



Public Defense Backup Center REPORT

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

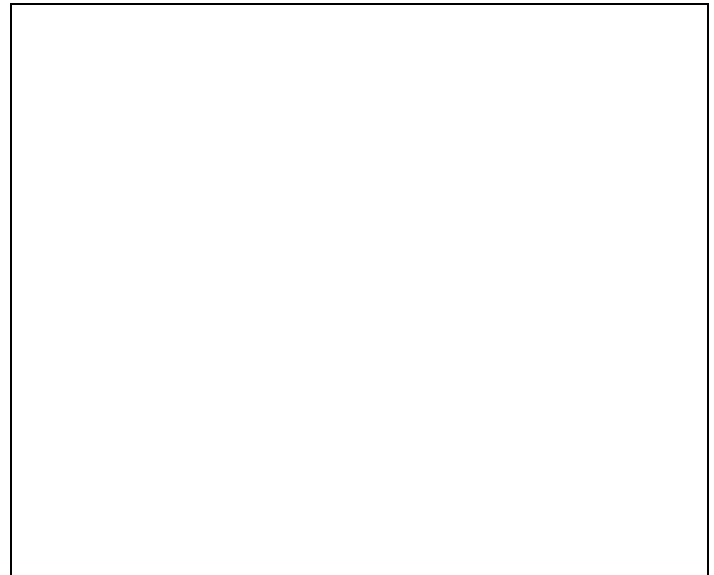
Defender News

NYSBA Criminal Justice "Outstanding Practitioner" Calls for Public Defense Reform

In accepting the Charles F. Crimi Memorial Award as the Outstanding Practitioner, Raymond A. Kelly, Jr. spoke movingly at the New York State Bar Association's Criminal Justice Section meeting in January about current threats to the right to counsel. "The program we have for providing indigent defense services is in shambles," Kelly said. He listed problem after problem creating delay and injustice. He cited the lack of experienced lawyers—the lack of any lawyers—for many defendants due to the underfunding and disorganization of public defense services in New York State.

As a solo practitioner and longtime Assistant Public Defender in Albany, Kelly "is known locally as a tenacious, aggressive and often combative litigator," a reporter recently noted. (*New York Law Journal*, 1/20/00.) Each year, Kelly shares his knowledge with new lawyers at NYSDA's Defender Institute Basic Trial Skills Program. He was a recipient in 1998 of the state bar's prestigious Denison Ray award. (*Public Defense Backup Center REPORT*, Vol. XIII, #9.)

If he could turn his award into Aladdin's Lamp, Kelly said, he would wish for "a new, unified and healthy public defender system for this State." Such a system would be insulated from politics, free of conflicts of interest, and beholden to no one except the clients it serves. It would function pursuant to performance standards, be state supported and adequately resourced. "It would be a system that fosters innovative and creative litigation by zealous, committed lawyers whose zeal is matched by professional salaries . . . [a]nd



Ray Kelly and Cessie Alfonso demonstrate in this 1999 photo the energy they bring as coaches to the Basic Trial Skills Program.
(Photo Credit: Schuyler Photography)

whose integrity is rewarded by a seat at the table of government criminal justice decision-making." Kelly concluded by saying that he accepted the award for all the intentionally under-funded yet ever vigilant public defender, legal aid and 18-B lawyers who stand in courtrooms as champions of the poor and disadvantaged, advancing the constitutional rights of us all. A copy of his speech can be read at NYSDA's web site, www.nysda.org.

Brown, Yaroshefsky Also Honored

Among others honored was Richard A. Brown, Queens County District Attorney. Two years ago, as President of the New York

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**Application Inside
for the
Defender Institute
Basic Trial Skills Program
June 11-17, 2000**

State District Attorneys Association, Brown consistently expressed support for an increase in assigned counsel fees.

Also honored was Ellen Yaroshefsky, professor and Executive Director of the Jacob Burns Ethic Centers at the Benjamin N. Cardozo Law School. Yaroshefsky, a former litigator with the Center for Constitutional Rights and former Seattle public defender, is a scheduled presenter at NYSDA's upcoming New York Metropolitan Trainer (see pg. 8).

Presiding Justice of 4th Dept. Dies

M. Delores Denman, Presiding Justice of the Appellate Division, 4th Dept. since 1991, died in January at the age of 68. She was one of the first two women to serve in the Appellate Division, being appointed in 1977. Accolades from fellow judges and others abounded in the press coverage of her death. She was credited with persuading county and state officials to build a new courthouse for her court in 1996, and was named as a honoree of the NYSBA Criminal Justice Section in January.

Denman testified in 1998 at hearings on public defense sponsored by NYSDA and the League of Women Voters. She spoke strongly of the need for adequate funding for public defenders, in the face of political pressure resulting in the cutting of public defense funds across the state. NYSDA extends sympathy to Justice Denman's many colleagues, friends, and family.

Governor Cuts Public Defense

Governor George Pataki has again issued a budget eliminating all funds for NYSDA, the Neighborhood Defender Service (NDS), Prisoners' Legal Services (PLS), and the Indigent Parolee Representation Program (IPP). Aid to Defense, a program which provides state aid to some counties for certain types of felony cases, is funded in the governor's budget at last year's level of \$13,837,500. The table below notes the governor's funding, the amount needed, and (in parenthesis) the monies needed to restore these programs to previous levels.

Program	Governor	Needed	Restoration
NYSDA	\$0	\$1.6 million	(\$1,400,000)
NDS	\$0	\$1 million	(\$500,000)
PLS	\$0	\$7 million	(\$3,500,000)
IPP	\$0	\$5 million	(\$1,600,000)
ATD	\$13,837,500	\$20 million	—

Judiciary Calls for Increased AC Fees

Chief Judge Judith Kaye, in her annual State of the Judiciary address, recognized that "our system makes it more difficult for low income people to obtain equal justice." In addition to proposing creation of a centralized Access to Justice entity that could enhance the availability of civil legal services and, most importantly, promote new revenue sources, Kaye repeated her support for an increase in as-

signed counsel fees. (See *Public Defense Backup Center REPORT*, Vol. XIV, #5.) Existing fees were barely adequate in 1986 when they were set, Kaye acknowledged, and are completely out of line with today's economic realities, resulting in a mass exodus of attorneys from assigned counsel panels.

OCA Report Issued on Assigned Counsel Fees

In her comments about 18-B fees, Kaye referred to a report from the Office of Court Administration (OCA), released the same day, in support of her position. The report, "Assigned Counsel Compensation in New York: A Growing Crisis," and other news about fees, is available at the NYSDA web site (www.nysda.org), in the "Assigned Counsel Rates" section of the "Hot Topics" area. Public defense providers who do not have access to the Internet can obtain a copy by calling the OCA Communications Office [David Bookstaver, (212) 428-2500].

Kaye and Governor Disagree on Fees

Kaye announced that a judiciary bill will be submitted this legislative session to raise assigned counsel rates to \$75 an hour for felony and Family Court cases, and \$60 an hour for nonfelony cases. Also to be sought is a commission to review the rates periodically and make non-binding recommendations for rate adjustments when needed. Funds for the increase, Kaye suggested, could come from the mandatory surcharge paid by every person in the state convicted of an offense.

Noting that he has different priorities than the Chief Judge, the governor has responded negatively to the call for increased fees for lawyers representing indigent criminal clients. Pataki indicated that he has no intention of diverting court-generated fees to fund Chief Judge Kaye's initiative—he wants an increase in fines and fees to be spent on services for victims of crime. He also let it be known that he is

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unlikely to support any increase in assigned counsel rates, regardless of the funding source. (*New York Law Journal*, 1/12/00.)

Lawyers Look to Legislation and Litigation to Lift Fees

• **Gradess Testifies at City Council Committee**

Bar associations and individual attorneys continue to advocate for an increase in the rates paid to assigned counsel lawyers. NYSDA's Executive Director, Jonathan E. Gradess, testified on Jan. 14, 2000 before the Council of the City of New York Committee on Fire and Criminal Justice Services regarding Resolution 770, which would call upon the New York State Legislature to increase the rates. Gradess also addressed Resolution 769, which would ask the legislature to create an Access to Justice Fund.

Urging the Council to pass these resolutions, Gradess noted that low fees and other problems in indigent defense and civil legal services are but part of a larger issue. The core problem in New York, he said, is that no government entity or human being has as a job description "the assurance that the poor will receive zealous and professional legal services from appropriate, adequately funded, independent providers." A copy of Gradess's testimony is available from the Backup Center.

• **Other Bar Associations Push Fee Increase**

Included in the "President's Message" of the New York State Bar Association's *Journal* for January, 2000—an open letter to lawmakers—is a reiteration of that organization's support for increased fees. Thomas O. Rice also addresses in that column the State Bar's continuing support of state funding for public defense programs, and the need for defense funding on a par with that provided for prosecutorial services. The need for an increase in the fees is also a priority of NYSBA's Criminal Litigation Section, according to its Chair, Vincent E. Doyle III.

Kathryn Kase, the newly installed President of the New York State Association of Criminal Defense Lawyers, has made it clear that she plans to argue strongly during her term for a legislative increase of assigned counsel fees. Systemic litigation is apparently not beyond Kase's consideration, however. She is already involved in litigation to increase fees for capital defenders. (*New York Law Journal*, 2/4/00.)

Kase's immediate predecessor, Marvin E. Schechter, also pushed hard for an assigned counsel fee raise. NYSDA will continue to work with NYSACDL and others on this issue.

• **Litigating Fees, Systemically and Case by Case**

Some lawyers are not waiting for legislative action, but have already turned to litigation in efforts to bring 18-B rates up. Nassau lawyer Thomas F. Liotti has filed a federal suit in the Eastern District, asserting that the statutory fee structure is unconstitutional as applied. In Manhattan, attorney Gary

Schultz has said that the *ad hoc* group he has led in efforts to lobby for increased assigned counsel fees in Family Court is considering filing its own complaint. (*New York Law Journal*, 1/25/00.)

The need for higher fees can also be litigated within the context of the case in which counsel was assigned rather than systemically. A Dutchess County Family Court judge recently overrode the statutory fee schedule in a particular case, choosing to impose the rate proposed last month by Chief Judge Kaye. Judge James V. Brands ordered a fee of \$75 per hour for attorney Leslie D. Maserjian, who successfully secured a dismissal of neglect charges against a mother of three children. Brands cited the court's discretion to exceed the statutory fees in appropriate cases. (*New York Law Journal*, 2/8/00.) [The statutory limits may be exceeded under County Law 722-b's "extraordinary circumstances. See *People v Perry*, 27 AD2d 154 (1967); *People v Brisman*, 173 Misc2d 573 (Supreme Ct, New York Co 1996), and *People v Samuel Davis*, NYLJ 7/11/91, pg. 24 (Supreme Ct, Bronx Co).]

Participants in NYSDA's 32nd Annual Conference and Meeting last July heard Kathryn Kase speak on "Get Help and Get Paid! Law and Strategies for 18-B Counsel." Her handouts from that CLE session are included in the conference materials, available from the Backup Center to public defense providers for \$25.

Other References, Rules, and Rulings Emanate from Kaye and the Court

Several other recent items of interest to criminal practitioners have emanated from the Unified Court System (UCS) and Court of Appeals. Encompassing procedural and political matters as well as case decisions, the items are touched upon below. Further details may be found through the Court's "new and improved" web site (launched in December) at www.courts.state.ny.us/ctapps. According to a press release, decisions are to be posted on the site hours after their official release. The site also contains descriptive summaries of recently-argued and scheduled cases, up-to-date text of all court rules, information about the judges, and the history of the court and the building in which it sits.

Judiciary Address Includes Other Criminal Defense Issues

In her State of the Judiciary speech, which was "webcast" from the new Internet site, Chief Judge Kaye touched on several issues of concern to public defense providers.

• **Specialty Courts Commended and Recommended**

Kaye began with what she described as the UCS's 1999 successes and advances, including record dispositions, national model Family Courts in Erie and New York Counties, and new domestic violence courts. She then turned to "the persistent low-level nonviolent offender." Kaye called for more drug courts statewide to deal with the burgeoning

number of people charged with drug-related crime, and for more “community courts” to deal with what are being called quality-of-life crimes. The Midtown [Manhattan] Community Court, Kaye said, is soon to be followed by others in Red Hook and Harlem. These courts will be the nation’s first multi-jurisdictional community courts; Red Hook will hear not just misdemeanor criminal cases, but also selected Housing and Family Court matters.

• **Need for Defense Viewpoint Not Expressed**

The Chief Judge did not mention the need for public defense participation in the planning of these new specialty courts. However, continuing observations from public defense providers with experience in such courts is that when public defense concerns are ignored in the courts’ creation and functioning, clients—and the effectiveness of the courts—suffer. (See *e.g.* *Public Defense Backup Center REPORT*, Vol. XIV, #3.)

The Backup Center continues to collect information about drug courts and spin-offs (community courts, domestic violence courts, teen courts, etc.) in New York and across the country. Readers are invited to send information on specialty court developments to staff attorney Mardi Crawford.

• **Kaye Suggests Bringing Back Bench Trials in a Big Way**

Huge calendars in New York City have reduced the misdemeanor system to a plea bargain mill that is “not necessarily good” for defendants who want a trial to test the charges against them in a swift certain process or for the public, Kaye said. One way the UCS will deal with this is to propose legislation permitting City prosecutors in Class A misdemeanor cases to stipulate that they will not seek a sentence of more than six months, allowing the matter to proceed to a bench trial [see Criminal Procedure Law 340.40].

Kaye claimed that, bench trials being less time-consuming than jury trials, a prior analog to this proposed law increased misdemeanor trial capacity while meeting the letter of constitutional law requiring jury trials in cases involving potential significant imprisonment. However, a 1988 report from the OCA indicated that “no direct case processing can be attributed directly to the [Misdemeanor Trial Law] MTL.” A report by the New York City Criminal Justice Agency, Inc., found that the MTL had “not affected the trial rate or disposition patterns in New York City Criminal Courts, nor does it seem likely to do so in the future.” Dynia, “Misdemeanor Trial Law: Is it Working?” 1990.

The proposed legislation would be a major improvement for all concerned, the Chief Judge said. But defense lawyers were very critical of the prior law. Rather than “benefiting” persons accused of class A misdemeanors by halving the maximum sentence to which they were exposed, the MTL deprived first-time defendants of a jury in cases in which the conviction of a class A misdemeanor would, itself, be the punishment, labeling them ever after to their detriment in job applications, etc. By providing a “petty” sen-

tence for otherwise serious misdemeanors, the MTL denied defendants a jury of their peers, requiring that they submit instead to the judgment of a single jurist. In this regard, one lawyer quoted G.K. Chesterton’s essay “The Twelve Men,” referring to those who labor in the criminal justice system regularly: “Strictly, they do not see the prisoner in the dock: all they see is the usual man in the usual place.” In the misdemeanor courts, where it is the large number of cases that has provoked a desire to revert to the MTL, how especially true this may be.

If this legislation is passed, counsel should beware of the fact that defendants charged with multiple offenses carrying a maximum sentence of six months can be denied the right to a jury trial even if the resulting sentences are aggregated to more than six months. See *Lewis v United States*, 518 US 322 (1996); *People v Foy*, 88 NY2d 742 (1996). (Aggregate local sentences are, however, statutorily capped at two years. Penal Law 70.30[2][b] and [d]).

Recycling and Other Rules Readily Available

Among court notices marked as “NEW” on the UCS web site (www.courts.state.ny.us/ucsrules.html) is last fall’s amendment to the Uniform Rules for the Trial Courts setting a policy for the use of recycled paper for court filings where practicable. Filings on paper that contain a minimum content of 30% waste paper should bear on the signature page the legend “Printed [Reproduced] on Recycled Paper. 22 NYCRR 215. (*REPORT* readers may have noticed that a similar legend has appeared in the masthead box [see pg. 2] for the last several issues as the Backup Center works to improve its environmental habits.)

No Vindictiveness Found in Young

A motion for reargument was denied on Jan. 11, 2000 in a Court of Appeals case in which NYSDA had filed an *amicus* brief. (See *Public Defense Backup Center REPORT*, Vol. XIV, #7.) The Court held in late November that whether vindictiveness is to be presumed when a higher sentence has been imposed on an individual count following appellate reversal and retrial will depend on whether the record shows there was a “reasonable likelihood” that the increase resulted from vindictiveness. *People v Rudolph Young*, No. 172 (11/23/99) [see digest pg. 14]. The opinion may be found online at the Court’s web site noted above, or through the *New York Law Journal*’s web site: <http://www.nycourts.com>.

State-Ready Contract May Deny Due Process

A statute allowing the Department of Correctional Services to contract with local facilities to hold state-ready convicted felons up to six months may violate inmates’ due process rights, a Bronx Supreme Court Justice has found. In the absence of criteria for choosing which inmates remain in local facilities, some prisoners may be improperly denied the opportunity to shorten their term of confinement, because they

Lawyer Heroes

The following was written by Jerry Kenkel, who died last October, for a colleague receiving an award from the California Attorneys for Criminal Justice while Kenkel was CACJ President. Upon Kenkel's death, CACJ's Executive Director, Mary Broderick, republished this message in the CACJ Forum, as an epitaph. It is reprinted here not as an epitaph, but in celebration of the heroes that NYSDA knows, like Ray Kelly (see pg. 1), and for those we do not know as they advocate for their clients and justice in courts across New York and the nation.

When the subject of criminal defense attorneys comes up in the media, it seems, more often than not, that those attorneys who defend the high profile cases are spotlighted as examples of our profession. But those who are engaged in the business of defending people accused of crime on a day-to-day basis are well aware that the unspoken heroes of our profession are not the well-known or the glamorous. The real heroes are the defense attorneys who struggle day-to-day in the criminal justice system representing people whose names rarely become known to the media or the public. CACJ is made up of those attorneys. Our membership is predominantly attorneys in small or solo practices and public defenders. These are the heroes of the criminal defense bar.

Devoting one's career to criminal defense requires a unique perspective and, above all, complete dedication to the principles that underlie the criminal justice system. It is this dedication to the principles of criminal defense that CACJ honors.

As criminal defense attorneys, we all know the dedication it takes to defend a person accused of crime, whether it be a misdemeanor or felony. We also know that to take on this responsibility on a daily basis requires a total belief in and a commitment to our function. But this commitment does not come without sacrifice, on both a personal and professional level.

Success in the day-to-day battle for people's rights and freedom is not measured in large jury awards; it is not measured in hourly billings and handsome incomes; and, unfortunately, it is not measured by the acclaim and appreciation of the public, the media, the government, or, often times, the judiciary. Success is the knowledge that we are doing our best for each of our clients. Success is the ability to fight each case with the understanding that what we do often does not result in dismissals or acquittals, but is necessary to keep the system honest. Success is recognition by our peers of the criminal defense bar.

cannot enroll in merit time programs or the Shock Incarceration Program, and may be denied timely Parole Board review. Until the state and city corrections departments identify those inmates who should be exempt from the contract in order to preserve their chance to shorten their time, the departments are directed to amend the contract. They must exclude those eligible for parole within six months of confinement (or guarantee timely Parole Board review) and merit-time-eligible inmates with sentences short enough that confinement at the local level will deny them the opportunity to participate in programs that would allow them to reduce the duration of their confinement. A copy of the Jan. 13 opinion by Justice Richard Lee Price, in *People ex rel Carillo v Basilone* and *Matter of Carillo v Kerik and Goord*, Index #52745-1999, is available from the Backup Center.

Meanwhile, a lawsuit has been filed in the U.S. District Court for the Northern District of New York on behalf of two named plaintiffs and a proposed class of inmates who are being held or were previously held in local facilities under the contract after becoming state-ready. The complaint seeks injunctive and other relief. For more information about *Allen et al v Goord et al*, contact: Robert N. Isseks, Esq., 6 North Street, Middletown NY 10940.

Oneida Public Defender Office Adopts Objective of Vertical Representation

The Oneida County Public Defender Office is using a critical federal magistrate judge's report to seek resources to improve the office. The report had criticized, *inter alia*, the office's inability to provide vertical representation to the defendant whose case was before the court (see *Public Defense Backup Center REPORT*, Vol. XIII, #10). Public Defender Frank J. Nebush, Jr. used the report to obtain technical assistance from the federal Bureau of Justice Assistance Criminal Courts Technical Assistance Project. (See details about CCTAP at the American University web site, www.american.edu/justice.)

The result was an evaluation of the office's case management practices and procedures by a nationally-known expert in indigent criminal defense. That expert, Marshall J. Hartman of Illinois, whose current position is Director of the Capital Litigation Division of the Illinois Appellate Defender's Office, found that a lack of resources was preventing the Oneida Public Defender Office from accomplishing its mission—to provide the finest service to the jurisdiction's indigent accused.

The report praised Nebush for being concerned enough about the problems outlined in the magistrate judge's opinion to seek added resources to remedy them even after the magistrate's legal recommendation was rejected. Nebush was cited for staying on top of new management techniques.

Hartman made specific recommendations for change in the defender office, such as increasing staff in Utica City Court by one lawyer so that each lawyer could be assigned to a particular judge and clients would have a single public

defender, rather than having two lawyers juggling cases in front of three judges as had been the practice. Hartman's analysis showed that his recommendations, aimed at improving the quality of representation, would also increase the efficiency of the office and the court by ending costly duplication of effort, mistakes and miscommunications, and unnecessary court delay.

The report was endorsed by a Special Committee of the Oneida County Bar Association. Nebush then submitted a proposal implementing its recommendations to the County Executive, who included the entire recommendation in the budget submitted to the county legislature. The Board of Legislators in turn agreed to the addition of three lawyers and two secretaries. Implementation of the recommendations will be tracked and reported to the entities providing the technical assistance: the Justice Department (Bureau of Justice Assistance); American University; and the National Legal Aid and Defender Association.

Take a Non-Profit to the Ballpark

Ronald J. Tabak, Pro Bono Coordinator at Skadden Arps Slate Meagher and Flom LLP, has once again organized the baseball fundraiser of the year—April 30, 2000, at Yankee Stadium, watching, from wonderful upper box seats, the two-time defending World Championship Yankees play the Toronto Blue Jays. Tabak has ordered more tickets than ever, and hopes to raise over \$10,000 for various groups, including NYSDA. Those who wish to attend should write a check for \$13 per seat (payable to Tabak) for the seat(s), and a check for at least \$15 per seat (payable to the group of their choice), then send both checks to: Ronald J. Tabak, Four Times Square, 24th Floor, New York NY 10036-6522.

Cameras In the Courtroom, Continued

As preparations for the high-profile trial of four New York City police officers for the killing of immigrant Amadou Diallo got underway in Albany following a change of venue, media calls for televising the case were heard. On Jan. 25, Supreme Court Justice Joseph C. Teresi found unconstitutional a 1952 state law barring cameras from the courts. A day later, another judge allowed cameras into the trial of a woman accused of killing her baby. (*Albany Times Union*, 1/25/00 and 1/26/00.)

Justice Teresi criticized legislative leaders for having allowed an exemption to the law to lapse. That exemption, an experiment which put cameras in New York courts for about 10 years, expired in 1997. In the wake of the Diallo case ruling, legislation is being considered to end the ban, this time permanently.

Along with the New York State Bar Association, the New York State Association of Criminal Defense Lawyers, and other individuals and organizations, NYSDA has found serious evidence that allowing televised coverage of judicial proceedings is harmful to defendants' rights and the cause

of justice. A page under Hot Topics on the NYSDA web site chronicles New York's cameras-in-court saga, and offers a fact sheet, www.nysda.org.

Trial Counsel Can Waive IAD Time Limit

By agreeing to a trial date outside the time limits set by the Interstate Agreement on Detainers (IAD), defense counsel waived his client's right to be tried within 180 days, the U.S. Supreme Court held recently in a New York case. The unanimous opinion by Justice Scalia said that scheduling is a matter controlled by counsel, and that the Court of Appeals ruling requiring something more than an attorney's mere acquiescence was incorrect. *New York v Hill*, No. 98-1299 (1/11/00). (See case digest, p. 13). The Monroe County Public Defender Office represented the prisoner, Michael Hill. The case was argued in the Supreme Court by First Assistant Public Defender Brian Shiffrin.

Running from Police Found Grounds for Detention

Several other cases relating to criminal practice have been decided by the high court since the beginning of the year. In one, the court held that unprovoked flight from police in a high-crime area can provide a sufficient basis for the fleeing individual to be detained for further investigation. (*Illinois v Wardlow*, No. 98-1036, 1/21/00.) Digests of this and other Supreme Court cases will appear in future issues of the *REPORT*. Text of the opinions can be found on the Internet at Cornell University's Legal Information Institute web site: <http://supct.law.cornell.edu/supct>.

<p style="text-align: center;">Clear Your Calendar Now for the GIDEON COALITION'S LEGISLATIVE DAY March 14, 2000</p>

Commission Censures Justice Over Right to Counsel

A town justice has been censured for a number of legal errors and ethical transgressions, including failing to properly advise defendants about the right to counsel, failing to provide an application for public defense representation, and discouraging a defendant from getting a lawyer by wrongly saying the defendant had not applied soon enough. John D. Pemrick, a justice of the Greenwich Town and Village Courts, is not a lawyer. The Commission on Judicial Conduct, citing *Matter of Meacham* (1994 Ann Report of NY Comm on Jud Conduct at 87, 91) noted that a judge has an obligation to maintain professional competence, and to learn and obey ethical rules, whether or not the judge is a lawyer. Determination 10/28/99.

Justices of several other courts were censured or admonished in December and January for actions relating to criminal matters. Their misconduct included: making comments, at arraignment and to the press, that indicated a predisposition to believe the male defendant in an assault case and to disfavor the female complainant; having a defendant detained in handcuffs for over an hour and a half after the defendant's pager sounded in the courtroom, while the judge considered whether to hold the defendant in contempt after the defendant allegedly cursed the sergeant who cuffed him; issuing a criminal summons on a nonexistent charge of "False Swearing on Information Subpoena" to bring an indi-

vidual into court for having failed to pay on a small claims judgment; and issuing subpoenas for law enforcement officers without a request from the prosecution or defense, because the justice was disturbed that a deputy had not appeared as a witness in an earlier traffic case, and also writing to another judge at the request of a citizen, asking that the citizen's son be given youthful offender status, thereby using the prestige of the court to advance the private interests of others. These and other Determinations can be found at the Commission's web site: <http://www.scjc.state.ny.us>.

(Continued on page 27)

Job Opportunities

The OFFICE OF THE APPELLATE DEFENDER (OAD) in New York City seeks a **Senior Staff Attorney**. OAD is a not-for-profit, 16-lawyer firm devoted to high quality representation of indigent defendants in state criminal appeals and state and federal collateral proceedings. Part law firm, part training program, OAD strives to attract outstanding lawyers and to find innovative and economical ways to serve the poor. All cases are double-teamed by a staff attorney and supervisor. Moot courts are conducted for every argument. The senior staff attorney will have primary responsibility for a caseload but will receive supervision consistent with the double-teaming model. Required: substantial criminal defense experience, including appellate work or other relevant writing experience; high energy; strong commitment to client-centered indigent defense; and excellent analytical, writing, and oral advocacy skills. Salary CWE, excellent benefits. Submit cover letter, resume, and writing sample to Tuli Taylor, Administrative Attorney, Office of the Appellate Defender, 45 W 45th St, 7th Floor, New York NY 10036

OAD also offers two **Staff Attorney Fellowships**, commencing in 9/00, to relatively new lawyers with demonstrated top-level skills in legal research and writing and a commitment to providing legal services to the indigent. Each will be intensively trained and supervised within the double-teaming model. The positions are open to outstanding lawyers completing judicial clerkships, those with non-judicial post-graduate experience, and distinguished law graduates straight out of school. Salary \$39,000 the first year, \$42,000 the second year, plus benefits. Submit cover letter, resume, and writing sample to the above address

The WAYNE COUNTY PUBLIC DEFENDER'S OFFICE seeks an **Assistant Public Defender**. The position involves handling felony and misdemeanor cases.

Experience in criminal defense, including trial experience, preferred. EOE, minorities encouraged to apply. Send resume, writing sample and references to: Ronald C. Valentine, Esq., Wayne County Public Defender, 26 Church Street, 2nd Floor, Lyons NY 14489

The TEXAS DEFENDER SERVICE, a non-profit office dedicated to improving the quality of indigent capital defense, seeks a **Legal Director** for its recently-inaugurated Capital Trial Project in Austin. Duties will include direct case-specific consultation and guidance to appointed counsel in death penalty trials around Texas, developing high-quality training materials and model legal pleadings, designing and conducting training programs, devising a data collection system to track pending trial-level capital cases, and working to raise public awareness of the need for indigent capital defense reform. Required: 3 or more years experience in death penalty trials and substantial additional felony trial experience; ability to command respect from and work with local trial counsel; aggressive and imaginative approach to litigating capital trials; extensive familiarity with relevant substantive law; and commitment to serving the client communities, including people of minority race or with mental illness or retardation. Minorities and women especially urged to apply. Salary \$45,000-\$65,000 DOE, plus benefits. Send resume, cover letter, and two letters of recommendation from attorneys familiar with the quality of your legal work to: Jim Marcus, Executive Director, Texas Defender Service, 412 Main Street, Suite 1150, Houston TX 77002

The NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS seeks an **Indigent Defense Counsel** to lead national and grassroots efforts on indigent defense issues, with particular emphasis on identifying and promoting systemic challenges to the currently over-burdened and underfunded public defender systems. Responsible for: developing model pleadings; devis-

ing litigation strategies; and working with law firms and affiliated groups on litigation and lobbying. Applicants should possess civil rights litigation experience and exceptional organizational, analytical, writing and advocacy skills. Experience as a public defender helpful. Send CV and cover letter to: Executive Director, 1025 Connecticut Ave., NW, Ste. 901, Washington DC 20036. fax (202)872-8690. [See NACDL's web site at www.criminaljustice.org]

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Conferences & Seminars

Sponsor: New York State Defenders Association
Theme: 14th Annual New York Metropolitan Trainer
Date: March 4, 2000
Place: New York City
Contact: NYSDA: tel (518) 465-3524; fax (518) 465-3249; e-mail training@nysda.org; web site www.nysda.org

Sponsor: Appellate Division, 1st Department & The Assigned Counsel Plan of the City of New York
Theme: Continuing Legal Education Courses
Dates: March 6, 2000 (Expert Witnesses)
March 13, 2000 (Cross-Examination)
March 20, 2000 (Grand Jury Practice)
March 27, 2000 (Basic Legal Ethics)
April 3, 2000 (Family Court Appeals)
April 11, 2000 (Criminal Court Appeals)
May 1, 2000 (Oral Argument and Brief Writing)
Place: New York City
Contact: Appellate Division, Office of Special Projects (212) 340-0400

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

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

Sponsor: Association of the Bar of the City of New York
Theme: Continuing Legal Education
Dates: March 20, 2000 (Forfeiture Law: Ethics, Strategies and Trends)
March 30, 2000 (Legal Ethics in the Practice of Criminal Law)
May 2, 2000 (Navigating the Prison Litigation Reform Act)
June 8, 2000 (Use of Psychological Evidence in Negotiations & Sentencing)
Place: New York City
Contact: CitiBar Center for CLE, ABCNY, 42 West 44th Street, New York NY 10036. tel (212) 382-6663; fax (212) 869-4451; web site: www.abcny.org

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Making Crime Pay: The Business of Criminal Law
Date: March 25, 2000
Place: New York City
Contact: Patricia Marcus: tel (212) 532-4434; fax (212) 532-4668; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance 2000 (Death Penalty Training)
Dates: March 25-28, 2000
Place: Washington, DC
Contact: Aimee Gabel: tel (202) 452-0620 x214; fax (202) 872-1031; e-mail: a.gabel@nlada.org; web site www.nlada.org/t-events.htm

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

Sponsor: Law Offices of Public Defender Bennett H. Brummer, ABA Juvenile Justice Center, The Sentencing Project, Inc, & Florida Public Defender Association, Inc.
Theme: Juveniles in Adult Court: Our Children, Our Future
Dates: March 30-31, 2000
Place: Miami, FL
Contact: Maria PH. (305) 545-1902; e-mail registration@pdmiami.com

Sponsor: Center on Violence and Victims Studies
Theme: Victim Assistance
Dates: April 3-7, 2000
Place: Topeka, KS
Contact: Tom Underwood, Center on Violence and Victims Studies, Washburn University, 1700 College Avenue, Topeka KS 66621. tel (785) 231-1010, ext. 1242

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

Conferences & Seminars

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: April 7, 2000
Place: Mineola, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212) 532-4668; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor: The National Association of Sentencing Advocates
Theme: 8th Annual Conference
Dates: April 12-15, 2000
Place: San Diego, CA
Contact: NASA, c/o The Sentencing Project: tel (202) 628-0871; fax (202) 628-1091; e-mail staff@sentencingproject.org; web site www.sentencingproject.org/nasa

Sponsor: Louisiana Association of Criminal Defense Lawyers
Theme: Law and All that Jazz
Dates: April 27-29, 2000
Place: New Orleans, LA
Contact: LACDL: tel (225) 387-3261; fax (225)387-3262; web site www.lacdl.org

Sponsor: New Yorkers Against the Death Penalty
Theme: Unmasking the Death Penalty: Opening Hearts and Minds
Dates: April 28-30, 2000
Place: Binghamton & Johnson City, NY
Contact: Judicial Process Commission, Sue Porter: (716) 325-7727; e-mail anti-death@qwikpages.com

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

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

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

Sponsor: New York State Association of Criminal Defense Lawyers
Theme: Seminar
Date: June 10, 2000
Place: Binghamton, NY
Contact: Patricia Marcus: tel (212) 532-4434; fax (212) 532-4668; e-mail nysacdl@aol.com; web site www.nysacdl.org

Sponsor: National Criminal Defense College
Theme: Trial Practice Institutes 2000
Dates: June 11-24, 2000
July 16-29, 2000
Place: Macon, GA
Contact: NCDC: c/o Mercer Law School, Macon GA 31207; tel (912) 746-4151; fax (912) 743-0160; e-mail Rosie@ncdc.net

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

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

Sponsor: National Bar Association
Theme: 75th Annual Convention & Exhibits
Dates: August 5-12, 2000
Place: Washington, DC
Contact: National Bar Association, 1225 11th Street NW, Washington DC 20001-4217. tel (202) 842-3900; e-mail nba@nationalbar.org; web site: www.nationalbar.org ☪

Defense Practice Tips

Obtaining Supporting Depositions

by Gary Muldoon*

ISSUE: What are the requirements for obtaining a supporting deposition after *People v Perry* and the amendment to CPL 100.25?

A motorist who receives a traffic ticket (simplified traffic information) is entitled to request a supporting deposition. Failure to provide this results in the traffic ticket being defective and subject to dismissal. CPL 100.25(2).

Prior to 1996, the common practice of requesting supporting depositions was a tad sloppy, and not in harmony with the statute. In *People v Perry*, the Court of Appeals let the legal community know that the statutory requirements were to be followed, with the defense's failure to conform leading to the dismissed traffic charge therein being reinstated. The attorney's "appearance letter," entry of not-guilty plea, and request for supporting deposition did not dispense with the need for arraignment, required by CPL 100.25(2), and thus did not trigger the prosecution's obligation to furnish a supporting deposition. *People v Perry*, 87 NY2d 353, 639 NYS2d 307 (1996).

After *Perry*, the state legislature amended CPL 100.25 in a manner not in conformity with *Perry*'s holding. *Perry* was decided on Feb. 8, 1996; the amendment to 100.25 was effective Oct. 27, 1996.

What does *Perry* stand for now? Arguably, nothing—the statute the Court of Appeals interpreted no longer exists. But it should still serve for the proposition of strict compliance in requesting a supporting deposition, even though the specific requirements of the old 100.25 no longer apply. *Handling a Criminal Case in New York*, sec. 3:73.

An arraignment normally occurs in person, but with a traffic ticket it may be made by mail. A not-guilty plea by mail (certified, registered or first class) must be made within 48 hours. VTL 1806.

Few reported decisions have cited *Perry*. One 1997 decision cited it as controlling authority, but the traffic infractions at issue in that case occurred prior to the amendment to 100.25. *People v Maran*, 174 Misc2d 327, 666 NYS2d 870 (App Term 2d Dept 1997).

* Gary Muldoon is a Rochester attorney. This article is a reprint of Vol. 1, #13, "Criminal Law Issues in New York," his e-mail publication. To subscribe (no charge) send an e-mailing to muldg@aol.com with the word "include" in the subject box. (To drop the subscription, send an e-mailing with the word "unsubscribe" in the box.) Muldoon is co-author, with Sandra J. Feuerstein, of *Handling a Criminal Case in New York*, referenced in this article, and is also co-author of *Criminal Law in New York*, 4th edition, both published by West Group (1-800-328-4880 or www.westgroup.com).

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More recently, a decision from the Justice Court of the Village of North Hills discussed the requirements of a supporting deposition and *Perry*'s applicability. *People v Guerrerio*, 181 Misc2d 517, 694 NYS2d 619 (1999).

Under CPL 100.25 as amended, a defendant upon timely request is entitled to a supporting deposition. To be timely, the request must be made within 30 days after the date the person is required to appear in court. The request may be made by mail.

Where the charge is a misdemeanor, the defendant, for good cause shown, may request a deposition up to 90 days after the return date. CPL 100.25[3]. Where the traffic ticket is venued in the administrative adjudication bureau, the defendant is not entitled to a supporting deposition. *Handling*, sec. 1:30.

The defendant in *Guerrerio* mailed in his not-guilty pleas (although not within 48 hours) and the request for depositions prior to the return date on the ticket. Because the mailing was not performed within 48 hours, it did not constitute an arraignment under VTL 1806. The prosecution, citing *Perry*, argued that an arraignment was required. The village justice disagreed. Terming it a case of first impression, the court stated that the issue was "whether, in the absence of a valid arraignment, the request for a supporting deposition was timely." *Perry* was not controlling. The court held the failure to provide the supporting depositions within the 30-day period required dismissal of the six traffic tickets.

Remember, there are two 30-day time periods at work here. If the defense wants a supporting deposition, it must be made within 30 days after the court date noted on the ticket. And, after request, the prosecution has 30 days from receipt by the court to supply the deposition, or the ticket is defective. Under *Guerrerio*, both of these periods can start prior to the defendant appearing in court.

It should be noted that the two statutes have different mailing requirements. VTL 1806 requires the mailing be done within 48 hours of receiving the ticket; CPL 100.25(2) has no such restricted time period. The right to a supporting deposition under 100.25(2) is separate from the defendant's entry of a plea under VTL sec. 1806, though they can be accomplished in the same mailing.

Perry required an arraignment as a condition of triggering the providing of a deposition because former 100.25(2) required it ("... defendant arraigned upon a simplified information is, upon a timely request, entitled as a matter of right to have ... a supporting deposition.") Under the amended section, no arraignment is required to trigger the right to the deposition. ("A defendant charged by simplified information is, upon a timely request, entitled as a matter of right to have ... a supporting deposition. ... To be timely, such a request must ... be made ... not later than thirty days after the date the defendant is directed to appear in court as such date appears upon the simplified information. ... If the defendant's request is mailed to the court, the request must be mailed within such thirty day period.") (cont'd. pg. 27)

Immigration Practice Tips

Defense-Relevant Immigration News

by Manuel D. Vargas*

DWI While License Suspended or Revoked Is a Crime Involving Moral Turpitude—Simple DWI Is Not

The Board of Immigration Appeals (BIA) issued further bad news in December for noncitizens facing DWI charges. Although DWI has traditionally been thought not to constitute a crime involving moral turpitude under the immigration statute, the BIA held that the Arizona offense of aggravated driving under the influence is a crime involving moral turpitude potentially triggering deportability/inadmissibility. The basis for the ruling is that the DWI statute in question requires a showing that the offender knew that his or her license to drive had been suspended, cancelled, revoked or refused. At the same time, the BIA ruled that simple driving while under the influence, without any such aggravating circumstance, is not a crime involving moral turpitude. *Matter of Lopez-Meza*, Interim Decision #3423 (BIA 12/21/99).

This latest DWI decision follows other rulings against immigrants in 1999 and in 1998. The earlier decisions found that felony DWI with a prison sentence of one year or longer may trigger the particularly harsh immigration consequences of the separate deportation ground for conviction of an aggravated felony. See, *Public Defense Backup Center REPORT*, Vol. XIV, #9, at pg. 4.

As a result of the *Lopez-Meza* decision, defense lawyers and their DWI noncitizen clients should now beware of more than conviction of any New York felony DWI offense with a prison sentence of one year or longer. Conviction of any other New York Vehicle and Traffic Law (VTL) offense or combination of offenses, regardless of sentence, where the conviction may establish unlicensed operation of a vehicle in addition to driving while ability impaired or intoxicated creates potential problems. For example, it now appears that a noncitizen convicted of first-degree aggravated unlicensed operation of a motor vehicle (VTL § 511(3)(a)(i)), which requires a showing of operating a vehicle both without a license and while under the influence, may now trigger the crime involving moral turpitude deportability/inadmissibility grounds. On the other hand, conviction of a DWI offense lacking such an aggravating circumstance and with-

* **Manuel D. Vargas** is the Director of NYSDA's Criminal Defense Immigration Project, which provides backup support concerning immigration issues to public defense attorneys. Manny has been working on an update of the Project's manual, *Representing Noncitizen Criminal Defendants in New York State*. Watch for announcement of its availability in a future issue of the REPORT and on NYSDA's web site, www.nysda.org. If you have questions about immigration issues in a criminal case, you can call Manny on Tuesdays and Thursdays from 9:30 a.m. to 4:30 p.m. at (212) 367-9104.

out a prison sentence of one year or longer should not, in and of itself, trigger removal from the United States.

Two Federal Courts Reduce Sentences of One Year and One Day to Less than One Year to Avoid Triggering Deportation

Federal judges of the U.S. District Court for the Southern District of New York in two separate cases have granted writs of *coram nobis* and reduced sentences for federal convictions that had subjected the noncitizen defendants in each case to removal from the United States. The reduction should have the effect of removing the convictions in both cases from the purview of the aggravated felony deportation ground.

In December 1999, Senior District Judge Charles S. Haight, Jr., lowered a sentence of one year and one day to ten months for a noncitizen convicted of bribery. *United States v. Ko*, 1999 WL 1216730, 1999 U.S. Dist. LEXIS 19369 (SDNY, 12/20/99). Earlier, in September, Chief District Judge Thomas P. Griesa also reduced a sentence of one year and one day to ten months for a noncitizen convicted of conspiracy to commit robbery. *United States v. Corso*, 97 Cr. 56-6 (SDNY, 9/2/99). Bribery and robbery offenses constitute aggravated felonies for immigration law purposes only when the defendant is sentenced to a term of imprisonment of at least one year.

These federal court actions follow at least one state court decision earlier in 1999 in which the Appellate Division, First Department, reduced a noncitizen defendant's one-year sentence for attempted second-degree robbery to 364 days in order to relieve the defendant of the "unanticipated effect on his immigration status" of the one-year sentence. *People v Cuaran*, No. 993 (1st Dept., 5/11/99). See *Public Defense Backup Center REPORT* Vol. XIV, #5, at pg. 10.

INS Deportations of Noncitizens with Criminal Convictions Up 12% in 1999

The Immigration and Naturalization Service (INS) announced that it removed 176,990 "criminal and other illegal aliens" in Fiscal Year (FY) 1999, up 3% from FY 1998. Of this total, 62,359 represented so-called "criminal alien" removals, up 12% over the number of such removals recorded in FY 1998. The INS reported that most of these criminal removals were accounted for by drug convictions (47%), criminal violations of immigration law (13%), convictions for assault (6%), and convictions for burglary (5%).

According to the INS, the largest increase in criminal removals occurred in the Institutional Removal Program (IRP). The INS describes IRP as a cooperative effort of the INS, the Executive Office for Immigration Review (*i.e.*, immigration judges), and participating federal and state correctional agencies "to identify, charge and conduct removal proceedings for convicted criminal aliens while they are still serving their prison sentence so that they can be immediately removed from the United States upon completion of

their sentences.” A total of 19,592 “criminal aliens” was removed through the IRP program in FY 1999, a nearly 45% increase over FY 1998. The INS reported that it targeted IRP resources to seven states — including New York, as well as Arizona, California, Florida, Illinois, New Jersey, and Texas — which account for 75 to 80% of all foreign-born state inmates nationwide. In New York, IRP removal proceeding hearings take place at three state facilities — Downstate Correctional Facility in Fishkill, Ulster Correctional Facility in Napanoch, and the Bedford Hills Correctional Facility for Women.

ABA Publishes New Standards Requiring Judges and Defense Counsel to Advise Defendants Pleading Guilty about Immigration Consequences

The American Bar Association (ABA) has issued a new third edition of its ABA Standards for Criminal Justice, Pleas of Guilty. For the first time, separate standards require defense counsel and judges to advise noncitizen defendants regarding collateral consequences of guilty pleas, such as deportation.

New ABA Standard 14-3.2(f) (Responsibilities of defense counsel) provides: “To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.” The commentary on this Standard states: “For example, depending on the jurisdiction, it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.” The commentary further states: “In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defen-

dant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, *nolo* or *Alford* plea.”

With respect to responsibilities of judges, new Standard 14-1.4(c) (Defendant to be advised) provides: “Before accepting a plea of guilty or *nolo contendere*, the court should also advise the defendant that by entering the plea, the defendant may face additional consequences including . . . if the defendant is not a United States citizen, a change in the defendant’s immigration status.”

The ABA Standards for Criminal Justice, Pleas of Guilty, Third Edition (ABA 1999) is available from the American Bar Association Service Center. tel (312)988-5522; \$39.95 (\$25.95 for public defenders, prosecutors, judges, and students), plus shipping — Cite Product Code 5090078).

Early Parole for Deportation Reactivated

After being suspended for most noncitizen prisoners for much of the last two years, the state’s early parole for deportation program will now resume under new standards, according to the New York State Division of Parole.

New York law provides that the Board of Parole may, prior to completion of the minimum term of a sentence of imprisonment, grant early parole to certain noncitizens with final orders of deportation. Under state law, such early parole is statutorily barred only for an inmate convicted of either a violent felony offense or an A-1 felony offense, other than a section 220 controlled substance A-1 felony offense. See New York Executive Law 259-i(d). In March 1998, however, the state suspended the early parole program due to controversy over the early release and deportation of certain A-1 drug felons.

The Parole Division reports that over 100 cases of individuals previously approved for early parole are now being turned over to the INS for deportation. In addition, Parole will start processing new cases under the new standards. The new standards will be covered in a future issue of the *REPORT*. ☪

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 available.

United States Supreme Court

**Search and Seizure (Arrest/
Scene of the Crime Searches)
(Warrantless Searches)** **SEA; 335(10) (80)**

Flippo v West Virginia, No. 98-8770, 10/18/99

Holding: A West Virginia trial court denied suppression of evidence found as the result of a warrantless "crime scene search." Review was denied in the state Supreme Court of Appeals. The trial court's ruling conflicts with *Mincey v Arizona*, 437 US 385 (1978). *Mincey* rejected a "murder scene exception" to the 5th Amendment requirement that a warrant be obtained. No opinion is expressed as to whether the instant search could be justified as consensual or as meeting any other exception to the warrant requirement. Judgment reversed, remanded for further proceedings.

Death Penalty (Cruelty) **DEP; 100(40)**

**Knight v Florida, Nos. 98-9741 and 99-5291,
11/8/99**

Holding: Certiorari denied.

Opinion Respecting Cert Denial: [Stevens, J] Denial of cert does not constitute a ruling on the merits.

Concurrence: [Thomas, J] There is no constitutional or precedential support for a defendant complaining of a delay in carrying out the death penalty after taking advantage of "the panoply of appellate and collateral procedures." That is why the proponents rely only on the European Court of Human Rights and other foreign opinions. State courts have resoundingly rejected this type of claim; the "experiment" as to the claim's validity should be ended.

Dissent: [Breyer, J] Where a delay of decades results from a state's failure to comply with constitutional demands, a claim that the passage of time renders an execution inhuman is strong and should be considered. The suffering inflicted by prolonged waits for execution is undeniable (eg *In re Medley*, 134 US 160, 172 [1890]), and delay weakens the justifications of retribution or deterrence (*Lackey v Texas*, 514 US 1045, 1046 [1995] [Stevens, J, respecting denial of cert]). While foreign authority does not bind the Court, foreign applications of roughly comparable standards are relevant and informative. There are many people who have been on

death row for more than 20 years. The issue presented here should be considered.

Speech, Freedom of (General) **SFO; 353(10)**

**Los Angeles Police Department v United Reporting
Publishing Corp., No. 98-678, 12/7/99**

Holding: A private publishing service that provides lists of arrestees to attorneys, insurance companies, drug and alcohol counselors, driving schools, etc. sought to overturn a California statute that would restrict release of arrest information. Arrest information that includes arrestees' addresses would be released under the statute only to persons affirming that they would not use the information to sell a product. The federal court of appeals affirmed a district court ruling that the statute was facially invalid under the 1st Amendment. But facial overbreadth challenges are an exception to the traditional rule that courts focus on the fact situation before them. *New York v Ferber*, 458 US 747, 767 (1982). The publishing service seeking the information did not even attempt to qualify for receipt of the information, which California could decide to withhold from everyone (*Cf Houchins v KQED Inc.*, 438 US 1, 14 [1978]), and no threat of prosecution hangs over the head of the customers of the publishing service (*see Gooding v Wilson*, 405 US 518 [1972]) who may seek access on their own. No possibility is set out here that protected speech is being muted by the challenged law. *Bates v State Bar of Arizona*, 433 US 350, 380 (1977). Judgment reversed.

Concurrences: [Scalia, J] The question of whether the statute can be successfully challenged "as applied" remains open. [Ginsburg, J] It does not appear that California's selective disclosure of arrestee address information impermissibly burdens free speech.

Dissent: [Stevens, J] By making the information at issue available to all but a narrow category of persons, the statute violates the 1st Amendment.

Detainers (General) **DET; 106(10)**

Speedy Trial (Consent to Delay) **SPX; 355(15)**

New York v Hill, No. 98-1299, 1/11/00

The respondent was a prisoner in Ohio who signed a request under the Interstate Agreement on Detainers (IAD) for disposition of a detainer lodged by New York. When counsel and the prosecution appeared in court to set a trial date, a prosecutor standing in said that a trial date had been preliminarily discussed. When the court asked defense counsel how that date was, counsel replied that it would be fine. The date was beyond the IAD's 180-day speedy trial limit. The trial court found that the defendant had waived the limit by counsel's agreement to the trial date. The Court of Appeals reversed.

US Supreme Court *continued*

Holding: While the IAD does not specifically address this situation, a general rule presumes that constitutional and statutory provisions can be waived. *US v Mezzanatto*, 513 US 196, 200-201 (1995). There has been disagreement as to what is necessary to effect a waiver of IAD time limits. Scheduling matters are generally among the things that counsel’s agreement will control. Only counsel can assess a delay’s benefit or detriment to the client, and to know whether the defense would be prepared for an earlier trial date. The statute specifically allows continuances when a prisoner or counsel is present, and does not contain any clear negative implication that would overcome the presumption that waiver is available. Although society may benefit from the IAD time limits (*see eg Sibron v New York*, 392 US 40, 56-57 [1968]), its interest is not a part of the unalterable policy of the statute. The Court of Appeals erred in requiring a hypertechnical distinction between “agreement” and “affirmative request.” Judgment reversed.

New York State Court of Appeals

Sentencing (Resentencing) **SEN; 345(70.5)**

People v Young, No. 172, 11/23/99

The defendant was convicted of multiple counts and was sentenced as a persistent violent felony offender to 25 years to life on the robbery and burglary. He was sentenced as a second felony offender to concurrent two-to-four year terms on the possession of stolen property and grand larceny counts. His aggregate sentence was 45 years to life. The convictions were reversed because they were the result of illegally-obtained evidence. On retrial, in front of a different judge, the defendant was convicted of possession of stolen property and acquitted of the remaining counts. He was sentenced as a persistent felony offender to an indeterminate sentence of 25 years to life. The Appellate Division affirmed.

Holding: Criminal defendants should not be penalized for exercising their right to appeal. A presumption of vindictiveness generally arises when defendants who have won appellate reversals are given greater sentences after their retrials than were initially imposed. *See People v Van Pelt*, 76 NY2d 156. In *North Carolina v Pearce* (395 US 711 [1969]), the US Supreme Court required that in those situations, “the reasons for [the enhanced sentence] . . . must affirmatively appear.” Where a defendant receives a greater sentence on an individual count, but an equal or lesser overall sentence, courts must examine the record to determine whether there is a reasonable likelihood the enhanced sentence on the individual count was the result of vindictiveness. Here, a different judge imposed sentence. *See Texas v McCullough*, 475 US 134 (1986). This record shows no reasonable likelihood of vindictiveness. While trial courts must impose dis-

crete sentences for individual counts, in multi-count cases they may view the individual sentences as part of one whole. The single most important factor in the sentencing determination was the defendant’s extensive criminal record. Order affirmed.

Privacy (General) **PRV; 302(10)**

Search and Seizure (General) **SEA; 335(42)**

People v Jose, No. 195, 12/16/99

Holding: Determining whether a defendant had a legitimate expectation of privacy involves a mixed question of law and fact. Where, as in this case, there is record support for the Appellate Division’s determination of this question, the issue is beyond this Court’s review. *See eg People v Ortiz*, 83 NY2d 840, 843. Order affirmed.

Judges (Powers) **JGS; 215(10)**

People v Dexter, No. 200, 12/20/99

Holding: The defendant’s own alternative request that the original indictment be reinstated precludes consideration of his contention that the court did not have the authority to vacate the order dismissing the original indictment. CPL 470.05(2). Order affirmed.

Admissions (Spontaneous Declaration) **ADM; 15(37)**

Confessions (Co-defendants) **CNF; 70(15)**

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

People v Campney, No. 196, 12/21/99

The defendant and his brother were taken into custody following a burglary. The defendant invoked his right to counsel and refused to speak. His brother gave a statement detailing how the two brothers burglarized a store, but asked to talk to the defendant before signing it. After they conferred, an officer asked the brother if he was ready to sign. The defendant said his brother might as well, as he had already told everything. The trial court denied the defendant’s motion to suppress that comment. His conviction was affirmed.

Holding: An adoptive admission is allowed when a party acknowledges and assents to something already uttered by someone else. The prosecutor presented sufficient, if circumstantial, evidence to meet the threshold foundation that the defendant knew of the assertion alleged to have been adopted, and comprehended its implications. *See People v Lourido*, 70 NY2d 428, 433. The defendant had been left alone with his brother for 10 to 15 minutes, was seen holding

his brother's unsigned statement, and said his brother might as well sign it, having already told what happened. The court had enough before it to deduce that the defendant had read or been informed of the contents of his brother's statement, understood its implication, and affirmatively adopted the statement as the defendant's own. Weighing the value or effect of the evidence was for the jury. *People v Ferrara*, 199 NY2d 414, 430. Order affirmed.

Dissent: [Smith, J] At the suppression hearing the defendant said that he never read his brother's statement. The prosecutor failed to establish that the defendant had read it. No one heard the brothers' conversation, so it is impossible to determine whether the defendant knew the content and scope of his brother's statement. See *People v Woodward*, 50 NY2d 922, 923.

Arbitration (General)**ARB; 28(10)****Prisons (Correction Officer)****PRS II; 300.5(10)****Matter of NYS Correctional Officers v State of
New York, No. 201, 12/21/99**

The individual petitioner is a correctional officer who was suspended from duty for flying a Nazi flag from the front porch of his home on the 55th anniversary of Hitler's declaration of war on the United States. This received statewide news coverage. The petitioner's suspension was submitted to arbitration as required by a collective bargaining agreement between the petitioner correctional officers' union and New York State. The arbitrator concluded that the petitioner was not guilty of the charges contained in the notice of discipline—that he acted to reflect discredit on his employer and affiliated himself with a group so as to interfere with impartial and effective performance of his duties. He was reinstated. The petitioners, employee and union, sought confirmation of the award, and the state sought to vacate. Confirmation of the award was affirmed by the Appellate Division.

Holding: Jurisprudence limits invocation of public policy concerns to usurp an arbitrator's role. This award did not violate any well-defined constitutional, statutory or common law of New York. By submitting the issue of the petitioner employee's conduct to arbitration, the parties gave the arbitrator the responsibility of passing on the implications of the petitioner employee's offensive conduct. Judges cannot reject the findings simply because they do not agree with them. The choice of the parties to have their controversy decided in the arbitration forum must be honored. Order affirmed.

**Identification (Eyewitnesses)
(General)****IDE; 190(10) (17)****Misconduct (Prosecution)****MIS; 250(15)****People v Alexander, No. 205, 12/21/99**

A gunshot was fired during an altercation outside a nightclub and an off duty police officer identified the defendant as the shooter. At trial the defendant offered three eyewitnesses stating that he was not the shooter. During summations the prosecutor stated, over objection, that intraracial identification (white on white, Asian on Asian, Afro-American on Afro-American), as was made in the prosecution's case, was more reliable. The Appellate Division affirmed the defendant's conviction.

Holding: The issue of race-based identification is no part of the record here. By raising it for the first time during summation, the prosecutor had the "sole, final, inapt word on the subject." Psychological studies about weaknesses in interracial identification do not justify the comments in this case. Where the proof of the defendant's guilt was not overwhelming, in an identification case that turned on the jury's assessment of a single witness, the error in permitting the comments cannot be found harmless. Order reversed, new trial ordered.

First Department**Freedom of Information (General)****FOI; 177(20)****In re Application of Brown v New York City Police
Dept., No. 988, 1st Dept, 9/2/99, 694 NYS2d 385**

The petitioner was charged with rape, sodomy and two counts of assault, and was convicted of assault only. He later filed an article 78 petition, seeking to overturn the city police department's denial of his request under the Freedom of Information Law (FOIL) for documents associated with his arrest. The Supreme Court dismissed the petition.

Holding: Documents related to the arrest on rape, sodomy and assault charges were not exempt from disclosure to the petitioner under the Freedom of Information Law (FOIL) on the blanket ground that they tended to identify the victim of a sex crime and were therefore excluded under Civil Rights Law 50-b(1). Blanket exemptions are contrary to the open government policy of FOIL. This petitioner had only been convicted of assault, and the victim had testified at trial that the petitioner did not rape her. On these unique facts, there was no victim of a sex crime to protect. Judgment reversed. (Supreme Ct, New York Co [Saxe, JJ])

Civil Practice (General)**CVP; 67.3(10)****Counsel (General)****COU; 95(22.5)**

First Department *continued*

Sentencing (Restitution)

SEN; 345(71)

**Lang v State of New York, Nos. 1528-1528A,
1st Dept, 9/2/99, 696 NYS2d 3**

An attorney's client paid funds to the state as a result of a criminal sentence, including restitution, for Medicaid billing fraud. The attorney commenced a turnover proceeding (CPLR 5225, 5227, 5239, and 6221) against the state to establish the priority of her judgment liens for legal fees and to enforce them against the restitution payment. The client later moved to release funds for reasonable living expenses and attorney fees. The Supreme Court ruled against both the attorney and the client.

Holding: Just because funds paid for restitution were being held in escrow pending the outcome of a hearing to document the calculation by which the amount of the restitution had been determined (*see People v Consalvo*, 89 NY2d 140) did not mean that the client retained an interest in the funds. The criminal judgment, which was upheld, incorporated the restitution, entitling the state to the funds. *Hanrahan v Albany County Probation Dept.*, 110 AD2d 334 *affg* 128 Misc2d 604. The attorney's lien, which was premised on the client's postconviction confession of judgment for legal services, did not have priority and could not be enforced against the restitution payment. Statutory law governs a judgment creditor's rights against property which the judgment debtor does not possess but has an interest in. CPLR 5225(b). Here, the client retained no interest in the restitution payment. Judgment affirmed. (Supreme Ct, New York Co [Miller, JJ])

Juries and Jury Trials (Deliberation)

JRY; 225(25)

**People v Pino, No. 1597, 1st Dept, 9/9/99,
695 NYS2d 548**

The defendant was convicted of second-degree murder. The only issue at trial was whether he had acted under the influence of an extreme emotional disturbance that was reasonable under the circumstances. He unsuccessfully moved to set aside the verdict because two of the sequestered jurors had engaged in an improper reenactment of the crime (how the deceased's throat was cut), then discussed it during deliberations.

Holding: There is no *per se* reversal rule as to prohibited reenactments. The court must inquire whether the conduct in question was a conscious, contrived experiment rather than an application of everyday experience, whether it was directly material to a point at issue in the trial; and whether it created a risk of prejudice to the other jurors. *People v Brown*, 48 NY2d 388, 393. Even if the interaction between the two jurors here amounted to a conscious experiment, it did not warrant reversal because it was only "to 'clarify a non-

critical point in the case.'" *People v Cortez*, 172 AD2d 766 *affd* 80 NY2d 855. Judgment affirmed. (Supreme Ct, New York Co [FitzGerald, JJ])

Detainers (General)

DET; 106(10)

**Sentencing (Credit for Time
Served) (Delay) (General)**

SEN; 345(15) (25) (37)

**People v Peterson, Nos. 1611-1611A, 1st Dept,
9/9/99, 695 NYS2d 550**

The defendant was sentenced on a state drug charge. He was also facing a federal parole violation and was twice ordered to be released to federal custody to be sentenced. He was sent to state prison with no federal sentence. He successfully moved to vacate the state sentence and was again transferred for federal sentencing. After being sentenced he asked to be returned to state court for resentencing. However, the state prosecutor's detainer erroneously asked that the defendant be returned only after he had served his federal term. When he was released for resentencing in state court, he received the same original sentence, which could not be concurrent because the federal one had already been served. Further motions were made and denied. Eventually an amended sentence was imposed to run *nunc pro tunc* from the date federal sentence was imposed, with credit for the federal time served. Meanwhile, the defendant successfully sought *habeas* relief because his state custody had extended beyond the time he should have received his conditional release. He was released on parole, and unsuccessfully sought to vacate the judgment and set aside the sentence.

Holding: The errors with respect to imposition of the state and federal sentences did not violate the Interstate Agreement on Detainers (IAD), which is inapplicable where a defendant has not been sentenced. Nor did the delay in sentencing require dismissal of the state indictment. Diligence was shown and there was no delay in imposing the original sentence. That the defendant remained incarcerated eight months beyond his conditional release date did not amount to cruel and unusual punishment. Judgment affirmed. (Supreme Ct, New York Co [Shea, JJ])

Juries and Jury Trials (General)

JRY; 225(37)

**People v Johnson, No. 1765, 1st Dept, 9/23/99,
695 NYS2d 341**

The defendant was convicted of third-degree sale and possession of a controlled substance, and was sentenced, as a second felony offender, to concurrent terms of 5½ to 11 years.

Holding: The police chemist's testimony that he tested the drugs sold by the defendant and found them to contain cocaine was admissible, even though the chemist's recollection had to be refreshed. That fact went only to credibility.

First Department *continued*

People v Rivera, 213 AD2d 281 *lv den* 86 NY2d 740. The court properly excused a prospective juror who expressed strong disapproval of police undercover tactics in general, casting doubt on his ability to be impartial. *See People v Torpey*, 63 NY2d 361. The defendant failed to establish that he was prejudiced by the late disclosure of *Rosario* material, and the court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion. Judgment affirmed. (Supreme Ct, New York Co [Davis, JJ])

Search and Seizure **SEA; 335(15)[k] [p] (80[a])**
(Automobiles and Other
Vehicles [Investigative Searches]
[Probable Cause Searches])
(Warrantless Searches
[Abandoned Objects])

People v Gabriel, No. 1728, 1st Dept, 9/23/98,
695 NYS2d 557

The defendant was convicted of drug possession charges after his suppression motion was denied.

Holding: "In light of the officer's expertise in drug trafficking by bus passengers, his observations of defendant, who, with a companion, boarded, at the last minute, a bus bound for a location known to be a delivery point for drugs from New York, placed his two bags in different compartments, then sat apart from the companion, justified the officer's approach to request information." *See People v Hollman*, 79 NY2d 181, 193. The defendant became extremely nervous and denied ownership of one of the bags after non-intimidating questions by the officer, which gave the officer a founded suspicion that criminal activity was afoot permitting further inquiry. Rather than a reaction to overbearing official pressure, the defendant's disclaimer of ownership was a deliberate and calculated decision to abandon the bag. *See People v Boyd*, 213 AD2d 291 *lv den* 85 NY2d 970. Once the officer opened the bag and saw what appeared to be drugs, he had probable cause to arrest the defendant and search the second bag. Judgment affirmed. (Supreme Ct, New York Co [Wetzel, JJ])

Conspiracy (General) **CNS; 80(23)**

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

People v Kassebaum, No. 1793, 1st Dept, 9/28/99,
696 NYS2d 23

Holding: Evidence that the defendant and others were involved in a transaction for purchase and sale of narcotics was sufficient to support convictions for attempted first-degree criminal possession of a controlled substance and second-degree conspiracy. The formation of the intent to

possess narcotics took place in New York, and the defendant took many steps toward completion of the crime in New York, although the exchange was to take place outside of New York and that transaction was canceled by a co-defendant. Even though the steps taken within New York did not fully amount to a charge of attempted possession until actions outside the state were effected, New York had jurisdiction because material elements including formation of intent took place within New York. *Compare People v Guidice*, 83 NY2d 630, 635-636 *with People v Cullen*, 50 NY2d 168, 175. Caselaw holding that the statutory term "community welfare" from CPL 20.10(4) applies only to the county venue statute (CPL 20.40) and not the state jurisdiction statute (CPL 20.20) is rejected. *People v Puig*, 85 Misc2d 228. Judgment affirmed. (Supreme Ct, New York Co [Snyder, JJ])

Accomplices (Accessories) **ACC; 10(5)**

Juries and Jury Trials (Deliberation) **JRY; 225(25) (56)**
(Sequestration)

People v Ramirez, No. 1794, 1st Dept, 9/28/99,
696 NYS2d 20

Holding: The defendant's conviction, after a jury trial, of first-degree robbery, was based on legally sufficient evidence and was not against the weight of the evidence. The complainant's testimony that, while the co-defendant pointed a gun at the complainant, the defendant looked through the complainant's wallet and discussed with co-defendant how to obtain more money from the complainant, amply established that the defendant shared a "community of purpose" with the co-defendant. *People v Allah*, 71 NY2d 830, 832. The claim that the unsequestered jury deliberated in the absence of a juror who arrived late was unpreserved for review. *See People v Agramonte*, 87 NY2d 765. The court properly exercised discretion in adjourning deliberations over the weekend rather than calling a mistrial due to the co-defendant's absence from court. *See Matter of Plummer v Rothwax*, 63 NY2d 243, 250. Judgment affirmed. (Supreme Ct, New York Co [Atlas, JJ])

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

Matter of Frank, No. M-2326, 1st Dept, 9/28/99,
695 NYS2d 91

Holding: The 1st Department Disciplinary Committee recommended public censure for an attorney's failure to file a client's divorce action and to return unearned retainer fees. The attorney admitted the conduct underlying the sustained charges. He had realized that he was unable to meet the demands of his practice and had virtually ceased practicing law. This, plus his entrance into a mentoring arrangement with a former Committee member, remorse, and community and *pro bono* activities were mitigating factors. The inten-

First Department *continued*

tional refusal to return unearned fees and to thereafter satisfy the clients' judgments against him warranted public rather than private discipline. Recommendation confirmed.

Search and Seizure SEA; 335(15[k]) (20[f])
(Automobiles and Other Vehicles [Investigative Searches] (Consent [Coercion and Other Illegal Conduct])

People v Berberena, Nos. 1810-1813, 1st Dept, 9/28/99, 696 NYS2d 116

The defendants were arrested after a traffic stop where the police, after receiving permission to search the vehicle's trunk, found a weapon. The evidence was suppressed.

Holding: The officers were justified in stopping the vehicle for a traffic violation. Absent any suspicious circumstances other than allegedly nervous behavior of a minimal and equivocal nature, they did not have a founded suspicion that criminality was afoot sufficient to justify their clearly accusatory inquiry and their request for consent to search the vehicle's trunk. *See People v Barreras*, 253 AD2d 369. That request followed an examination of the vehicle that revealed no contraband. Even if the police were invited to search the trunk, such invitation followed the officers' unauthorized inquiry as to contraband. *See People v Hollman*, 79 NY2d 181, 185. Judgment affirmed. (Supreme Ct, Bronx Co [Price, J])

Counsel (Effective Assistance) COU; 95(15)

People v Salmon, No. 1822, 1st Dept, 9/28/99, 695 NYS2d 352

Holding: The defendant was convicted of sale of a controlled substance in or near school grounds and third-degree sale of a controlled substance. Although defense counsel failed to properly review the court's charge before the jury was instructed, counsel corrected this oversight by obtaining a curative instruction that correctly stated the defense theory. The record does not show that the supplementary instruction confused the jury as to the defense theory. *See People v Bright*, __ AD2d __, 690 NYS2d 279. The defendant has not shown that counsel's conduct deprived him of a fair trial. *See People v Benevento*, 91 NY2d 708, 713-714. Judgment affirmed. (Supreme Ct, Bronx Co [Newman, J])

Evidence (Photographs and Photography) EVI; 155(100)

People v Rodriguez, No. 1838, 1st Dept, 9/30/99, 698 NYS2d 1

Holding: The defendant was convicted of murder, robbery, and grand larceny. Admitting bank surveillance videotapes, and photographs made from those tapes, was a proper exercise of the court's discretion. While there was no expert testimony about the digitizing process used at the FBI laboratory to slow the tapes down and make still photos from them, a bank employee responsible for making the original tapes at the bank testified that he compared the original and slowed-down tapes and found what was represented therein to be identical except for speed. *See People v Patterson*, 93 NY2d 80, 84. Judgment affirmed. (Supreme Ct, New York Co [Uviller, J])

Search and Seizure SEA; 335(15[p]) (80[k])
(Automobiles and Other Vehicles [Probable Cause Searches] (Warrantless Searches [Plain-view Searches])

People v Thomas, No. 1840, 1st Dept, 9/30/99, 697 NYS2d 1

Holding: The suppression motion in the defendant's drug case was properly denied. The record supports the court's finding of probable cause to stop and search the vehicle and the defendant's knapsack. The drug runner who provided information to a confidential informant was reliable and his basis of knowledge was personal observation of criminal activity, "in that it could be reasonably inferred that the runner was a participant in the crime." The runner's statements to his friend, whom he trusted not to reveal them to police, were still against his penal interest as he implicated himself by revealing that his drug organization was selling many drugs. *See People v James*, __ NY2d __ (7/1/99), 1999 LEXIS 1433, *40-*41. In the alternative, the record supports the theory that the police had reasonable suspicion to stop the car and saw, in plain view while they were lawfully removing the defendant, what appeared to be a package of drugs. Judgment affirmed. (Supreme Ct, New York Co [Scherer, J at hearing; Sudolnik, J at plea and sentence])

Evidence (Sufficiency) EVI; 155(130)

Lesser and Included Offenses (Instruction) IOF; 240(10)

People v Jones, No. 1900, 1st Dept, 10/5/99, 696 NYS2d 38

The defendant was convicted of multiple counts of robbery.

Holding: Evidence that the complainant's wallet was completely removed from his pocket by the defendant was sufficient to establish the asportation needed for a completed robbery, even though the complainant immediately took his wallet back. *See Harrison v People*, 50 NY2d 518. No reasonable view of the evidence could support a finding that

First Department *continued*

the defendant had only committed attempted robbery, so refusing to give a charge as to that lesser offense was proper. Judgment affirmed. (Supreme Ct, New York Co [Corriero, J])

Counsel (Standby and Substitute) COU; 95(39)**People v Banks, No. 1911, 1st Dept, 10/5/99,
696 NYS2d 41**

Holding: The defendant did not show good cause for substitution of counsel. See *People v Sides*, 75 NY2d 822. Strategic disagreement between the defendant and counsel about counsel's handling of the competency issue was not a "conflict" requiring substitution. Any error would be harmless because counsel was ultimately replaced, well in advance of trial, by a different Legal Aid attorney about whom the defendant expressed no dissatisfaction. Judgment affirmed. (Supreme Ct, New York Co [Shea, J])

Fraud (General) FRD; 176(10)**Civil Practice (General) CVP; 67.3(10)****Diversified Group Inc. v Sahn, Nos. 1468-1468A,
1st Dept, 10/5/99, 696 NYS2d 133**

This civil action for rescission of a contract involved the question of what constitutes illegal ticket scalping under Arts and Cultural Affairs Law 25.03. The buyer of subscription rights to professional sports season tickets brought suit against the seller and the original subscription holder after the arena cancelled the buyer's subscription. The buyer was repaid the face value of the tickets he had purchased, but not the \$140,000 above face value that he had paid. The Supreme Court found the contract was illegal under the statute.

Holding: The sale violated the anti-scalping law. That the contract was phrased so that the tickets were sold at face value and the (nontransferable) subscription rights for a higher sum did not disguise the scalping intent. The statute specifically provides for a private right of action to recover actual damages. It was therefore contemplated that among those suffering actual damages would be purchasers of scalped tickets, although they could generally be assumed to have been aware of the illegality of ticket scalping when they entered into the transaction. Judgment affirmed. (Supreme Ct, New York Co [Ramos, J])

Evidence (Hearsay) EVI; 155(75)**Witnesses (Cross Examination) WIT; 390(11) (20)
(Experts)****People v Brighthart, No. 1979, 1st Dept, 10/12/99,
696 NYS2d 143**

Holding: The court properly exercised its discretion by precluding, as impermissible hearsay, proposed testimony by the defendant's girlfriend regarding statements allegedly made by the defendant to her. The statements concerned things the defendant allegedly said to the girlfriend concerning various conduct by the deceased prior to the incident underlying the defendant's murder charge. *People v Reynoso*, 73 NY2d 816, 819. Cross-examination of the defendant's expert psychiatric witness about his consideration of the defendant's past violent criminal acts was properly permitted. The witness acknowledged that such matters were relevant to his evaluation of the defendant's emotional state of mind at the time in question, and thus were relevant to the jury's consideration of the validity of the witness's reasoning and conclusion. *People v Stone*, 35 NY2d 67, 74-76. The court properly instructed the jury on consideration of these allegations of violent acts. Judgment affirmed. (Supreme Ct, New York Co [Leibovitz, J])

Juries and Jury Trials (Discharge) JRY; 225(30)**People v Carmona, No. 2003, 1st Dept, 10/14/99,
696 NYS2d 147**

The defendant was convicted of criminal sale of a controlled substance.

Holding: The court properly exercised its discretion in ruling that a sworn juror was unavailable for continued service. The determination was made after a reasonable inquiry, including two telephone conversations between the court and the juror, and the court recited on the record the answers to the questions and the reason for such discharge. See *People v Page*, 72 NY2d 69. The record supports the court's determination that the juror's obvious emotional distress so distracted him from his duties that it rendered him grossly disqualified for continued service, and he was unable to say when he could return. See *People v Sparrow*, 220 AD2d 321, 322 *lv den* 87 NY2d 908. Judgment affirmed. (Supreme Ct, New York Co [Fried, J])

Search and Seizure SEA; 335(15[k]) (80[a])**(Automobiles and Other
Vehicles [Investigative Searches])
(Warrantless Searches
[Abandoned Objects])****People v Wellington, No. 2035, 1st Dept, 10/19/99,
698 NYS2d 2**

The defendant was convicted of criminal possession of a weapon.

Holding: The suppression motion was properly denied. The officer's observations of the defendant's conduct and demeanor provided an objective credible reason for approaching the defendant to request information, given the

First Department *continued*

officer's expertise concerning drug trafficking by bus passengers. Although the officer saw the defendant carry a bag onto the bus, the officer's initial inquiry as to whether the defendant was carrying any luggage was neither accusatory nor intimidating, and made no specific reference to the bag the officer had seen. Once the defendant denied having any luggage, which was contrary to the officer's observations, the officer had a founded suspicion that criminal activity was afoot. Further inquiry as to whether the defendant owned the bag on the seat next to him was then permitted. *People v Hollman*, 79 NY2d 181, 193. Judgment affirmed. (Supreme Ct, New York Co [Shea, J])

Search and Seizure (Arrest [Probable Cause]) **SEA; 335(10[g])**

In re Felix R., Nos. 1636-1636A, 1st Dept, 10/21/99, 696 NYS2d 455

Holding: The appellant was adjudicated a juvenile delinquent on charges involving the possession of weapons. The undefined bulge in the knapsack of the appellant's friend, did not, alone, supply the necessary predicate to stop the appellant. The police failed to identify any basis for believing that the knapsack contained a weapon. The testifying officer also failed to enunciate any meaningful basis for believing that the undefined bulge in the appellant's jacket pocket was a gun. An undefined bulge in a jacket pocket, as opposed to a waistband bulge, is hardly indicative of criminality. *People v Holmes*, 81 NY2d 1056, 1058. The officer's frisk of the appellant was improper in the absence of some indication that the appellant had a weapon. Judgment reversed. (Family Ct, Bronx Co [Martinez-Perez, J at suppression; Roberts, J at fact-finding and disposition])

Second Department

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

People v Jackson, No. 97-07633, 2nd Dept, 10/4/99, 697 NYS2d 288

The defendant was convicted of criminal possession of a weapon.

Holding: The court erred in denying the defendant's challenge for cause to a prospective juror where there was evidence that the juror's state of mind was likely to preclude her from rendering an impartial verdict. See CPL 270.20(1)(b). The prospective juror had been a crime victim and could only declare that she "hope[d]" that experience would not have an effect. A prospective juror is required to state in unequivocal terms that he or she would be able to render a verdict based solely on the evidence adduced at

trial. See *People v Torpey*, 63 NY2d 361, 367. If any doubt remains after prospective jurors' statements, in the context of their overall responses, they should be dismissed. Judgment reversed. (Supreme Ct, Queens Co [Eng, J])

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

Evidence (Sufficiency) **EVI; 155(130)**

People v Cheikh E, No. 98-06162, 2nd Dept, 10/4/99, 697 NYS2d 289

The appellant was adjudicated a juvenile delinquent for what would have constituted criminal negligent homicide if committed by an adult.

Holding: The court erred by refusing to suppress an incriminating statement that the appellant gave to the police on the ground that it was obtained in violation of his *Miranda* rights. See *People v Alexandre*, 215 AD2d 488. The evidence presented was, without the illegally-obtained statement, insufficient to support the court's findings of fact. But the presentment agency was entitled to rely on the ruling, and may be able to present evidence sufficient to meet its burden in a new fact-finding and dispositional hearing. Order reversed, matter remitted for a new hearing. (Family Ct, Kings Co [Segal, J])

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

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

People v Griffiths, No. 94-05686, 2nd Dept, 10/12/99, 697 NYS2d 295

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

Holding: The defendant's presence was secured at a post-indictment lineup by a court order. The lineup violated his right to counsel since his assigned counsel was not present, as the prosecution conceded. See *People v Coleman*, 43 NY2d 222. Admission of evidence concerning the lineup may not be deemed harmless since the person who viewed the lineup was the only witness to identify the defendant at trial as the shooter. See *People v Thomas*, 155 AD2d 706 *affd* 76 NY2d 902. Judgment reversed, new trial ordered. (Supreme Ct, Queens Co [Braun, J])

Juries and Jury Trials (Deliberation (General)) **JRY; 225(25) (37)**

People v Ortiz, No. 96-10766, 2nd Dept, 10/12/99, 697 NYS2d 78

Holding: The defendant was convicted of robbery. During deliberations the jury sent three notes to the judge re-

Second Department *continued*

questing evidence. The contentions that the trial judge erred by not completing the readback of testimony requested in the second note, and by requesting clarification of the third note, are not preserved for review. *See* CPL 470.05(2). They also lack merit, as the jury had indicated after the partial readback and a recess that it needed to hear no more. It was proper for the judge to ask what the jury meant in their third note asking to hear the “beginning” of a witness’s testimony. The court at all times indicated willingness to abide by the jury’s wishes. *See People v Santiago*, 231 AD2d 652. Judgment affirmed. (Supreme Ct, Kings Co [Marrus, J])

**Search and Seizure (Arrest/
Scene of the Crime
Searches [Probable Cause
(Observations and
State of Mind)])** SEA; 335(10[g(iv)])

Narcotics (Evidence) NAR; 265(20)

**People v Gomcin, No. 98-00168, 2nd Dept,
10/18/99, 697 NYS2d 93**

The defendant asked an undercover officer “if she wanted to take a hit of cocaine” at a social club. The officer left several hours later. Other police officers arrived, directed the occupants to leave, and searched everyone including the defendant when they came out. A hearing court suppressed the gun and the cocaine found on the defendant.

Holding: Wholesale searches of “everybody” without probable cause are improper. *See Davis v Mississippi*, 394 US 721 (1969). Criminal sale may be predicated upon an offer or agreement to sell cocaine, even if actual delivery of cocaine did not occur, but not every casual offer is made criminal. There must be evidence to indicate an ability and intent on the part of the defendant to complete the transaction. The cocaine found as the result of an illegal search cannot be used to show that the defendant had the ability to deliver drugs. A promise to deliver drugs in the near future is insufficient to constitute a sale. *See People v McGruder*, 63 AD2d 947. The defendant’s statement was merely an inquiry into the undercover officer’s “wishes and desires.” Probable cause to arrest is not established by conduct which is, at most, equivocal and suspicious. *See People v Davis*, 36 NY2d 280, 282 *cert den* 423 US 876. Order affirmed. (Supreme Ct, Queens Co [Schulman, J])

Dissent: [Sullivan, J] The statutory elements were satisfied. It reasonably appeared more probable than not to the officers that when the defendant asked if the undercover officer wanted “a hit” of cocaine, he was offering her an opportunity to ingest the drug.

Speedy Trial (Cause for Delay)

SPX; 355(12)

**People v Daley, No. 98-06580, 2nd Dept, 10/25/99,
696 NYS2d 879**

Holding: The court correctly determined that the prosecution should be charged with the unreasonable period of delay resulting from an unexcused, prolonged failure to prepare a protective order and provide a redacted copy of the search warrant and the confidential informant’s supporting affidavit. *See People v McKenna*, 76 NY2d 59. The defendant was thereby precluded from moving to controvert the warrant. He was not provided a speedy trial. Judgment affirmed. (Supreme Ct, Kings Co [Griffin, J])

Traffic Infraction (General)

TFI; 372(15)

**Matter of Neiman v State Dept. of Motor Vehicles,
No. 98-11170, 2nd Dept, 10/25/99, 697 NYS2d 310**

Holding: The petitioner received a ticket for exceeding a posted 50-mile-per-hour speed limit. At trial the officer testified that he estimated the petitioner’s speed visually to be 72 miles per hour, and confirmed that estimation with radar. While the petitioner’s testimony called into question the police officer’s version of the facts, where room for choice exists, it is beyond the scope of this court to weigh the evidence or reject the choice made by the Administrative Law Judge. *See Matter of Kandekore v Commissioner of Motor Vehicles*, 225 AD2d 774. Determination confirmed. (NYS Dept. of Motor Vehicles Appeals Board)

Third Department

Arrest (Intoxication) (Warrantless)

ARR; 35(20) (54)

Driving While Intoxicated (General)

DWI; 130(17)

**People v Cavanaugh III, No. 10920, 3rd Dept,
9/23/99, 695 NYS2d 625**

Holding: After the defendant’s vehicle struck a neighbor’s car, the defendant left the scene and returned home. Two state troopers went to the defendant’s residence. They knocked on the front and back door, but no one responded. They could see the defendant in the house. The troopers entered the home and walked a short distance in. The defendant appeared with two dogs and told the troopers he would resolve the problem with his neighbor himself, and repeatedly told them to leave. Based on the strong odor of alcohol from the defendant’s breath, his slurred speech, and his admission that he had been involved in the accident, the troopers arrested him. He was convicted of felony DWI. The record establishes the existence of both probable cause and exigent circumstances, making the warrantless arrest of this intoxicated driver in his home permissible. *See People v Oden-*

Third Department *continued*

weller, 137 AD2d 15. Judgment affirmed. (County Court, Ulster Co [Bruhn, J])

Defenses (Entrapment) DEF; 105(30)

Narcotics (Evidence) (Sale) NAR; 265(20) (59)

People v Alameen, No. 10220, 3rd Dept, 9/30/99, 697 NYS2d 173

The defendant was convicted on three counts of third-degree criminal sale of a controlled substance. He sold substances to three different undercover troopers on three independent occasions. Lab reports showed that the substance sold to the third trooper was not a controlled substance.

Holding: The proof of criminal sale of a controlled substance on one count was legally deficient due to testing showing that the substance at issue was not in fact a controlled one. The court erred in relying on a theory of an offer or agreement to sell where the proof as to the element of the substance being controlled was insufficient. *See* Penal Law 220.39(1); *People v Cooke*, 161 AD2d 783 *lv den* 76 NY2d 984. The judgment on the invalid count could not be modified to the lesser-included offense of attempted sale because the prosecution erred in pursuing the case as a sale. *See People v Wingate*, 175 AD2d 191. The refusal to allow defense witnesses to testify as to the defendant's prior statements regarding his feelings about being a police informant was not erroneous and did not inhibit his presentation of an entrapment defense. Judgment modified by reversing and dismissing as to count three, and as modified, affirmed. (County Ct, Ulster Co [Bruhn, J])

Assault (General) ASS; 45(27)

Sentencing (Excessiveness) SEN; 345(33)

People v Harmon, No. 10583, 3rd Dept, 9/30/99, 697 NYS2d 173

The defendant caused injury to four correctional officers as they were attempting to move him from a keeplock cell. One of the officers was injured when he and another officer fell with the defendant to the floor, hurting the officer's back and shoulder. The defendant was convicted of multiple accounts of assault.

Holding: The argument that the injuries to the officer who hurt himself when he tackled the defendant to the floor were accidentally caused and can not support a conviction on that count is rejected. The defendant was convicted of second-degree assault (Penal Law 120.05[3]), which does not require intent to cause physical injury to a person. *See People v Campbell*, 72 NY2d 602, 604. It is only necessary that the

accused have acted "[w]ith intent to prevent a peace officer * * * from performing a lawful duty." Consecutive sentences were properly imposed. However, the sentence is modified in the interest of justice from a total sentence of 14 to 28 years to 7 to 14 years. Judgment modified, and as modified, affirmed. (County Ct, Greene Co [Pulver Jr., J])

Arrest (Probable Cause) ARR; 35(35) (54)
(Warrantless)

People v Letendre, No. 10648, 3rd Dept, 9/30/99, 696 NYS2d 538

After the defendant was convicted of three counts of arson, his conviction was overturned in the interest of justice. He was convicted at a second trial.

Holding: The claim that the prosecution failed to sustain its burden of establishing probable cause for the warrantless arrest is rejected. The evidence presented at the *Dunaway* hearing was "collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it [was] reasonably likely that such offense was committed" and that the defendant committed it. CPL 70.10 [2]; *People v Lynch*, 178 AD2d 779, 781 *lv den* 79 NY2d 949. The confluence of circumstances and witnesses' statements regarding the defendant's ability to access the two premises, his activities and demeanor just before the discovery of the first fire, his reactions when confronted by acquaintances, his earlier remarks about the setting of fires, and his arrest record for arson provided probable cause. Failure to redact portions of the defendant's statement referring to his actions when he lost his temper does not require reversal. *Cf People v Clark*, 194 AD2d 868, 870 *lv den* 82 NY2d 752. Judgment affirmed. (County Ct, St. Lawrence Co [Niccandri, J])

Dissent in Part: [Mikoll, JP] The facts presented at the *Dunaway* hearing did not rise beyond the level of suspicion; probable cause was lacking. The use of a prior arrest for a similar crime as a probable cause factor raises grave concerns.

Grand Jury (Procedure) GRI; 180(5)

People v Lashua, No. 11257, 3rd Dept, 9/30/99, 695 NYS2d 629

The defendant successfully moved to dismiss the indictment charging him with first-degree and third-degree rape and endangering the welfare of a child, stemming from allegations that he engaged in sexual intercourse with his 11-year-old stepdaughter. The prosecution sought reinstatement of those counts dismissed due to defects in the grand jury proceeding.

Holding: It was error to dismiss counts based on alleged defects not raised by the defense. The defendant has the burden to demonstrate, on written notice to the prosecution,

Third Department *continued*

defects impairing the integrity of the grand jury proceeding and raising the possibility of prejudice. *See* CPL 210.45[1]. Orderly procedures require that the prosecution be given the opportunity to address any alleged defects prior to dismissal of an indictment. *People v Santmyer*, 255 AD2d 871 *lv den* 93 NY2d 902. Because the prosecution was not afforded such an opportunity, the counts must be reinstated. Judgment reversed. (County Ct, Franklin Co [Main, Jr, J])

Defenses (Affirmative Defense Generally) **DEF; 105(2)**

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

Possession (General) **POS; 288.3(10)**

**People v Myers, No. 10745, 3rd Dept, 10/14/99,
697 NYS2d 178**

The defendant's residence was searched and a handgun was found inside a backpack in a second floor bedroom that also contained identification documents of the defendant. The defendant admitted that the gun had been present for a couple weeks, that it belonged to an invited guest, and that he put it where it was found in order to get rid of it. The jury rejected the defense of temporary and lawful possession and convicted him. The defendant argues that the jury charge was in error because it did not state "whether after obtaining possession, the defendant engaged in any act or conduct evidencing an intent to use same unlawfully against another." 1 CJI [NY], 9.65.

Holding: While the defendant may not have done anything unlawful *per se* with the gun once it came into his possession, the lack of such conduct does not in and of itself establish the defense of temporary and lawful possession. Once the unlawful possession of the weapon is established, the possession crime is complete and any unlawful use is punishable as a separate crime. *People v Almodovar*, 62 NY2d 126, 130. Judgment affirmed. (County Ct, Tompkins Co [Sherman, J])

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

Plea Bargaining (General) **PLE; 284(10)**

**People v Augustine, No. 10139, 3rd Dept,
10/21/99, 697 NYS2d 698**

The defendant was charged with robbery and murder. The defendant pled guilty to one count of robbery in full satisfaction of the indictment and all other pending charges. Pursuant to the plea the defendant was to be sentenced as a second violent offender to 11 years in prison and agree to fully cooperate in the prosecution of her co-defendant. Prior to her sentencing she sent a letter to her co-defendant indi-

cating that she gave false testimony in the statement made in connection of her plea. The court found that the letter was not a renunciation of her account of events but rather the product of a joint venture of her and the co-defendant designed to perpetrate a fraud upon the court in an attempt to facilitate the co-defendant's plea withdrawal. The defendant's sentence was enhanced to 15 years.

Holding: Where a defendant by his or her own conduct fails to comply with the obligations placed upon him or her under the agreement, specific performance is not warranted. *See People v Curdgel*, 83 NY2d 862, 864. The defendant's action was contrary to her agreement to cooperate, and she was warned about misleading the court on any material facts. Judgment affirmed. (County Ct, Broome Co [Mathews, J])

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

**People v Ham, No. 10351B, 3rd Dept, 10/21/99,
697 NYS2d 359**

The defendant entered a plea to DWI and aggravated unlicensed operation of a motor vehicle. During the plea allocution, the defendant stated, in response to the court's inquiry as to whether he had a valid drivers license, that he had a Pennsylvania license and at the time of the incident he thought, based on paperwork he received, that his driving privileges in New York had been reinstated.

Holding: The plea allocution was deficient with respect to this count; the defendant's statement negated that, at the time of the offense, he knew or had reason to know that his license in this state was suspended or revoked. *People v Espinoza*, 253 AD2d 983. The plea must be vacated. Judgments as to aggravated unlicensed reversed. (County Ct, Tioga Co [Sgueglia, J])

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

Robbery (Elements) **ROB; 330(15)**

**People v Ocasio, No. 10534, 3rd Dept, 10/21/99,
697 NYS2d 368**

Holding: The defendant pled guilty to one count of robbery in full satisfaction of the indictment and was sentenced. His allocution reveals that he admitted accompanying his co-defendants to the complainant's house in a car and waiting outside while one of the co-defendants went inside, and that the house was burglarized. However, the defendant stated that he was under the impression, based on what his co-defendant told him, that they were going to the complainant's home to complete a drug deal and that the defendant did not know what had actually occurred. To be guilty of the crime to which he pled, he must have acted with larcenous intent. The plea must be vacated. *People v Beasley*, 25 NY2d

Third Department *continued*

483, 488. Judgment reversed, plea vacated. (County Ct, Washington Co [Berke, J])

Assault (Evidence) **ASS; 45(25)**

Evidence (Sufficiency) **EVI; 155(130)**

People v King, No. 10591, 3rd Dept, 10/21/99, 697 NYS2d 371

The complainant, smelling of alcohol and appearing to be in distress, reported to an officer that he had been robbed. The defendant was convicted by a jury of second-degree assault and possession of a weapon.

Holding: Absent from the prosecution's case at trial was any evidence or testimony establishing that the defendant had, as charged, struck the complainant with a wooden object causing injuries. While the record reflected that the two had words on the afternoon in question, and that three men attacked the complainant, one with a piece of wood, there was no evidence before the jury that the defendant beat the complainant with an wooden object. This is not a case involving an inconsistency in identification testimony such that the accuracy of an eyewitness's identification presented a factual issue for the jury to resolve. *Compare People v Bigelow*, 106 AD2d 448. Rather, in this case no witness identified the defendant. The verdict rests on speculation and must be reversed. *See People v Castillo*, 47 NY2d 270, 277. Judgment reversed. (County Ct, Sullivan Co [La Buda, J])

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

Plea Bargaining (General) **PLE; 284(10)**

People v Cote, No. 10900, 3rd Dept, 10/21/99, 697 NYS2d 184

The defendant pled guilty to a single count of DWI; the court made a specific commitment to sentence the defendant to a term of 1 to 3 years. Neither the court nor the prosecutor mentioned any fine. At sentencing the defendant was sentenced to the agreed imprisonment and a \$2000 fine. Defense counsel said that the defendant was unable to pay the fine.

Holding: The court erred in not sentencing the defendant as agreed but instead additionally imposing the fine, which, therefore, must be vacated. *See People v Fisher*, 233 AD2d 625. (County Ct, St. Lawrence Co [Nicandri, J])

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

People v Langlois, No. 11099, 3rd Dept, 10/21/99, 697 NYS2d 360

The defendant was convicted of first-degree sexual abuse and attempted sexual abuse.

Holding: There was no strategic or other legitimate explanation for counsel's failure to request a *Sandoval* hearing and concomitant failures to object to any question as being irrelevant or prejudicial or to request limiting instructions when numerous instances of prior bad acts were admitted at trial. The defendant was the only available source of the material testimony in support of his defense (*People v Dickman*, 42 NY2d 294, 298), and despite the court's laudable efforts to bring this matter to counsel's attention, no hearing was requested. The defendant did not receive effective assistance of counsel. Judgment reversed. (County Ct, St. Lawrence Co [Nicandri, J])

Fourth Department

Accusatory Instruments (General) **ACI; 11(10)**

Speedy Trial (Prosecutor's Readiness for Trial) **SPX; 355(32)**

People v Stone, No. KA 97-2196, 4th Dept, 10/1/99, 697 NYS2d 212

A felony complaint was filed against the defendant, and the prosecution announced their readiness for trial within the six-month period. Nine months after the original indictment it was discovered that one of the minor witnesses who testified before the grand jury was unsure of the dates of the alleged incidents. The original indictment was dismissed and the defendant was arraigned on a second indictment which expanded the dates and added an additional count. The prosecution again announced their readiness for trial. The defendant was convicted of a number of sex offenses.

Holding: The prosecution's announcement of readiness for trial with respect to the first indictment satisfied the requirements of the speedy trial statute with respect to the superseding indictment. The second indictment was directly derived from the felony complaint as reflected in the first indictment. *People v Sinistaj*, 67 NY2d 236, 241 n 4. The charges were based on several groups of acts so closely related as to constitute a single criminal incident. Even if the charges were separate and distinct, the six-month readiness period began as to the new count with the filing of the second indictment. *See People v Dearstyne*, 230 AD2d 953, 955 *lv den* 89 NY2d 921, 1034. Judgment affirmed. (County Ct, Monroe Co [Bristol, J])

Possession of Stolen Property (Evidence) **PSP; 288.5(15)**

Robbery (Degrees and Lesser Offenses) **ROB; 330(10)**

People v Bell, No. KA 97-5116, 4th Dept, 10/1/99, 696 NYS2d 610

Fourth Department *continued*

Holding: The defendant did not assert the affirmative defense to first-degree robbery that the weapon displayed was not loaded or capable of firing, so the court properly denied his request to charge the jury on the lesser included offense of second-degree robbery. *See People v Cotarelo*, 71 NY2d 941, 942-943. The defendant's flight on foot when a uniformed officer yelled, "freeze," supports the conviction of resisting arrest. Penal Law 205.03; *see* CPL 120.80(2). His possession of keys that unlocked the door and started the ignition of the stolen vehicle is legally sufficient to establish that he exercised dominion and control over it, supporting the conviction of fourth-degree criminal possession of stolen property. *See People v Manini*, 79 NY2d 561, 573-574. Judgment affirmed. (County Ct, Oneida Co [Dwyer, J])

Confessions (Counsel) **CNF; 70(23)**
Witnesses (Experts) **WIT; 390(20)**

**People v Eberle, No. KA 97-5368, 4th Dept,
10/1/99, 697 NYS2d 218**

The defendant was convicted of criminal negligent homicide for the death of his child. While the defendant was in custody on a charge for which he had counsel, the police requested that the deceased's mother visit the defendant, wear a wire, and speak to him concerning his involvement in the child's death. The mother complied. When the defendant later asked to speak with the mother the police contacted her and instructed her to record the phone conversation. At trial the prosecution's expert testified that the autopsy equally supported two causes of death, SIDS and suffocation. The expert then gave the opinion that the death was caused by "homicidal suffocation."

Holding: Because the police solicited the aid of the deceased's mother and advised her of the information she was to seek from the defendant, she was acting as an agent of the police. *See People v Cardona*, 41 NY2d 333, 335. The police were more than passive recipients of the information from the visit and recorded phone conversation; the statements were obtained in violation of the defendant's right to counsel. The opinion of the prosecution's expert was not based on medical knowledge, but on inferences and conclusions drawn from various statements presented to her by the police. The opinion "homicidal suffocation" improperly stated a conclusion regarding the defendant's intent. *See People v McCart*, 157 AD2d 194, 197-198. Judgment reversed. (County Ct, Oneida Co [Kirk, J])

Plea Bargaining (General) **PLE; 284(10)**
Sentencing (Restitution) **SEN; 345(71)**

**People v Kevin C., No. KA 97-5526, 4th Dept,
10/1/99, 697 NYS2d 217**

The defendant pled guilty to criminal possession of stolen property with an agreement that he would be sentenced as a youthful offender to probation and with a cap of 16 "work Saturdays and possible community service." After sentencing, the prosecution notified the court that they were seeking restitution or reparation as a condition of probation. The defendant objected because it was not part of the agreed sentence, and he could not be placed back at "square one" because he had already begun his work Saturdays. The court ordered reparation.

Holding: There is no statutory authorization for modifying a judgment of conviction to include restitution or reparation after imposition of sentence in the absence of pre-sentence notice. Allowing this would frustrate Penal Law 60.27(1), which requires advance notice that restitution or reparation will be sought. Additionally, the court could not impose restitution or reparation without giving the defendant an opportunity to withdraw his plea. Where the defendant had changed his position in reliance on the plea, vacatur of the plea is not available. *See People v Schultz*, 73 NY2d 757, 758. Judgment modified, reparation vacated as a condition of probation. (County Ct, Monroe Co [Marks, J])

Discrimination (Race) **DCM; 110.5(50)**
Evidence (Prejudicial) **EVI; 155(106)**

**People v Brinson, No. KA 99-36, 4th Dept, 10/1/99,
697 NYS2d 221**

The defendant was convicted of first-degree robbery and criminal possession of a weapon.

Holding: The court properly limited the defendant's cross-examination of the complainant about racial bias. The proof sought to be introduced concerned the alleged general ill will of the complainant and not his specific hostility toward the defendant; it was therefore inadmissible. Under the circumstances, the risk of confusing the jury outweighed the probative value of the proof. *See People v Thomas*, 46 NY2d 100, 105-106 *app dsmd* 444 US 891. The prosecutor's comment in summation on the defendant's failure to call a witness was an effort to persuade the jury to follow the prosecution's theory of the case, not misconduct. Although the prosecution's derogatory references about the defendant's dress were improper, they did not amount to a denial of due process of law. *See People v Hess*, 234 AD2d 925 *lv den* 90 NY2d 1011. Judgment affirmed. (County Ct, Ontario Co [Harvey, J])

Admissions (Spontaneous Declaration) **ADM; 15(37)**

**People v Arch, Jr., No. KA 99-59, 4th Dept, 10/1/99,
695 NYS2d 857**

Fourth Department *continued*

The defendant was convicted of second-degree robbery.

Holding: During booking the defendant asked the officer what he was being charged with. The officer replied robbery first. The defendant stated that robbery first required carrying a weapon, which he had not done. The officer advised the defendant that the officer was going to document the defendant's statements and that the defendant should speak to his attorney. The defendant then stated that he couldn't remember his attorney's name, and that he planned to testify at the grand jury that he had been up all night getting high, had grabbed cash out of the register, and had never robbed anyone. The court properly determined that these statements were spontaneous and not the result of police inducement, provocation, encouragement or acquiescence. *See People v Maerling*, 46 NY2d 289, 302-303. Judgment affirmed. (County Ct, Monroe Co [Maloy, J])

Search and Seizure (Arrest/ Scene of the Crime Searches [Probable Cause (Identification)]) (Motions to Suppress) SEA; 335(10[g(ii)]) (45)

People v Roach, No. KA 99-62, 4th Dept, 10/1/99, 697 NYS2d 406

Holding: The court erred in denying the defendant's motion to suppress physical evidence seized from the defendant's person and evidence of two show-ups. The prosecution failed to present any witness with first-hand knowledge of the circumstance of the defendant's apprehension. The testimony presented was not sufficient to support the contention that initially the defendant was detained pursuant to *People v Hicks* (68 NY2d 234, 242) and was not arrested until after he was identified. Judgment reversed, plea vacated, motion to suppress granted in part, matter remitted. (Supreme Ct, Monroe Co [Mark, J])

Discovery (General) DSC; 110(12)

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

People v Ulrich, No. KA 99-99, 4th Dept, 10/1/99, 697 NYS2d 410

The defendant's conviction was vacated upon a determination that the prosecution had failed to provide defense counsel with a copy of a trial witness's notes.

Holding: The court's finding is against the weight of the evidence. Defense counsel stated that he had no recollection of receiving the one-page note, and there was no copy of it in his files. But a prosecutor testified that counsel had received the notes and used them at trial. The trial record reflects that, in response to a question on cross-examination,

the witness responded: "Yes. I have that here" and furnished information that could be found in no other document save the notes at issue. Counsel displayed a consistent pattern of inquiring whether trial witnesses had any notes or memorandum concerning their testimony, but did not so inquire of the witness in question, supporting the inference that counsel already had those notes. The defendant failed to meet his burden. *See* CPL 440.30(6). Even if the notes were not furnished, the defense showed no reasonable possibility that any prosecution failure to disclose *Rosario* material materially contributed to the verdict. Both the notes and the witness's testimony included shot-pattern test results that suggested the shotgun used was not the defendant's. Order reversed, conviction reinstated. (County Ct, Cattaraugus Co [DiTullio, J])

Driving While Intoxicated (Evidence) (Prior Convictions) DWI; 130(15)(20)

Evidence (Hearsay) EVI; 155(75)

People v Smith, No. KA 99-181, 4th Dept, 10/1/99, 697 NYS2d 783

The defendant was indicted for felony driving while under the influence of alcohol or drugs (DWI) on the allegation that he had two previous DWI convictions within the last ten years. The court reduced the DWI charge from a class D to a class E felony because a DMV abstract, offered to establish one of two alleged prior DWI convictions, was insufficient evidence.

Holding: A DMV abstract can be admissible hearsay, falling squarely within the common-law public document exception: " 'When a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports so made . . . are admissible . . . ' " (Prince, *Richardson on Evidence*, § 8-1101, at 688-689 [Farrell 11th ed]). The Commissioner of the Department of Motor Vehicles is a public officer required to retain certificates of conviction relating to Vehicle and Traffic Law offenses for at least four years and to furnish, upon request, " 'an abstract of the operating record of any person * * *, which abstract shall include enumeration of any convictions of such person of a violation of any provision of any statute relating to the operation of a motor vehicle' (Vehicle and Traffic Law § 354)." However, the Commissioner's attestation and the state seal on the defendant's DMV abstract here were preprinted on blank forms, before information regarding his driving record was transferred electronically. The strict compliance with authentication rules that is required concerning public documents was lacking. *People v Garneau*, 120 AD2d 112, 117 *lv den* 69 NY2d 880. The DMV abstract offered did not constitute competent and admissible evidence of the alleged DWI conviction. Order affirmed. (Supreme Ct, Monroe Co [Cornelius, J])

Fourth Department *continued*

Misconduct (Prosecution) MIS; 250(15)

Trial (Public Trial) TRI; 375(50)

**People v Chase, No. KA 99-184, 4th Dept, 10/1/99,
695 NYS2d 792**

The defendant was convicted, at a second trial following a mistrial, of first-degree rape and endangering the welfare of a child.

Holding: The defendant was not deprived of his constitutional right to a public trial when the court, *sua sponte*, closed the courtroom during the testimony of the minor complainant. The court, having presided over the first trial,

knew the nature of the testimony; the court's efforts to prevent courtroom disruption during the complainant's sensitive testimony provided no basis for overturning the defendant's conviction. *People v Glover*, 60 NY2d 783, 785 *cert den* 466 US 975. Several of the prosecutor's summation remarks "were improper because they denigrated the defense, were inflammatory, improperly referred to God and religion, improperly commented on defendant's request to consult with an attorney, and vouched for the credibility of the People's witnesses." Defense counsel's objections were sustained and curative instructions given on several occasions. The court's firm control obviated any prejudice that might have resulted from the prosecutor's misconduct. *People v Hess*, 234 AD2d 925 *lv den* 90 NY2d 1011. Judgment affirmed. (County Ct, Erie Co [DiTullio, J]) ⚖

Defender News (continued from page 7)

NYPD Stops More Minorities, AG Concludes

A 15-month investigation by the state Attorney General into the "stop and frisk" practices of the New York City Police Department (NYPD) led to the December 1999 release of a report showing that blacks and Hispanics are stopped at a higher rate than whites. In announcing the report's findings, Attorney General Eliot Spitzer said that it showed "the perception that minority residents have been disproportionately stopped and frisked by the police is based in reality." Among the findings in the 170-page document:

- City police stopped 9.5 blacks, 8.8 Hispanics, and 7.9 whites for each stop that resulted in an arrest.
- The Street Crime Unit stopped 16.3 blacks, 14.5 Hispanics, and 9.6 whites for each stop that resulted in an arrest.

Spitzer said it was his hope that the report will be a starting point for a community-wide dialogue on law enforcement and race relations in which the police department, the city, community and religious leaders, neighborhood watch groups, elected officials, and educators would take part. The press release, and the full report, are available at the AG's web site, www.oag.state.ny.us/press.

LAPD Scandal Grows

While NYPD procedures are being questioned in the glare of the AG's report and the Amadou Diallo case, another major urban police department across the continent faces a burgeoning corruption scandal. As of mid-December, a dozen officers had been removed. The LA district attorney estimated that over 3,000 criminal convictions needed to be reviewed to see if they, too, had been tainted, and the public defender was calling for additional funding to handle that review. (*Criminal Justice Newsletter*, 7/15/99 [coverage through 12/99].)

By the end of January, 23 criminal convictions had been thrown out due to false police testimony or planted evidence.

10 Trained at "Mini-BTSP" in Bronx

Replicating many elements of the Defender Institute week-long Basic Trial Skills program, NYSDA trained 10 trial lawyers at the office of the Bronx Defenders on Feb. 3-5. Coaches for the event were Chicago attorney Jed Stone, attorney Cary Bricker from the Federal Defender Division of The Legal Aid Society, actor/director/producer and trial consultant Joseph V. Guastaferrro, and Neighborhood Defender Service Director Leonard Noisette. (Applications for BTSP 2000 are inserted in the printed copies of this issue of the *REPORT*; for more information see our web site, www.nysda.org, e-mail training@nysda.org, or call the Backup Center.) ⚖

Defense Practice Tips (continued from page 10)

According to *Guerrero*, CPL 100.25 was amended to avoid situations where a person who gets a ticket appears in court years after the return date and requests a supporting deposition. Under the new statutory language, the time limit to request it is 30 days after the ticket's return date, regardless of whether the defendant has been validly arraigned.

For motion papers to dismiss a traffic ticket as defective

due to no timely supporting deposition, see *Handling*, Forms 3K and L. ⚖

Correction: The author of *New York Criminal and Civil Forfeiture*, which was reviewed in the last issue of the *REPORT*, is Steven L. Kessler. We apologize for the error that appeared in the review.

Yes! I want to support NYSDA.

I wish to join the **New York State Defenders Association** and support its work to uphold the Constitutional guarantees of all citizens accused of crimes to legal representation and to advocate for an effective system of public defense representation for the poor.

Enclosed are my membership dues: \$50 (Attorney) \$15 (Law Student/Inmate Member) \$25 (All Others)

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