.

Local Judge Benched

The relationship between judges and attorneys in local court runs the gamut from unpretentious familiarity to outright rancor. At all points along this spectrum, judges must act within the bounds of "judicial temperament." Justice Robert M. Corning of the Ovid Town Court in Seneca County has been found to have stepped outside those bounds. Among the charges of misconduct filed against him were several concerning his abuse of attorneys appearing before him. The most notable incident is described this way in a recent Court of Appeals decision upholding the State Commission on Judicial Conduct determination ordering Justice Corning removed:

> [The petitioner, Justice Corning] improperly requested [a defense attorney] to pay $50 to secure a jury trial in a criminal case. Seven years later, the attorney was representing a different criminal defendant in a matter assigned to petitioner. The attorney requested that petitioner recuse himself. In open court, petitioner became aggressive toward him, refused to recuse himself, questioned him about the complaint he had lodged before the Commission and stated in a loud voice, 'You should have paid the $50 [in the 1989 case],' followed by profanity."

In Re: Robert M. Corning, Sr., No. 156 (12/14/00). A digest of the opinion will appear in a future issue of the *REPORT.*

Plea Reversed for Judicial Bias

In another example of a judge drawing too deeply from his well of experience, leading to bias, actions of the late Judge Rothwax led to a recent 1st Department opinion vacating a defendant's guilty plea. The judge's comparison of a defendant's assault charge to an incident involving his own daughter, coupled with threats of maximum punishment if the defendant was convicted at trial, was found "impermissibly coercive." *People v Remer-Smith*, No. 1405 (1st Dept 11/28/00). (*New York Law Journal*, 11/29/00.)

Defense Ethics and Liabilities Explored

The idea of a "fine line" was probably invented around the same time as the first professional code of ethics. Public defense attorneys must constantly balance the need to zealously advocate for clients with their obligations as "officers of the court." Federal and state courts have been responding to situations that raise these issues in the context of civil rights, legal malpractice, and post-conviction proceedings, while the ABA has been taking a second look at the Model Rules.

Orange County Legal Aid not a "State Actor"

Independence from government influence and retaining a separate identity from county and state government are keystones of public defense offices. This independence was underscored in an age discrimination lawsuit filed by a former investigator against a legal aid office. The case was dismissed upon summary judgment in federal district court. On appeal, the Court of Appeals for the 2nd Circuit considered the relationship of the office to the government. The court held that the Legal Aid Society of Orange County was not a "state actor" for purposes of federal civil rights law. *Schnabel v Legal Aid Society of Orange County*, No. 99-9385 (2nd Cir. 11/28/00). The court noted that the lack of governmental control over or interference with the affairs of legal aid societies, notwithstanding the societies' receipt of substantial government funds, removed them from the category of state action. (*New York Law Journal*, 11/13/00.)

Malpractice Action Accrued Upon Indictment Dismissal

In another matter involving legal aid liability, the Court of Appeals recently clarified the boundaries of statutes of limitations in criminal malpractice actions. The plaintiff in *Britt v Legal Aid Society* (No. 125, 11/30/00), had been a criminal defendant. He claimed that his legal aid attorney was ineffective and coerced him into pleading guilty. Ultimately, the plea was vacated and the indictment dismissed. Britt later filed a legal malpractice action in which the time frame for filing the action became critical. The Court of Appeals distinguished criminal from civil malpractice actions: "The policy reasons underlying the unique nature of legal malpractice claims arising out of criminal proceedings dictate that the cause of action accrues for Statute of Limitations purposes when the criminal proceeding is terminated, i.e., on the date when the indictment against the plaintiff is dismissed." The court affirmed a decision that the case was timely brought. (*New York Law Journal*, 12/1/00.) A digest of the opinion appears on p. 17.

Hearing Required Where Prosecutor Targeted both Lawyer and Client

After being convicted of various firearms offenses, Anthony Armienti filed a federal *habeas corpus* motion claiming that his 6th Amendment right to "conflict-free" counsel had been violated. His lawyer had been being criminally investigated by the same US Attorney's office that was prosecuting Armienti. Armienti alleged deficiencies in his lawyer's performance including failure to conduct a thorough investigation, lack of vigor in trying the case, and devoting resources to the lawyer's own case. The 2nd Circuit found that a sufficient showing had been made to require an evidentiary hearing to determine if an "actual conflict" existed and, if so, whether the conflict adversely affected the lawyer's performance. The court pointed out that a lawyer dealing on behalf of his client with the same office that is prosecuting the lawyer personally could, consciously or otherwise, seek the goodwill of the prosecutor for personal benefit. *Armienti v United States*, No. 99-2102 (2nd Cir. 12/12/00). (*New York Law Journal*, 12/15/00.)

Office-Sharing Former Partners Conflicted Out of Co-defendants' Cases

The economy of practicing law can also create situations leading to conflict of interest problems. Two former law partners who continued to share offices and retained access to each others' case files posed a hazard to criminal co-defendants represented by each lawyer. According to Judge Calabrese of the Nassau County Court, there existed a "non-partnership relationship." Therefore, the attorneys' failure to erect a "Chinese wall" separating their practices and insulating their respective clients created a conflict. (*New York Law Journal*, 12/14/00.)

Conflict for Attorney to Argue Own Conduct in Client's Case

A lawyer's defense of the lawyer's conduct in a client's case may also present an unacceptable risk of prejudice to the client, as illustrated in a recent federal case. As a second felony offender charged with robbery, Elias Guzman faced the possibility of 25 years in prison if convicted after trial. From the beginning of proceedings, he questioned the quality of his defense counsel's representation. Guzman unsuccessfully asked each judge before whom he appeared to assign new counsel. A plea arrangement was worked out despite admitted problems by defense counsel in communicating with his client and other factors possibly affecting Guzman's ability to make decisions (he was in considerable pain from carpel tunnel syndrome and on medication). After a lengthy and disjointed allocution, the plea was accepted. Before sentencing, Guzman moved *pro se* to withdraw his plea, asserting that his plea was coerced and counsel's performance unacceptable. The court asked defense counsel to describe any other communications that arguably supported the claim of coercion; the lawyer thus argued the issue of his own ineffectiveness, and the motion was denied. The matter was finally resolved in a *habeas corpus* proceeding in the Southern District of New York.

The court found that "A conflict of interest may exist when an attorney is asked to speak on the record with regard to a motion brought by his client that implicates the attorney's own conduct." When the lawyer began to answer questions on the coercion issue that dealt with his interaction with Guzman leading up to the guilty plea, the attorney stopped acting as an advocate for the client. The appropriate course for the trial judge was to appoint new counsel to represent Guzman on his motion to withdraw his plea. The case has been remanded to state court for that purpose. *Guzman v Sabourin*, NYLJ, 12/8/00, at 34 (SDNY). (*New York Law Journal*, 12/7/00.)

NJ Lawyer Misled Court in Plea Negotiations

A New Jersey lawyer had represented a client who pled guilty, without allocution and without the presence of a prosecutor, to reckless driving and associated charges before a municipal court. In response to the judge's question about whether there were injuries or property damage, the attorney answered "injuries." The defendant received a fine. Unknown to the judge and the local prosecutor was the fact that two people died in the accident and the defendant was facing indictment for manslaughter. The court did not review the defendant's previous convictions for reckless driving, DWI, and leaving the scene of an accident. Another prosecutor successfully moved to vacate the pleas, which shielded the defendant from more serious charges, "to correct a manifest injustice."

The defendant then faced an indictment and his attorney faced charges of ethical misconduct for failing to

Nominations Sought for Harrison Tweed Award

The National Legal Aid and Defender Association and the ABA Standing Committee on Legal Aid and Indigent Defendants seek nominations for a prestigious award recognizing extraordinary achievements of local and state bar associations for developing or significantly expanding projects or programs to increase the access of poor people to civil legal services and criminal defense services. The New York State Bar Association was among past recipients (1996). Nominations must be postmarked by March 3, 2001. The nomination form can be downloaded from the Internet: www.abanet.org/legalservices/sclaidawd-nom.html, or contact the Backup Center.

Prison Families of New York: Resources Available

Prison Families of New York, Inc. 40 North Main Avenue Albany, NY 12203 (518) 453-6659 Email: pfny@nycap.rr.com	The Osborne Association (New York City) FamilyWorks Hotline: 1-800-344-3314 For Prison Families

*Prison Families of New York, Inc. provides STATEWIDE Support*Information*Advocacy*Referrals*

reveal necessary information to the court to prevent fraud or misrepresentation. The ethics committee hearing revealed that the defense attorney had known of the double jeopardy implications but believed that he had an absolute duty to represent his client fully within the letter of the law and no obligation to disclose the strategy to plead guilty in municipal court unless asked. An ethics expert, Michael Ambrosio from Seton Hall University School of Law, opined that "The judge possibly unfairly relied on defense counsel for information at his disposal." He noted that "defense counsel have to be circumspect about acting as officials of the government." More hearings on the matter were scheduled. (*New Jersey Law Journal*, 12/14/00.)

This case comes a decade after the US Supreme Court in *Grady v Corbin*, 495 US 508 (1990), a double jeopardy case arising in a similar situation. A footnote in *Corbin* merely noted the ethical issue. The New York Court of Appeals had held in *Corbin* that, while an attorney may not misrepresent facts, "'a practitioner representing a client at a traffic violation prosecution should not be expected to volunteer information that is likely to be highly damaging to his client's position'" 495 US at 513, n 4, citing *Corbin v Hillery*, 74 NY2d 279, 288, and n 6. Based on the state court's refusal to characterize as misconduct the behavior of either the defendant or his attorney, the high court did not decide whether its double jeopardy analysis would have been different if affirmative misrepresentations of fact by the defendant or counsel had misled the court into accepting a guilty plea. (The federal double jeopardy holding of *Corbin* was overruled in *US v Dixon*, 509 US 688 [1993]).

The issue of whether a defendant has wrongfully "procured" a plea to a lesser offense, thereby vitiating statutory protection against a successive prosecution, continues to arise in New York under article 40 of the Criminal Procedure Law. *See eg People v Antonelli*, 250 AD2d 999 (3rd Dept); *Northrup v Relin*, 197 AD2d 228 (4th Dept); *People v Claud*, 181 AD2d 830 (2nd Dept). Defense attorneys must carefully analyze such situations to best advocate for their clients within ethical bounds.

ABA Ethics 2000 Report Issued

The American Bar Association Commission on Evaluation of the Rules of Professional Conduct has been working for three years to study and modernize the ABA Model Rules of Professional Conduct. Inconsistencies and gaps in the rules approach to various issues are being addressed. In November, the Commission issued a report summarizing their recommended changes to date. They considered such topics as informed consent, scope of representation, assisting client crime or fraud, communication with client, confidentiality, and conflict of interest.

A complete copy of the report is available on the web: http://www.abanet.org/cpr/ethics2k.html. Printed copies are available at cost ($40). To order, call the ABA Service Center at 800-285-2221 and ask for PC #5610159.

Governor Vetoes Battered Women's Release Program

Governor Pataki has vetoed a proposed law that would have allowed battered women serving prison sentences to participate in temporary release programs. The bill authorized "the commissioner of correctional services to designate inmates convicted of assault or homicide as eligible for the temporary release program, if such crime was committed as the result of substantial physical, sexual or psychological abuse by the victim of the crime." Bill Summary S03941 (A01560).

According to a press account, the Governor "said he had expressed a willingness to sign the bill if the Assembly would add a provision requiring the district attorney who prosecuted the inmate to have input on the decision whether to let the prisoner into work release." Robert Gangi, Executive Director of the Correctional Association of New York, opposed the provision, fearing that "some prosecutors would oppose work release so they could look tough on crime for constituents and not because of the merits of the inmates' case." (Albany *Times Union*, 12/12/00.)

NYSDA Provides Recent CLE Training

Syracuse Trainer Co-sponsored

The Association co-sponsored a criminal defense update with the Onondaga Assigned Counsel Program, Inc. on Saturday, Dec. 2, 2000 at Syracuse University. Dr. William Shields, College of Environmental Science and Forestry in Syracuse, teamed up with James C. Hopkins, a private practitioner who has litigated or assisted in numerous criminal or civil DNA cases, to present a

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Book Reviews

Who Owns Death? Capital Punishment, the American Conscience, and the End of Executions

By Robert Jay Lifton and Greg Mitchell
Morrow (2000)
270 pages; $25.00

by Barbara DeMille*

> *Capital punishment is the mirage that distracts society from more fruitful, less facile answers. It exacts a terrible price in dollars, lives, and human decency. Rather than tamping down the flames of violence, it fuels them while draining millions of dollars from more promising efforts to restore safety to our lives*
>
> —Robert Morgenthau,
> District Attorney for Manhattan

Who Owns Death? joins the current list of books deploring capital punishment. However, in contrast to William McFeely's *Proximity to Death*, David Cole's *No Equal Justice*, and Scott Christianson's *Condemned: Inside the Sing Sing Death House*, Lifton and Mitchell's aim is not primarily to present the immediacy of the death penalty in its human terms: the despair of those condemned, the untiring struggles of those elected to defend them, or even, as McFeely's work attempts, the struggles of conscience of those serving on the juries that send them to their death. Rather, this book is an argument—interspersed with graphic examples illustrating Justice William Brennan's verdict of "cruel and unusual punishment" —that sets out reasons for the eventual overturn of capital punishment in this country even as a majority will still support it.

The death penalty, Lifton and Mitchell argue, will eventually collapse of its own momentum, as the execution rate increases while more and more on death row are found innocent due to advanced techniques in DNA; as more and more state legislatures allow a true sentence of life without parole; as more and more capital convictions are overturned on appeal. Presently, two-thirds of appeals in capital cases, according to Lifton and Mitchell, eventually lead to a lesser sentence due to incompetent defense at the initial proceedings or the prosecution's withholding of crucial evidence. But most of all, capital punishment will be eventually outlawed in the US as more and more evidence of its extremely arbitrary application is made clear.

A hopeful start they point to is Illinois Governor George Ryan's moratorium. A supporter of the death penalty, Ryan halted executions in January of 2000 after *The Chicago Tribune* documented 13 exonerations of prisoners on death row since 1977 and pointed to the 260 death row cases appealed in Illinois in recent years, fully half of which were reversed. In 30 cases these condemned were found to have been represented by lawyers later disbarred or suspended from practice. Encouragingly, Ryan's halt to executions in Illinois appears lasting, for he is demanding "a 100 percent guarantee" against mistaken convictions. "I don't know if we'll ever go back to the death penalty as we knew it as long as I am governor," he has said.

Intermingled with descriptions of the condemned struggling in death throes, of botched and bungled executions, of faint-hearted and sickened spectators, and of effects on prison guards, wardens, prosecutors, juries, and judges in that order of abstraction—from immediately involved to more removed—the authors state their case. By setting statistics of increased murder rates against statistics of increased executions in the same jurisdiction, and the propensity of juries to sentence to life without parole where this is made an option, they hope to prove "that the prevailing wisdom—that America is fiercely in favor of executions—is largely wrong. . . . [and that] even as the execution rate soars, the death penalty's days are numbered." Their optimism comes from many sources: public figures who have spoken against exacting a public death for a private one, such as Mario Cuomo who states that such seeking "lowers us all," and Robert Morgenthau, as well as the 3,000 relatives of murder victims who, comprising Murder Victims Families for Reconciliation, engage yearly in a Journey of Hope, speaking against the death penalty in a state where it is heavily used.

This is not a book that will move you, as McFeely's and Christianson's work does, with the personal accounts of those who wait condemned or the struggles of those appointed to defend them. Rather, it is a reasoned work based on a careful accumulation of material arranged to convince that the death penalty is not a workable option in preventing murder. But in the end it is an emotional appeal, if based in argument and reason, for the authors' bias is clear.

Perhaps their aim in illustrating the ineffectiveness as well as the arbitrariness of the death penalty is best summed up by their quotation from a representative in the New Hampshire legislature speaking of the murder of his father. "If we let those who murder turn us to murder, it gives over more power to those who do evil. . . . [and] we become what we say we abhor."

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* ***Barbara DeMille*** *is a freelance writer with a Ph.D. in English Literature from the State University of New York at Buffalo. She has published several scholarly articles, and her work was also heard on Northeast Public Radio, WAMC, from 1993 to 1995, as well as having appeared in many magazines and newspapers including the* New York Times *and the* Christian Science Monitor.

** [from page 9] ***Mardi Crawford*** *is a Staff Attorney at the NYSDA Backup Center, and Editor of the REPORT.* ***Thomas Brewer*** *is the Backup Center's Research Associate.*

The State of Criminal Justice

American Bar Association Criminal Justice Section
American Bar Association (October 2000)
36 pages; $14.95

by Mardi Crawford and Thomas Brewer**

The Criminal Justice Section of the American Bar Association has issued its compilation of statistics and trends concerning crime and criminal justice for 2000. This edition of *The State of Criminal Justice* maintains the methodology of prior reports. An unfortunate result of this consistency is that public defense data continues to be omitted. Inclusion of information such as the disparity of resources available to defense and prosecution/law enforcement and types of systems providing public defense would benefit readers seeking a full picture of the nation's criminal justice system.

The report provides "plain English" bulleted comments regarding certain trends and summarizing certain tables. Even more of these bullets would be helpful, as some tables may be confusing, especially to readers who do not work routinely with criminal justice statistics.

There are, however, some shortcomings in the report's use of statistics from the two major national indicators of crime, the Uniform Crime Reports (UCR) and the National Crime Victimization Survey (NCVS). For example, certain tables misrepresent the data derived from the FBI's Uniform Crime Report by simply referring to a measure as "Violent Offenses," when the proper definition would be "Violent Offenses *Reported to the Police*." This is more than a subtle difference in terms of art, as the phrase "Violent Offenses" can lead the reader to believe that all violent offenses committed have been included, when the UCR only measures those crimes which have actually been reported to local police and forwarded to the FBI. Similarly, NCVS data are sometimes presented ambiguously, without reference to the unit of analysis. The editorial board would be well advised to include a brief section describing the differences in the two major national indicators, and their limitations, in future editions.

The State of Criminal Justice contains statistics from a variety of sources. Its major strength—brevity—is also its primary weakness, as it lacks a great deal of depth in the "Courts and Case Processing" section. It draws from many sources, including editions of the *Sourcebook of Criminal Justice Statistics*, published by the US Department of Justice Bureau of Justice Statistics. At 36 pages plus appendices, the Criminal Justice Section's report is a handy reference, lacking the *Sourcebook's* bulk (and, of course, breadth). While more careful and precise use of the data would better inform the casual reader and reduce confusion for more experienced consumers of national crime figures, *The State of Criminal Justice* is, overall, a useful at-a-glance summary of criminal justice information. ⚖

Resources Sighted, Cited, or Sited

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

- ✔ "Federal Habeas Corpus Considerations for State Practitioners," Wendy C. Peoples, *The Forum* [publication of the California Attorneys for Criminal Justice], Vol. 27, No. 3, p. 46 (2000)
- ✔ *Muldoon on Criminal Law*, Gary Muldoon, e-newsletter. [Addresses New York criminal law and procedure issues; featured on the Monroe County Assigned Counsel web site: www.mcacp.org/muldoon.html
- ✔ *The New York Professional Responsibility Reporter*, monthly newsletter, 8 pp. [Contains articles and reports on Ethics and Professionalism for New York lawyers]. Contact: (888)693-8442; web site: www.nyprr.com
- ✔ *Law Office Policy and Procedures Manual*, 4th ed. (2000), American Bar Association, $109.95 (list price), ISBN: 1-57073-359-7; LCC: 96-86286; product code: 511-0375. [Outstanding resource manual providing information and forms for basic law office operating policies and procedures. Includes diskette with forms. New edition includes sections on: sexual harassment; support staff responsibilities; personnel policies and benefits; Internet and video surveillance; and disaster recovery.] Contact: (800)285-2221; web site www.abanet.org
- ✔ "Special Report: Restatement of the Law Governing Lawyers, A Users' Guide," ABA/BNA *Lawyers' Manual on Professional Conduct*, Vol. 16, No. 24 (12/20/00). [Summarizes noteworthy provisions in the American Law Institute's new edition of the *Restatement of the Law Third, Law Governing Lawyers*, released in August, 2000. The hardbound edition of *Law Governing Lawyers* can be ordered from ALI through their web site for $195.00 (Order Code 1R3LGLOTK) at www.ali.org/ali/A252.htm.]
- ✔ "Defense Counsel in Criminal Cases," Bureau of Justice Statistics (2000). [Special Report examines issues of legal representation for defendants in Federal district court and large local jurisdictions, and inmates in local jails and Federal and State prison. It also briefly describes types of publicly financed programs available to both Federal and local defendants.] Available online, through links on the Association's web site—see the Resources Sighted, Cited, or Sited section of Defense News at www.nysda.org. ⚖

Job Opportunities

The Greater Upstate Law Project, Inc., (GULP) seeks an HIV Legal Services Project Director at the Hudson Valley Poverty Law Center (HVPLC). This new project, located in White Plains, NY at Pace Law School, will provide legal services to immigrants who are HIV positive or PWA in Westchester, Rockland, and Putnam counties. The HVPLC provides civil representation and advocacy which is prohibited for federally-funded legal services offices. The ideal candidate is a public interest lawyer with four to six years of experience, background in issues impacting the poor, HIV+/PWA clients, and immigration law. Bilingual (Spanish/English) desirable. Salary range $35,000 - $40,000 DOE. EOE. Send cover letter, resume, references, and writing sample to Search Committee, Attn: Anne Erickson, Chief Executive Officer, Greater Upstate Law Project, Inc., 119 Washington Avenue, Albany NY 12210.

Pace University School of Law expects two entry-level, tenure-track positions for the 2001-2002 academic year. Academic areas needed include criminal procedure and an integrated criminal law/legal research and writing program. Strong academic record and potential for excellent scholarship and teaching required; two to five years in legal practice or clerkships preferred. Send resume, including references, to Prof. Barbara Black, Chair Appointments Committee, Pace University School of Law, 78 N. Broadway, White Plains NY 10603; email Bblack@law.pace.edu.

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 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.

BEAT THOSE SHORT APPLICATION DEADLINES:

Get Job Notices Sooner on the Web!

The REPORT appears on our web site when the process of making printed copies has just begun. Check the latest issue at www.nysda.org so that slow mail does not deprive you of an opportunity!

Send resume to: Ms. Cheryl Thompson, Capital Defender Office, 277 Alexander Street, Suite 600, Rochester NY 14607.

The Office of the Multi-County Public Defender (MPD) in Atlanta, GA seeks an experienced Attorney. The MPD is a division of the Georgia Indigent Defense Council and is engaged exclusively in representation of individuals facing the death penalty in Georgia. Salary: CWE + full benefits package (GA state employee status). Required: admitted to the GA state bar, or eligible to sit for the bar in Feb. 2001. EOE. Contact: Michael Mears, Director, Office of the Multi-County Public Defender, 985 Ponce de Leon, Atlanta GA 30306, tel (404) 894-2595, e-mail: mmears@gidc.state.ga.us.

The Correctional Association, the only private organization in New York State with legislative authority to visit prisons and report its findings to policymakers, seeks a Director for its Juvenile Justice Project. The Project's main activities will be preparing a report on NYC's juvenile detention practices, policy analysis, coalition building, and developing case histories of prevention programs that work. Responsibilities include overseeing and carrying out the project's principal activities. Duties include: developing and initiating advocacy strategies, including preparing policy papers and working with government agencies and the media; coordinating a coalition; preparing public education materials; arranging visits to juvenile detention facilities; supervising staff; and working with the executive director on fundraising activities. Same abilities as noted above are required. Preferred: Experience in juvenile justice and advocacy. Salary CWE + benefits. EOE/AA. Send writing samples and a resume to: Robert Gangi, Executive Director, Correctional Association of New York, 135 East 15th Street, New York NY 1000

Prisoner's Legal Services of NY seeks applicants for two Managing Attorney positions (Ithaca and Poughkeepsie). Responsible for managing legal and administrative matters for 3 attorneys, 3 paralegals, and 2 support staff. Must be admitted to practice in NYS or be eligible for admission pro hac vice and be willing to take the next available bar exam. Must have minimum of 5 years legal practice experience (preferably in civil legal services, civil rights, poverty law, or federal litigation). Previous management and supervisory experience preferred. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references (with phone numbers) to Maria McGuinness, Human Resources Manager, Prisoners Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca NY 14850; tel (607) 273-2283; fax (607) 272-9122.

Prisoner's Legal Services also seeks a Staff Attorney in Ithaca. Previous legal service or civil rights experience preferred. Recent graduates with interest in Public Interest law are encouraged to apply. Serious need for Spanish-speaking staff. Outstanding benefits package, liberal and flexible leave policies. EOE. Send resume, writing sample, and list of three references to address above.

The Balancing Justice Project of the League of Women Voters of New York State is hiring two organizers in the New York City metro area to "create a statewide dialogue on New York State's criminal justice system." Positions run through October 2001; $8000 stipend. EOE. Send cover letter, resume, and three references to Rob Marchiony, Balancing Justice Project Coordinator, League of Women Voters of New York State, 35 Maiden Lane, Albany NY 12207; tel (518) 465-4162; fax (518) 465-0812. ⚖

Conferences & Seminars

Sponsor: Albany County Bar Association
Theme: All Ethics in One Afternoon
Date: February 15, 2001
Place: Albany, NY
Contact: Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail acba@global2000.net; web site www.web-ex.com/acba

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Sponsor: California Attorneys for Criminal Justice & California Public Defenders Association
Theme: CACJ/CPDA Capital Case Defense Seminar: One Case—One Client
Date: February 16-19, 2001
Place: Monterey, CA
Contact: CACJ, 4929 Wilshire Blvd, Suite 688, Los Angeles CA 90010; tel (323) 933-9414; fax (323) 933-9417; e-mail cacj@ix.netcom.com; web site www.cacj.org

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Sponsor: National Association of Criminal Defense Lawyers
Theme: Midwinter Meeting & CLE: Forensic and Psychological Aspects of Trial
Date: February 21-24, 2001
Place: Las Vegas, NV
Contact: NACDL, 1025 Connecticut Ave. NW, Ste. 901, Washington DC 20036 tel (202) 872-8600, fax (202) 872-8690, email assist@nacdl.com, web site www.criminaljustice.org

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Sponsor: New York Criminal Bar Association and the New York State Association of Criminal Defense Lawyers
Theme: Recent Developments in the 2nd Circuit
Date: February 24, 2000
Place: New York, NY
Contact: NYSACDL: (212) 532-4434

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance: Capital Case Training for Mitigation Specialists, Defense Investigators, and Defense Attorneys
Date: March 3-6, 2001
Place: Albuquerque, NM
Contact: Ron Gottlieb: tel (202) 452-0620 x233; email r.gottlieb@nlada.org

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Sponsor: Lorman Education Services
Theme: Strategies in Handling DWI Cases in New York
Date: March 2, 2001
Place: Albany, NY
Contact: Lorman Education Services, PO Box 509, Eau Claire WI 54702-0509; tel (715) 833-3940; fax (715) 833-3953; web site www.lorman.com

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Sponsor: Albany County Bar Association
Theme: Do's and Don'ts of Local Courts
Date: March 8, 2001
Place: Albany, NY
Contact: Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail acba@global2000.net; web site www.web-ex.com/acba

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Sponsor: New York State Bar Association
Theme: Jim McElhaney's Trial Evidence
Dates & Places: March 9, 2001 Albany
March 30, 2001 NYC
Contact: CLE Registrar's Office, New York State Bar Association, One Elk Street, Albany NY 12207; tel (800) 582-2452 [Albany area (518) 463-3724]; fax on demand (800) 828-5472; web site www.nysba.org

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Sponsor: New York State Defenders Association
Theme: 15th Annual NYU Trainer
Date: March 24, 2001
Place: New York City
Contact: Nancy Steuhl, New York State Defenders Association, 194 Washington Avenue, Albany NY 12210; tel (518) 465-3524; fax (518) 465-3249; email nsteuhl@nysda.org; web site www.nysda.org

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Sponsor: National Legal Aid and Defender Association
Theme: Equal Justice Conference
Date: March 29-31, 2001
Place: San Diego, CA
Contact: National Legal Aid & Defender Association, 1625 K Street, NW, Suite 800, Washington DC 20006-1604, tel (202) 452-0620; fax (202) 872-1031 e-mail info@nlada.org

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Sponsor: Albany County Bar Association
Theme: Criminal Law: Recent Developments & Practical Tips
Date: April 20, 2001
Place: Albany, NY
Contact: Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail acba@global2000.net; web site www.web-ex.com/acba

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Sponsor: Albany County Bar Association
Theme: Update on Evidence
Date: May 9, 2001
Place: Albany, NY
Contact: Albany County Bar Association, Albany County Courthouse, 16 Eagle Street, Room 315, Albany NY 12207; e-mail acba @global2000.net; web site www.web-ex.com/acba ⚖

Defense Practice Tips

Be Sure to Get a Copy of the Pre-sentence Report

by Alan Rosenthal and Richard Luciani*

[**Ed. note:** *Because sentencing comprises an important part of public defense work, NYSDA collects and disseminates information on best practices concerning sentencing, and maintains close ties with sentencing advocates and experts. Marsha Weissman, the Executive Director of the Center for Community Alternatives, is a member of NYSDA's Board of Directors. This article assumes readers have some familiarity with procedures that have evolved under the presentence investigation and report requirements of Criminal Procedure Law 390.20 et seq.*]

Introduction

It is now common practice for defense attorneys to review the pre-sentence report prepared by the Probation Department prior to sentencing. (Before 1975 the pre-sentence report was completely confidential and was not available for review by the defense or prosecution.) What is surprisingly still not common practice, however, is for defense attorneys to obtain an actual copy of the pre-sentence report. The legislature codified a defendant's right to a copy of the pre-sentence report 16 years ago in CPL 390.50(2)(a), which provides in relevant part:

> . . . the pre-sentence report or memorandum shall be made available by the court for examination and for *copying* by the defendant's attorney . . . (Emphasis added.)

The original language of CPL 390.50(2)(a) did not specify that the report could be copied. In the Assembly Memorandum in support of the 1984 amendment of the statute, the bill's sponsor explained the rationale for the legislative change:

> In many instances, the parties are currently required to hand-copy the reports without photocopying them. This is an unnecessarily laborious practice which serves no legitimate function. By permitting copying we ensure that both sides can verify information in the report if such becomes necessary.

The statute as amended is in accordance with the current American Bar Association (ABA) *Standards for Criminal Justice, Sentencing Standards* (3rd ed.), Standard 18-5.6(a)(i), which provides that pre-sentence reports should be available to the parties.

Counsel and Client Should Use Copy to Correct Errors

By obtaining a copy of the pre-sentence report, defense counsel is able to carefully review, with the client, the information provided to the Court by the Probation Department. Inaccuracies as to the client's criminal history, level of involvement in the crime, remorse, mitigating factors, and other matters may be detected. Those inaccuracies and misinformation can then be addressed in a defense pre-sentence memorandum and/or at the time of sentencing and, if not corrected, on appeal and in other proceedings after sentence is imposed.

National standards for defense counsel mandate that attorneys review the pre-sentence report, ensure that clients have an opportunity to examine the pre-sentence report, and protect clients' interests concerning the content of the pre-sentence report. *See* National Legal Aid and Defender Association (NLADA), *Performance Guidelines for Criminal Defense Representation*, Guidelines 8.3(4); 8.4 [defense counsel should "take appropriate steps to ensure that erroneous or misleading information which may harm the client is deleted from the report" (Guideline 8.4[4])]. *See also* ABA, *Standards for Criminal Justice, Prosecution and Defense Function* (3rd ed.), Standard 4-8.1(b) [defense counsel should seek to verify information in the pre-sentence report when it is made available and be prepared to supplement or challenge information if necessary.]

Lawyers should not hesitate to ask the Court to make corrections on the face of the probation report and/or to have the report sent back to the Probation Department for correction of all errors. See *e.g.* Cohen and Neely, eds., Supreme Court of the State of New York Appellate Division, 1st Department, *Criminal Trial Advocacy* (7th ed. 1992) p. 724 ["If successful in efforts to correct report, ask court for direction to Probation to retype report and for revised version only to be sent to Corrections."]. This is important because the report's function does not end with the Court's use of it at the time of sentencing. A copy of the report accompanies a client sentenced to a term of imprisonment and will be used in decision-making regarding the client by the Department of Correctional Services (DOCS), Division for Youth, or Office of Mental Health. See CPL 390.60(1).

PSI Important for Parole, DOCS

For a client who receives a state prison sentence, the pre-sentence report may also be critical at the time of

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parole consideration. The Parole Board is required to consider the pre-sentence report as a factor in making the parole release decision. (Executive Law 259-i(2)(c)(A)). It is difficult for a client without a copy to address with the Board issues raised in the pre-sentence report.

Long before prisoners are ready to see the Board, inaccuracies or misinformation in a pre-sentence report may affect many aspects of their lives while in custody. For example, DOCS uses pre-sentence report information to determine a prisoner's classification/designation, boot camp eligibility, temporary release programming, and transfers. Defense counsel should be aware at the time of sentencing of these potential uses for the pre-sentence report, and strive to ensure that no erroneous information is contained in the copy of the report that DOCS receives. The NLADA Guidelines call for counsel to "take appropriate steps to preserve and protect the client's interests" where defense challenges to erroneous or misleading information in the pre-sentence report are, at the time of sentencing, unsuccessful (Guideline 8.4[5]).

Hard for Clients to Get Copies Later

By the time clients realize that information contained in their pre-sentence reports may be causing concern in DOCS, or before their applications for parole, they may not be able to get copies of their pre-sentence reports. The statute makes clear that a defendant is entitled to a copy of the pre-sentence report prior to sentencing and also for the purposes of appeal. However, the Appellate Division is split on what the authority is for obtaining the pre-sentence report later and what the factual predicate is that must be alleged in the affidavit in support of disclosure. Therefore, prisoners' access may depend on where they were sentenced. (According to Peter Preiser's Commentary to 390.50[2][a], "The cases are fairly well in accord that the only court with authority to order disclosure is the sentencing court—as distinguished from the court where the collateral proceeding is pending (*see e.g., Holmes v State,* 140 AD2d 854, 528 N.Y.S.2d 686 [3d Dept.1988].")

In *Matter of the Legal Aid Bureau of Buffalo v Armer,* 74 AD2d 737 (4th Dept. 1980) the Appellate Division, 4th Department, citing to CPL 390.50(2), held that "Petitioner has a clear right to review the presentence reports for the purpose of preparing briefs and for use before the Parole Board." Eight years later the 4th Department, still relying upon the authority of CPL 390.50(2), added the requirement of a "factual showing sufficient to warrant overriding the cloak of confidentiality . . ." *Salamone v Monroe County Dept. of Probation,* 136 AD2d 967 (4th Dept. 1988). The Court in *Salamone* rejected the argument that CPL 390.50(1) was authority for disclosure of pre-sentence reports in a collateral proceeding.

The 1st Department has taken a different approach. In *People v Wright,* 206 AD2d 337 (1st Dept. 1994) the Court rejected the notion of the 4th Department that subdivision (2) of CPL 390.50 was authority for obtaining the pre-sentence report for collateral purposes such as parole. Nevertheless, citing the 4th Department's decision in *Matter of Legal Aid,* the 1st Department concluded that there was a clear right to review the pre-sentence reports for use before the Parole Board. Significantly, they held that "a showing of relevance is not required . . ."

The 3rd Department has taken yet another approach. In *Blanche v People,* 193 AD2d 991 (3rd Dept. 1993) the Court rejected the 4th Department's premise that the request for a copy of a pre-sentence report for a collateral matter was governed by CPL 390.50(2). Instead, the Court found the request to be governed by CPL 390.50(1). In addition, the 3rd Department has grafted onto that statute a requirement that there be a "factual showing sufficient to warrant the disclosure of the report." *See Shader v People,* 233 AD2d 717 (3rd Dept. 1996).

It is unclear what constitutes a "sufficient" showing. In *Allen v People,* 243 AD2d 1039 (3rd Dept. 1997) the supporting affidavit was apparently found to be inadequate because there was no indication that the Board considered the pre-sentence report in rendering its decision. Yet in *Shader* the Court reversed the lower Court's denial of disclosure, coming to the conclusion that "petitioner made such a showing inasmuch as a presentence report is one of the factors required to be considered by the Board of Parole upon application for release." Recently in *Kilgore v People,* 710 NYS2d 690 (3rd Dept. 2000) the Court indicated that at the very least a petitioner must demonstrate that "notice of an impending hearing before the Board of Parole" has been given.

Regardless of the standard, your clients should not be placed in a situation where their petitions for a copy of the pre-sentence report, submitted after sentencing and appeal, are rejected as lacking sufficient statutory authority or factual showing. You should give a copy of the pre-sentence report to your client at the time of sentencing. Explain why the document is important and how it will be used by DOCS and Parole. Clients should be prepared to point out any inaccuracies or misinformation. If you wait until your clients are in prison before you provide a copy to them, their opportunity to address certain issues with DOCS or Parole personnel may have passed.

You should keep a copy of the pre-sentence report for your file. The copy should be maintained with the file until your client has completed service of the sentence. It is not until the sentence has expired that this document loses its relevance.

Conclusion—Get a Copy Early

The lesson from all of this is simple—follow the statute. Obtain a copy of the pre-sentence report before sentencing. You will be better prepared at the time of sentencing and your client will not be stuck without a copy when it comes time to apply for parole or for DOCS classification and programming. ⚖

Legislative Update

Late 2000 Action on Bills by Governor Pataki

[***Ed. note:*** *This is a follow-up to Al O'Connor's "2000 Legislative Review," Backup Center REPORT Vol. XV, No. 8.*]

VETOED (S.6250-C) (Expungement – Erroneous Arrests).

Would have enacted a new CPL § 160.56 to provide for expungement of all records of an arrest when the arresting agency has, *prior to the filing of an accusatory instrument,* determined that "the wrong person has been arrested." The legislation would also have enacted a new CPL § 160.57 to provide a retroactive right to expungement when the petitioning party would have been entitled to relief under § 160.56 if the erroneous arrest had occurred after the effective date of the section.

VETOED (S.3941) (Work Release Eligibility – Victims of Domestic Violence).

Would have authorized the Commissioner of the Department of Correctional Services to grant temporary release (including work release) to otherwise ineligible inmates convicted of homicide and assault offenses "who can demonstrate to the commissioner that he or she was a victim of substantial physical, sexual or psychological abuse by the victim of such homicide or assault and such abuse was a substantial factor in causing the inmate to commit such homicide or assault."

Chap. 596 (S.674-B) (Persons in Need of Supervision – 16 and 17 year-olds).
Effective: November 1, 2000

Increases the age limit for PINS proceedings from persons under the age of 16 to those under age 18. The former statutory scheme was limited to males under the age of 16 and females under the age of 18, a sex-based distinction that was struck down by the Court of Appeals in 1972 but never addressed by the Legislature. *Matter of Patricia A.*, 31 N.Y.2d 83 (1972). The new scheme applies to both males and females under the age of 18. [Amends FCA § 712 (a); SSL § 371 (6)]

Chap. 562 (A.1432) (Bail enforcement agents – licensing and qualifications).
Effective: April 1, 2001

Amends the General Business Law to subject bail enforcement agents (bounty hunters) to licensing requirements; requires bail enforcement agents to give written notice to local law enforcement agencies prior to attempting to take a person into custody; and authorizes local law enforcement agents to accompany bounty hunters upon entry into "what is believed to be an occupied structure."

Chap. 406 (A.4919-B) (General Obligations Law – Drug Dealer Liability Act).
Effective: September 30, 2000

Enacts intricate provisions establishing a civil cause of action by persons affected by drug use against convicted "drug traffickers" who have "knowingly participated in a drug market" in New York State (General Obligations Law Article 12).

Chap. 549 S.6153-A (Name change applications by certain felons).
Effective: January 24, 2001

Amends Civil Rights Law § 61 to add special notice provisions for name change applications by persons convicted of a violent felony, homicide offense, and certain kidnapping and felony sex offenses when the applicant is incarcerated or under supervision at the time he or she petitions for a name change.

Chap. 555 (S.1469) (Statewide Child Abuse Register – Expungement of Unfounded Reports).
Effective: November 1, 2000

Authorizes the Office of Children and Family Services to expunge an unfounded report from the statewide central register of child abuse when the person who made the report has been convicted of falsely reporting an incident [Penal Law § 240.55 (3)] in connection with the matter, or when the "subject of the report presents clear and convincing evidence that affirmatively refutes the allegation of abuse and mistreatment." [Amends Social Services Law § 422 (5)] ⚖

Pro Bono Counsel Needed For Death Row Prisoners

Over 3,500 people are on death row across the United States. Hundreds of them have no legal help. Many states do not appoint lawyers to handle capital habeas cases. Many that do pay only token fees and provide few or no funds for necessary investigation and expert assistance. Shortened Federal habeas time limits are running out for many prisoners who have no way to exhaust their state remedies without the assistance of attorneys, investigators, mental health professionals and others. Competent representation can make a difference. A significant number of successful cases have been handled by pro bono counsel. To competently handle a capital post-conviction case from state through Federal habeas proceedings requires hundreds of attorney hours and a serious financial commitment. The ABA Death Penalty Representation Project seeks lawyers in firms with the necessary resources to devote to this critical effort. Having in mind the level of commitment required, criminal defense lawyers and practitioners in civil firms able to take on a capital post-conviction case and provide the level of representation that many death row prisoners did not receive at trial are invited to contact the project: Elisabeth Semel, Director, ABA Death Penalty Representation Project, 50 F Street NW, Suite 8250, Washington DC 20001; e-mail: esemel@aol.com. For information, also see the Project's web site: www.probono.net (Death Penalty Practice Area).

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 published.

New York State Court of Appeals

Discovery (*Brady* Material and Exculpatory Information) (Prior Statements of Witness) **DSC; 110(7) (26)**

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

People v Santorelli, No. 104, 10/26/00

The defendant was convicted of tampering with evidence. He had been seen by FBI agents attempting to discard evidence related to a murder they were investigating. At his trial, a witness who was also under FBI investigation testified for the prosecution. The defendant requested FBI reports related to the witness's testimony. The FBI would not turn over to the prosecution or the defense debriefing notes of the witness, and denied having such notes. The defendant sought to have his conviction vacated based on the withholding of material evidence. The Appellate Division affirmed his conviction.

Holding: There is no violation of *Brady v Maryland* (373 US 83 [1963]) or *People v Rosario* (9 NY2d 286 *cert den* 368 US 866). The prosecution can not be charged with failure to disclose material they themselves could not obtain from law enforcement officers answerable to another sovereign. *People v Kronberg*, 243 AD2d 132, 152. The duty to disclose material cannot be greater than the power to acquire it. The prosecution made two attempts to obtain the material that was not within its control.

The defendant waived his *Antommarchi* (*People v Antommarchi*, 80 NY2d 247 [1992]) right to be present at a side bar discussion. The trial judge had a very vivid recollection of the defendant's waiver; no reconstruction hearing was required. See *People v Alomar,* 93 NY2d 239, 245, 247 (judge is final arbiter of the record). Orders affirmed.

Dissent: [Smith, J] The waiver was not on the record. The judge recalled the defendant shaking his head and saying no. This is not a valid *Antommarchi* waiver.

Domestic Violence (General) **DVL; 123(10)**

Juveniles (Abuse) **JUV; 230(3)**

People v Johnson, No. 111, 10/26/00

The defendant attacked his ex-girlfriend in front of her three daughters, and continued the attack in the complainant's apartment for over 10 hours, with the children in their room. The defendant was convicted of two counts of endangering the welfare of a child, and several other felonies related to violating orders of protections. The Appellate Division reversed the child endangerment convictions, holding the evidence was legally insufficient.

Holding: The evidence was legally sufficient to support the charge of child endangerment although the defendant's actions were not specifically directed at the children. Actual harm to a child need not result for criminal liability; it is enough that the defendant acted in a manner likely to result in harm to the child, knowing of the likelihood of such harm. *People v Simmons*, 92 NY2d 829, 830. Nothing in the statute, Penal Law 260.10(1), restricts its application solely to harmful conduct directed at children. *See People v Bergerson*, 17 NY2d 398, 401. The adverse effects on children of domestic violence are well documented and have been recognized by all three branches of state government. A rational trier of fact could reasonably find that this defendant's conduct created a likelihood of harm to the children. Cases requiring that conduct be focused upon the child are not to be followed. Order modified, remitted to the Appellate Division for consideration of the facts, and as modified, affirmed.

Sentencing (Mandatory Surcharge) (Restitution) **SEN; 345(48) (71)**

People v Quinones, No. 123, 11/16/00

After conviction, the defendant was simultaneously ordered to pay restitution and the mandatory surcharge and crime victim assistance fee required under Penal Law 60.35(6). The Appellate Division affirmed.

Holding: The plain language of the statute permits the sentencing court to order both restitution and the mandatory surcharge/crime victim assistance fee where a defendant has not yet made restitution. The Practice Commentaries to the law note that the effect is to prefer and encourage payment of restitution to the crime victim. *McKinney's Cons Laws of NY,* Book 39, Penal Law 60.35, at 294. Until a defendant has in fact made restitution, a court can impose an order to pay them both. Order affirmed.

Homicide (Mental Condition) (Murder [Defenses] [Instructions]) **HMC; 185(35) (40[a] [m])**

Instructions to Jury (Theories of Prosecution and/or Defense) **ISJ; 205(50)**

People v Harris, No. 127, 11/16/00

The defendant was convicted of second-degree murder. The evidence established that the defendant killed his long-time friend with a machete, and with the help of his girlfriend decapitated and dismembered the body and discarded it. The Appellate Division affirmed the conviction.

NY Court of Appeals *continued*

Holding: The defendant stated that the decedent had said in crude terms that the defendant's girlfriend, who had once left the defendant for the decedent, was still at the decedent's beck and call. A psychiatric expert opined that the defendant acted under extreme stress. The trial court improperly rejected the defense request for a charge on extreme emotional disturbance. That a homicide was committed under the influence of extreme emotional disturbance is a mitigating circumstance reducing murder to first-degree manslaughter. Penal Law 125.20(2). Mitigation is not limited to traditional "heat of passion" circumstances, but may be considered with respect to a broad range of situations where a trier of fact believes that an emotionally disturbed defendant should be afforded leniency. *People v Casassa*, 49 NY2d 668, 679, 681 *cert den* 449 US 842. Where the defendant's conduct was actually influenced by extreme emotional disturbance (subjective), and the excuse for the emotional disturbance is reasonable (objective), the defendant is entitled to the charge. *See People v Moye*, 66 NY2d 887, 890. Order reversed, new trial ordered.

Accusatory Instruments (Sufficiency) ACI; 11(15)

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

People v Casey, No. 100, 11/21/00

The defendant was convicted of criminal contempt for violating a temporary order of protection. On appeal, he raised for the first time that the information charging him with criminal contempt was jurisdictionally defective. The Appellate Term affirmed, holding that while the information was defective because of its hearsay nature, it qualified as a complaint; the defendant therefore waived prosecution by information by waiving the reading of his procedural rights.

Holding: The defendant is not shown to have knowingly and intelligently waived his right to be prosecuted by an information. *See People v Weinberg*, 34 NY2d 429, 431. Just because an information would qualify as a complaint does not make it one. This case is distinguishable from *People v Connor* (63 NY2d 11). Reversal is not required here. Hearsay pleading defects in the factual portion of a local criminal court information must be preserved in order to be reviewable as a matter of law on appeal. The suggestion in *People v Alejandro* (70 NY2d 133) that the second, non-hearsay requirement of CPL 100.40(1)(c) could be reviewed without preservation was not essential to that case's holding and is now rejected. Only where an error goes to the essential validity of the proceedings below such that the entire trial is irreparably tainted can it present a question of law reviewable by this Court without being preserved. *People v Agramonte*, 87 NY2d 765, 770. Order affirmed.

Evidence (Hearsay) EVI; 155(75)

Rape (Evidence) RAP; 320(20)

People v Carroll, No. 130, 11/21/00

The defendant was convicted of three counts of rape and six counts of first-degree sexual abuse. The Appellate Division affirmed.

Holding: The child complainant testified only to "pressure" and not that the defendant had put his penis inside her; she recalled no other details. The medical evidence was not consistent with circumstances of the alleged rape. The evidence was insufficient to establish the required element of penetration, and the rape charges must be dismissed. *See People v Dunn*, 204 AD2d 919 *lv den* 84 NY2d 907. The trial court erred in precluding admission of the audiotape of the defendant's conversation with the 13-year-old complainant, during which he vehemently denied any inappropriate conduct. Asked if he thought she was lying, he told the complainant that he did not think she was making it up, but that she had had a rough life, and different ideas of what may have happened. In light of police testimony that defendant "never denied" the allegations, the trial court abused its discretion in failing to admit the tape or testimony related to the telephone conversation to rebut the prosecution's key assertions. *People v Hudy,* 73 NY2d 40, 58 *abrogated on other gnds by Carmell v Texas*, 529 US 513. Order reversed, rape counts dismissed, new trial ordered on sexual abuse.

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

Plea Bargaining (General) PLE; 284(10)

People v Denny, No. 128, 11/28/00

The defendant pled guilty to robbery and criminal possession of a weapon, accepting a sentence offer of concurrent 13-year sentences. The plea came after a different judge had offered the defendant a 10-year determinate sentence, to which defense counsel responded that he hoped to negotiate a more favorable plea as the prosecution had offered a lesser sentence. The Appellate Division affirmed the conviction holding that the defendant waived review of an ineffective assistance of counsel claim as part of his plea agreement.

Holding: Even assuming that the defendant's ineffective assistance of counsel claim survived his waiver of his right to appeal, such a claim was untenable. Nothing on the record supported his contention that he was unaware of the 10-year sentence offer or that his counsel rejected that offer without consulting him. Without additional facts that might have been developed as a result of a post-

NY Court of Appeals *continued*

conviction motion, it is not shown that counsel's actions lacked any strategic or other legitimate explanation. *See People v Rivera*, 71 NY2d 705, 708. Order affirmed.

Parole (Board/Division of Parole) (Release [Consideration for]) **PRL; 276 (3) (35[b])**

Matter of Silmon v Travis, No. 139, 11/28/00

The petitioner was convicted by way of an *Alford* plea and was sentenced to five to 15 years. After five years of imprisonment, the Parole Board denied the petitioner parole on the grounds that he lacked remorse and insight and accepted no responsibility for the actions that resulted in a death. Supreme Court vacated the determination as arbitrary and capricious. The Appellate Division reversed.

Holding: *Alford* pleas, in which a guilty plea is accepted without an admission by the defendant of culpability, are and should be rare. The resulting conviction is from the state's perspective no different from other guilty pleas and may generally be used for the same purposes. *People v Miller*, 91 NY2d 372, 378. The ultimate decision to parole a prisoner is discretionary (*Tarter v State of New York*, 68 NY2d 511, 517-518), and judicial intervention is warranted only where there is a showing of irrationality bordering on impropriety. *Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77. It is neither arbitrary nor capricious for the Board to consider remorse and insight into the offense following a petitioner's *Alford* plea. *See Matter of Dudley v Brown,* 227 AD2d 863. The Board is empowered to deny parole where it concludes that release is incompatible with the welfare of society and there is a strong rehabilitative component that may be given effect by considering remorse and insight. The Board is not constrained by a prisoner's claim of innocence from exercising its responsibility to confirm that the prisoner is ready to rejoin the community. Order affirmed.

Appeals and Writs (Question of Law and Fact) (Scope and Extent of Review) **APP; 25(75) (90)**

People v Valerio, No. 166, 11/28/00

Holding: Determinations regarding the scope of the initial stop, the questioning of the defendant about clothing in his trunk, the defendant's consent to the search, the inventory search, and use of a drug-sniffing dog all involve mixed questions of law and fact. They are supported by evidence in the record and are therefore beyond review here.

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

Counsel (Malpractice) **COU; 95(23)**

Statute of Limitations (Computation of Period) **SOL; 360(10)**

Britt v Legal Aid Society, Inc., No. 125, 11/30/00

The plaintiff pled to attempted rape after the court denied his request for new counsel. His plea was ultimately vacated, and the indictment against him dismissed on Mar. 7, 1996. He commenced a civil claim for legal malpractice on Sept. 27, 1997. The Appellate Division held the action timely.

Holding: A cause of action for legal malpractice in a criminal case accrues for Statute of Limitations purposes when the criminal proceeding is terminated, that is, when the indictment is dismissed. A plaintiff in such an action must allege innocence or a colorable claim of innocence of the underlying offense, as no cause of action will lie while a determination of guilt of that offense remains undisturbed. *Carmel v Lunney*, 70 NY2d 169, 173. The plaintiff must show that the attorney was the proximate cause of the plaintiff's conviction. *See Claudio v Heller*, 119 Misc2d 432, 434-435. Therefore, the cause of action could not accrue until the criminal proceedings terminated without a conviction. Order affirmed, certified question answered in the affirmative.

First Department

Counsel (Right to Self-Representation) **COU; 95(35)**

People v Wilder, No. 841, 1st Dept, 8/24/00

The defendant received a sentence of 25 years to life after being convicted of first-degree robbery.

Holding: The defendant's request to proceed *pro se* was nothing more than an attempt to play games with the court and cause an undue delay on the trial. It followed other efforts to delay the proceedings, including an announcement on Thursday before jury selection was to begin on Friday that the defendant was a Muslim who could not proceed on a Friday and a request to his attorney to say that an appellate court had issued a stay (such stay having actually been denied). "'When a defendant's conduct is calculated to undermine, upset or unreasonably delay the progress of the trial he forfeits his right to self representation . . . (*see People v McIntyre*, 36 NY2d 10, 18).'" Denial of the defendant's application to proceed *pro se* was proper. His contention that the trial court improperly admitted irrelevant and prejudicial evidence is without merit; the defense counsel clearly "opened the door" about these matters. Judgment affirmed. (Supreme Ct, Bronx Co [Covington, J])

First Department *continued*

Double Jeopardy (Lesser Included and Related Offenses) DBJ; 125(15)

People v Hellinger, No. 1310, 1st Dept, 8/24/00

After the jury was unable to reach a verdict on a first-degree manslaughter count, convicting the defendant of criminally negligent homicide, the court dismissed the manslaughter count.

Holding: The court's error in refusing to instruct the jury that the lesser included offense was only to be considered as an alternative following an acquittal of the greater offense (*People v Boettcher*, 69 NY2d 174) did not entitle the prosecution to a retrial on the manslaughter count. Criminally negligent homicide was a lesser included of first-degree manslaughter in that it involved causing the same result but with a less culpable mental state. *See People v Stallings*, 128 AD2d 908, 910. The conviction on the lesser charge is deemed an acquittal of manslaughter. (CPL 300.50[4]). A retrial on the greater offense is barred under settled double jeopardy principles. Order affirmed. (Supreme Ct, New York Co [Yates, J])

Concurrence: [Andrias, J] There is logic in the prosecution argument that retrial should be allowed because a first-degree manslaughter conviction, involving intent to cause serious physical injury, is not necessarily inconsistent with negligently causing death. However, the result here is compelled by *People v Robinson*, 145 AD2d 184 *affd for reasons stated below* 75 NY2d 879.

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

People v Thomas, Nos. 863; 864, 1st Dept, 8/31/00

The lower court granted the defense motions to suppress evidence.

Holding: When a vehicle and its occupants are not under any police restraint, asking the occupants to step out creates a new, unauthorized restraint absent grounds for suspicion. *See People v Harrison*, 57 NY2d 470, 477. The restraint of the defendants here by police "'was extremely minimal and designed simply to insure the officer[s'] safety.'" *People v Stevens*, 255 AD2d 145 *lv den* 93 NY2d 858. Several facts led the police to exercise the common-law right of inquiry, and then to become concerned that something in the defendants' vehicle posed a threat. The vehicle had out-of-state plates and was parked in a well-known drug area at an unusually late hour. Defendant Thomas, who was out of the car, acted nervous and agitated while police questioned her initially, and she repeatedly attempted to re-enter the car. Further, her claim that they had just visited someone in the hospital gave the officers good reason to doubt the truthfulness of her statements as there was no hospital nearby and it was 1:30 a.m. With the driver already out of the car, directing the passengers who were still sitting in it to exit did not constitute an impermissible restraint. The police actions were fully warranted under the circumstances. Order reversed, matters remanded. (Supreme Ct, New York Co [Daniels, J])

Civil Practice (General) CVP; 67.3(10)

Housing (General) HOS; 186(15)

In re Application of Walker v Franco, No. 110, 1st Dept, 9/21/00

Police with a warrant searched the petitioner's apartment. Crack cocaine and related marketing paraphernalia were found to have been thrown out the back window. The petitioner said she was not aware of any drug activity in her apartment, and that either her adult son or the father of her grandchildren was responsible. The New York City Housing Authority terminated her tenancy on the ground of undesirability. She filed a CPLR article 78 petition.

Holding: The petitioner's claim of ignorance was belied by her admission that she had known about a triple-beam scale that was found, broken, in a closet in her apartment. That she had been placed on probation in the past due to her son's drug involvement also helped disprove her claim. The petitioner did not sufficiently allege any due process violations. Determination confirmed. (Supreme Ct, Bronx Co [Friedman, J])

Dissent: [Andrias, J] The respondent offered no evidence that the petitioner had been given proper notice of the hearing. A request for an adjournment can be inferred where the petitioner appeared *pro se*, had no knowledge of the charges before the hearing, and said that she needed counsel because she did not comprehend the nature of the action. There was no evidence that any prosecution resulted from the search, which was three years before the termination. The Authority's Termination of Tenancy Procedures does not allow termination where the true offender has been removed from the household, as is the case here. *Matter of Brown v Popolizio*, 166 AD2d 44, 56.

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

Evidence (Demonstrative)(Sufficiency) EVI; 155(48) (130)

People v Laufer, No. 1647, 1st Dept, 9/26/00

The jury convicted the defendant of first-degree reckless endangerment and second-degree menacing. He was

First Department *continued*

sentenced to a term of six months concurrent with five years probation and a conditional discharge.

Holding: The evidence at trial was legally sufficient and the verdict was accordingly proper. The defendant's actions, including banging his car into the complainant's, displayed a depraved indifference to human life. Not only did he recklessly jeopardize the complainant's life, he placed all others on the road in danger as well. *People v Anglin*, 266 AD2d 557 *lv den* 94 NY2d 876. The admission of the crash test video into evidence was proper. It was relevant to issues presented at trial. The prosecution established that the conditions at the time of the event in question were substantially similar to the conditions under which the videotaped experiment was conducted. *People v Cohen*, 50 NY2d 908. The defendant's other contentions as to the videotape and prosecution expert testimony were unpreserved. The prosecutor did not inject his own credibility and personal beliefs into the trial or express personal beliefs that might have influenced the jury. *Compare People v Ortiz*, 54 NY2d 288 with *People v Paperno*, 54 NY2d 294. The defendant was not prejudiced by the prosecutor's references to his personal involvement in interviewing the complainant because his personal conduct never was an issue at trial. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J])

Trial (General) **TRI; 375(15)**

Transcripts (Procedure) (Right to) **TSC; 373.5(30) (40)**

People v McMahon, No. 1697, 1st Dept, 9/28/00

The jury convicted the defendant of two counts each of first-degree rape, first-degree robbery, and first-degree burglary, and one count of fourth-degree criminal possession of a weapon.

Holding: The defendant was given a full opportunity to comment on the court's response to a note from the jury before the jury was returned to deliberate. There was no prejudice from the error of taking out of sequence the steps required by *People v O'Rama* (78 NY2d 270). The court properly denied the defendant's request for daily copies of trial minutes. *See People v Zabrocky*, 26 NY2d 530, 536. The defendant's due process or equal protection rights were not violated by the fact that the court denied daily copies of trial minutes and granted daily copies of hearing minutes. *People v Walker*, 81 NY2d 661, 668. The ruling on trial minutes was not based on the defendant's representation of himself at trial after being represented by counsel at the hearing. Daily copies of hearing minutes are provided for the purpose of minimizing delay in proceeding to trial. Judgment affirmed. (Supreme Ct, Bronx Co [Hunter, J])

Counsel (Attachment) **COU; 95(9)**

Identification (Lineups) **IDE; 190(30)**

People v Jones, No. 1728, 1st Dept, 9/28/00

Holding: The court did not err by denying the defendant's motion to suppress identification testimony. The defendant's limited right to have counsel present at a lineup that occurred before the initiation of any formal proceedings was not violated. The lineup was not court-ordered, nor was it preceded by an accusatory instrument. "[T]he court's appointment of counsel for defendant, standing alone, did not constitute significant judicial activity causing the attachment of the indelible right to counsel." *See People v Smith*, 62 NY2d 306. Assigned counsel received adequate notice of the lineup but chose not to attend, entitling the prosecution to conduct the lineup in his absence. *See People v Hildago*, 240 AD2d 170 *lv den* 90 NY2d 1012. Judgment affirmed. (Supreme Ct, New York Co [Solomon, J]) ⚖

Defender News *continued from page 7*

session on how to identify favorable and unfavorable data in DNA test reports. Al O'Connor, NYSDA Staff Attorney and Legislative Coordinator, set out changes made in the last legislative session. Ed Nowak, Monroe County Public Defender and President of NYSDA, gave an informative update on recent court of appeals decisions. Public defenders and private practitioners attended.

Federal Defender Seminar

NYSDA joined the Office of the Federal Public Defender, Districts of Northern New York and Vermont, in presenting a Federal Criminal Defense Update in Albany on Nov. 21, 2000. Sessions at this well-received trainer included: Jeff Flax, National Systems Support Analyst for the Federal Defender Program, getting high tech with his presentations on computer use in the courtrooms for highly effective, persuasive advocacy and computer forensics/computer seizure for cases involving computer evidence; Gene Primomo, Senior Litigator for the Office of the Federal Public Defender for Northern District of New York, getting creative with downward departures, giving examples of arguments that have worked to mitigate sentences; and Kent Sprotbery, an Assistant Federal Public Defender in Albany, examining how *Apprendi* has changed federal law and what might happen as it is applied to future situations. The day was wrapped up by Jim Greenwald, an Assistant Federal Public Defender in Syracuse, looking inside the Federal Bureau of Prisons—examining internal procedures and what happens to prisoners after sentencing. ⚖

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