



Public Defense Backup Center
REPORT

Volume XVII Number 6 November-December 2002

A PUBLICATION OF THE DEFENDER INSTITUTE

Defender News

Developments in Eyewitness Identification

Eyewitness identification has come under increasing public as well as legal scrutiny in recent times, as better DNA testing and investigative work have proven the innocence of many defendants misidentified by their supposed victims. With eyewitness testimony a major factor in many criminal prosecutions, defense advocates may attack such evidence in a variety of ways—before, during, and after trial.

Exclusion of Expert Criticized

The most recent case addressing the admissibility of an eyewitness identification expert involved the killing of a cabdriver in front of four eyewitnesses in Upper Manhattan more than a decade ago. Seven years later, one witness identified Nico LeGrand as the assailant from a photo array, while three other witnesses found similarities between LeGrand’s photo and the assailant. A defense motion to introduce expert testimony on the reliability of eyewitness identification was denied. Still, the jury deadlocked. Before retrial, the Court of Appeals decided *People v Lee*, 96 NY2d 157, 726 NYS2d 361 (2001), giving the trial judge discretion in determining whether to admit expert testimony on identification. (See *The Report*, 6/01.) Defense counsel renewed efforts to present expert testimony. After a *Frye* hearing, Justice Fried found the research had not reached a level of general acceptance within the relevant psychological community. *People v LeGrand*, 747 NYS2d 733 (Sup Ct NY County 2002). (More commonly, the basis for excluding expert identification evidence is that it will not assist the trier of fact.)

Legal experts have already criticized the *LeGrand* decision. “You’re never going to find the kind of universal agreement he [Justice Fried] is expecting, especially in the social sciences,” according to D. Michael Risinger, Law Professor, Seton Hall University. Gary Wells, Professor of Psychology at Iowa State University commented, “I’m not going to waste a lot of time on that kind of wrongheaded thinking,” (*ABA Journal*, 12/8/02.) [Wells’ online lecture, *Eyewitness Identification*, is available free

online through a partnership of the Practising Law Institute and the National Legal Aid and Defender Association (NLADA). A link to the lecture appears on the NYSDA web site www.nysda.org, Eyewitness Evidence page.]

Brooklyn DA Gets Behind Double-Blind Lineups

Recently, Brooklyn District Attorney Charles Hynes became the first New York prosecutor to endorse the double-blind lineup, an improved procedure in which the police handling the identification process do not know the identity of the suspect. This will become standard practice in Brooklyn cases starting in early 2003. Until then, defense requests for such lineups will not be opposed by the DA’s office barring specific reasons. The double-blind procedure eliminates the risk that police officers with knowledge of the suspect in the lineup might influence the witness. The decision in *People v Kirby*, NYLJ, 10/21/02 (Sup Ct Kings County) convinced Hynes that it was time to implement this new policy. (NYLJ, 11/8/02.) The *Kirby* court recognized “the scientific conclusion that use of a double-blind procedure results in a more reliable identification,” despite the additional costs of administering it. Defense attorneys, and experts such as Gary Wells, are hopeful that other prosecutors’ offices will follow suit. (NYLJ, 12/12/02.)

The acceptance of double-blind lineups has not been extended to sequential ones, where suspects are viewed one at a time. Most prosecutors are leery of this procedure, and the courts have been slow to recognize it, as the *LeGrand* decision above shows. One Brooklyn court believed that it lacked authority to order such a procedure under the 4th Amendment and due process. *People v M.A.*, NYLJ, 11/18/02 (NYC Crim Ct Kings County).

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New Jersey became the first state to implement a policy requiring double-blind and sequential lineups. A year after the change, law enforcement have expressed satisfaction with the results. Peter J. Neufeld, Co-Director of the Innocence Project at Cardozo Law School, noted, "We find that the police who have experience with identification cases are listening." He observed that "experienced officers know what it is like to be stuck with a witness who has misidentified someone and cannot be called upon when the right defendant is found." (NYLJ, 12/12/02.)

Eventually, sequential lineups (first conducted in Staten Island) might find the same approval in the eyes of New York prosecutors. (NYLJ, 4/26/02.) Hynes' endorsement of double-blind procedures is seen as "a huge step forward" by David Feige, Trial Chief at The Bronx Defenders. (NYLJ, 12/12/02.)

Feige Receives Reggie

David Feige, a leading defense advocate of sequential, double-blind lineups and arrays, recently received a "Reggie"—the Reginald Heber Smith Award presented by the National Legal Aid and Defender Association (NLADA) each year at its Annual Conference—for his efforts on this and other issues. (Learn more about Feige's work on this issue, and The Bronx Defenders, at www.bronxdefenders.org, and more about the Reggie award at www.nlada.org/Training/Train Annual/Train Annual Awards Reggie.)

NLADA Conference Fosters Joint Defender and Civil Legal Service Action

Several sessions at the 2002 NLADA Annual Conference, held in Milwaukee in November, formed a joint civil and defender legal services track. Entitled "Preparing for the Tidal Wave of Prisoner Reentry: Equipping Civil Legal Aid and Defense Lawyers to Represent the Whole Client," this track set forth developments and encouraged state and local actions.

As a result, a group of civil legal services providers, public defense providers, and client advocates from across New York State met in Albany on Dec. 12, 2002, to discuss common reentry concerns and ways of more effectively dealing with those concerns. Members of NYSDA's Board of Directors, Advisory Board, and Backup Center staff joined representatives from several other groups at the meeting. Participating groups included the Greater Upstate Law Project, the Center for Community Alternatives, Prisoners' Legal Services of New York, the Center for Law and Justice, The Bronx Defenders, Neighborhood Defender Service of Harlem, The Legal Aid Society of

New York City, the Fifth Avenue Committee, and Prison Families of New York.

Another NLADA conference session encompassing more than defender issues also featured several New York panelists. Speakers on "New Challenges for Counsel and Clients: Experimental Courts—What is Gained, What is Sacrificed?" included Sandra Russo of the Support Unit of Legal Services of New York City, Mary Beth Anderson of The Legal Aid Society of New York, and NYSDA board member Leonard Noisette of Neighborhood Defender Services of Harlem.

Problem Solving Courts Don't Solve All Problems

As the NLADA panel and prior NYSDA presentations have indicated, experimental courts present a plethora of issues for advocates. As noted in the July-August issue of the *REPORT*, NYSDA continues to monitor developments.

Brooklyn Begins Mental Health Court

New York has opened its first mental health court. Modeled on drug treatment courts, the Brooklyn Mental Health Court is a place where nonviolent offenders with psychiatric disorders, such as schizophrenia or bipolar disorder, are directed to treatment rather than jail. Defendants are routed to the mental health court with prosecutorial approval, and—after they agree to plead guilty—receive psychological assessment and placement. Their time is spent in a mental health center, not prison. However, such a court does not address the root of the problem. The paucity of treatment facilities is the primary

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Volume XVII Number 6

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

THE REPORT IS PRINTED ON RECYCLED PAPER

reason mentally ill persons end up in the criminal justice system, according to Heather Barr, a lawyer with the Urban Justice Center. "The idea of diverting people with mental illness out of the criminal justice system is obviously a fantastic idea, but it can't do anything to remedy the fact that the mental health system is terribly broken. It aims to plug people back into services in the community, but if the services don't exist you have the same problem." (NYT, 10/1/02.)

While advocates recognize the need to offer mentally ill persons help rather than incarceration, many—lawyers and others—fear that mental health courts will improperly erode the rights of defendants. At the NLADA conference, Stephen Manley, Judge of Superior Court, Santa Clara, CA—a passionate believer that "business as usual" in criminal courts is an unreasonable approach to persons with mental illness—said that advocates were right to have reservations about experimental courts. "Coerced treatment isn't the only effective treatment," he said. He added that those of us in the criminal justice system must seek ways to change or use that system to aid mentally ill persons that have been brought into it.

Whether mental health or other special courts offer appropriate problem-solving strategies "is most appropriately considered within the communities where the impact is greatest." (John Petril, Chair, Department of Mental Health Law & Policy, Louis de la Parte Florida Mental Health Institute, "The Effectiveness of the Broward Mental Health Court: An Evaluation," [2002] www.fmhi.usf.edu/institute/pubs/newsletters/policy-briefs/issue016.pdf.)

Drug Courts Expand, Suffer From Defense Budget Cuts

New drug courts are beginning operation in Yates and Westchester Counties, and in Staten Island. "All 50 states and 62 counties in New York have—or soon will establish—drug courts." (*Finger Lakes Times*, 11/25/02.) Treatment of drug offenders has proven a viable alternative to prison, and the drug court movement continues to grow. Shawyn Patterson-Howard, Program Coordinator for Mount Vernon's Drug Court, pointed out that "based on her program's 80 percent success rate to date, she believes all cities with drug problems should establish drug courts." (*Journal News*, 11/4/02.)

The numbers bear out the cost-effectiveness of treating drug offenders instead of warehousing them. "Incarcerating nonviolent drug offenders costs between \$20,000 and \$50,000 per person per year. The capital costs of building a prison cell can be as much as \$80,000. In contrast, a comprehensive drug court system costs less than \$2,500 annually for each offender." (*Staten Island Advance*, 10/10/02.) Staten Island Presiding Judge Alan Meyer succinctly observed: "The Rockefeller laws do not work, this does."

As noted above with regard to mental health courts, drug courts must be structured and evaluated within the communities in which they are located. Certainly they must be adequately resourced in all aspects, including the defense. Budget problems can undermine defense participation, eroding defendants' rights and the efficacy of the courts.

The Nassau Legal Aid Society's funding crisis is forcing them to stop staffing that county's drug court. "This year, because of the extreme fiscal pressures, the agency let go five attorneys and a receptionist, trimmed legal research and will withdraw its lawyer for the county's Drug Treatment and Community Court in Hempstead, as of Jan. 1." (*Newsday*, 12/18/02.) Rising caseloads, funding cuts, and lack of parity with prosecutors have hindered participation in innovative programs such as drug court by Nassau County Legal Aid and other defender offices. Cuts also curtail such programs' ability to provide traditional defense services.

Developments in Providing and Paying Counsel

Public defense funding is a prime target for budget slashing or "restructuring," and not just in Nassau County. Continuing disparity in funding between prosecution and defense is felt statewide. "It's not just the lawyering, it's the ability to defend, to get the expert witnesses, to get the forensic evidence, to do an investigation," according to Jonathan E. Gradess, Executive Director of NYSDA. "The money for that is simply not there for the defense." (*Newsday*, 12/18/02.)

Issues regarding compensation of lawyers representing clients who cannot afford to hire counsel or doing impact litigation continue to arise in many different courts and to affect public defense representation across the state and nation.

Meanwhile, ironically, the adversaries of federal defense attorneys have won greater compensation for themselves. A federal court recognized the right of Department of Justice attorneys to receive overtime compensation under the Federal Employees Pay Act. *Doe v United States*, No. 98-896C (US Ct Cl 11/14/02).

Assigned Counsel Fees Addressed in Nassau, Queens

A Nassau County court has awarded an assigned counsel rate increase of \$75.00 per hour. Judge Calabrese approved defense attorney Fred L. Pollack's request and found extraordinary circumstances warranting payment of \$5,643.25 for representing a "minimally cooperative" defendant on several felony charges. Pollack's efforts resulted in an acquittal on all counts. According to Judge Calabrese, "But for the diligence and persistence of

Mr. Pollack in his pre-trial applications and his resolve and skills at trial, Defendant could have been convicted. Counsel has demonstrated the value of highly skilled assigned counsel and should be compensated in accordance with the work and professionalism he presented in this case." Judge Calabrese also observed that "Mr. Pollack is a sole practitioner and the costs to his business as a result of this representation while not calculated must be considered." *People v Sutton*, NYLJ, 12/17/02 (Nassau County Ct).

A Queens County Supreme Court held that privately retained attorneys might make applications under 18-B due to their clients' financial hardships. In a protracted attempted murder case involving several co-defendants, defense attorneys sought to be relieved because their clients were not paying their fees. The court was concerned that delays and injustices would be created by bringing new attorneys into the case. Therefore, the court decided that if the lawyers could not be satisfied by their client's financial resources, and "the defendants can establish that they are indigent, the Court will, subject to the rules and regulations of the Assigned Counsel Panel, entertain applications for payment from public funds under Article 18B of the County Law." *People v Fen*, NYLJ, 9/30/02 (Sup Ct Queens County).

Non-profit Lawyers Can Claim Full Fees

Federal public interest lawyers have litigated and won attorney's fees claims comparable to the private sector. A federal judge awarding fees to the prevailing party in a Fair Labor Standards Act case noted: "[N]onprofit civil rights attorneys are entitled to fees that are comparable to those awarded to private attorneys with fee-paying clients, despite defendants' claim that nonprofit attorneys have lower overhead costs and no built-in profit margins." *Moon v Kwon*, NYLJ, 11/22/02 (SDNY). In a more recent case, where The Legal Aid Society sued to prevent the NYC Housing Authority from slowing or reversing desegregation efforts at housing projects, the court stated: "[T]he fact that plaintiffs were represented by a nonprofit legal services organization does not alter the reasonable hourly rate." *Davis v NYC Housing Authority*, NYLJ, 12/20/02 (SDNY).

No Increase in Funds for US Supreme Court Assignments, No Clemency Counsel Compensation

The U.S. Supreme Court denied the right of death penalty defense attorneys to seek compensation from the states for bringing clemency petitions or last minute appeals. "Many death row inmates are poorly educat[ed], retarded, or mentally ill, wholly unable to marshal the materials necessary to file their own clemency applications. They will be executed without clemency review,"

according to court papers submitted by Charles Weisselberg, Law Professor, University of California, Berkeley. The litigation arose out of three capital cases from Texas. (*AP*, 12/9/02.) The Court also rejected an application to increase the fee schedule for lawyers appointed to handle death penalty appeals. Robert L. Hutton, the attorney who brought the motion, stated, "To only be compensated \$5,000 when basically for four months all I did was work on the Supreme Court case has to discourage private attorneys from handling them." The cap of \$5,000 was set in 1991. *In Re Berger*, 498 US 233 (1991). (*NLJ*, 10/18/02.)

PD Offices Created to Offset Fears of AC Rate Increase

In New York State, counties are considering the potential financial fallout from an increase in assigned counsel fees. One recent strategy has been to create public defender offices and eliminate or reduce funding to the assigned attorney panels.

Essex County Establishes Public Defender Office

Essex County's Board of Supervisors went ahead with a plan to establish a public defender office, without waiting for comment by the local Bar Association. The program will have one full-time and two part-time defenders with an annual budget of \$215,000. The assigned-counsel program budget was slightly less than \$200,000 a year. The fear of increased assigned counsel rates, and the difficulty of finding enough attorneys to handle the caseload, prompted the action. Critics of the plan fear that the new budget is insufficient. "Our quick analysis is that it is really deficient in terms of representation. It will not work," stated Attorney Nancy LeBlanc, who represented the County Bar Association in their request for more time. (*Press Republican*, 12/17/02.)

Cattaraugus County also recently voted to create a Public Defender Office, believing that this would allow them to get a tighter grip on the purse strings. (*Post-Journal*, 11/14/02.). Former Legislature Majority Leader

Chief Defender List Update

Whether from systemic changes or normal turnover, there are often changes in who heads a particular public defense office, or where it is located. Recent changes in addition to the creation of new Public Defender Offices in Essex and Cattaraugus counties include location changes for the Fulton County Public Defender and several units of The Legal Aid Society of New York City. For the most up-to-date listing of contact information for New York Chief Defenders, consult the NYSDA web site: www.nysda.org.

Mark S. Williams, R-Hinsdale was appointed as the first Public Defender. (*Buffalo News*, 12/19/02.)

NYC Signs LAS Contract, Settles Suit

New York City has shifted substantial funding to The Legal Aid Society and away from assigned counsel panels. "The goal of the new contract [with Legal Aid] is to limit 18-B lawyers to conflict cases, which was the intent when the system for representing the poor was first designed in the late 1960s," according to Criminal Justice Coordinator John Feinblatt. The budget for assigned counsel will be reduced from \$34 million to \$17 million. Legal Aid's budget for trial work will rise 17 percent to \$58 million, but Legal Aid lawyers will be required to handle 86% of all the cases in the arraignment parts they cover. The contract calls for financial penalties if LAS lawyers fall short of meeting that goal. (*NYLJ*, 12/18/02.)

With the signing of this contract, lawsuits brought by LAS and two of its unions over New York City's contracting with alternative providers for some public defense work have been dropped. (*NYLJ*, 12/27/02). This ushers in a new era of public defense in the City, with hopes high that public defense offices will be able to work more closely on the many systemic problems they and their clients face.

Public Defense Suffers in Other States

Defense funding problems are not unique to New York. A recent investigation by a Georgia Supreme Court commission concluded, among other things, that the "State of Georgia is not providing adequate funding to fulfill the constitutional mandate that all citizens have effective assistance of counsel available when charged with a crime." *Report of Chief Justice's Commission on Indigent Defense* (GA 2002). It recommended an immediate infusion of funds, and the establishment of state oversight to assure quality representation.

Meanwhile, the Connecticut Public Defender must face rising caseloads with fewer resources. The state has ordered layoffs of 21 permanent employees and 12 temporary workers, not to mention 8 vacancies that will not be filled, according to Chief Public Defender Gerard Smyth. In 1999, the Connecticut Civil Liberties Union settled a lawsuit over excessive caseloads that resulted in the funding of 51 additional attorneys. (*Hartford Courant*, 12/6/02.)

In Oklahoma, the Court of Criminal Appeals has ordered that two men held on felony charges since the summer without counsel be released and the Director of the Oklahoma Indigent Defense System held in contempt, unless lawyers are appointed. Conflicts of interest prevented any assigned attorney in Kay County, where the men are being held, from representing them. Sufficient public defense funds did not exist to hire counsel from

another county. The Director of the Indigent Defense System pointed out that their workload continued to increase despite staffing cuts. A plan is being floated to seek additional state appropriation to reimburse local court funds for assignment of counsel. (*Oklahoman*, 11/27/02.)

Wrongful Convictions and Corrective Measures

Questionable confessions and dubious forensics led the Manhattan District Attorney to request and a Manhattan Supreme Court to grant vacatur of the convictions of five young men wrongly sentenced to prison for involvement in the Central Park Jogger attack. *People v Wise*, Ind. No. 4762/89 (Sup Ct NY County 12/19/02). This case and others have heightened public awareness about wrongful convictions and their causes. *Newsday's* series, "Wronged Men," examined the problem in New York City. (*Newsday*, 12/8-11/02.)

According to the *Newsday* study, 13 men have been wrongfully convicted of murder in 11 cases since 1998. "The typical wronged man was young, poor, black or Hispanic, had a minor criminal record and was convicted largely on the word of a single eyewitness. . . . In most cases, the testimony was later recanted or discredited, with witnesses saying they had been high on crack, pressured by police or lying for money." Multiple failures were responsible in some cases: "Police used unreliable informants; prosecutors suppressed information that could have helped the defense; poorly paid, court-appointed defense attorneys didn't follow up on leads or call alibi witnesses; defendants hid relevant information; jurors slept in court." (*Newsday*, 12/8/02.)

Some reforms have occurred, *Newsday* found. In response to the wrongful conviction problem, the Brooklyn District Attorney must review prosecutions involving single witness identifications. In the past year, according to DA Charles Hynes, "he has rejected 15 out of 70 such cases because the witnesses were not credible enough."

Such efforts are an important first step, but more is required. The exonerations highlighted in the *Newsday* series "involved years of work by their advocates, as well as a lucky break—a tip from an informant, a confession by someone else. This pattern makes it seem likely that other men, lacking devoted helpers or a stroke of luck, never get their wrongful convictions reversed." (*Newsday*, 12/8/02.)

Federal Death Penalty Rescued by 2nd Circuit

Rumors of the federal death penalty's demise are premature. Federal District Courts in New York and Vermont had declared the federal death penalty invalid on due

process grounds. *US v Quinones*, 205 FSupp2d 256 (SDNY 2002) and *US v Fell*, No. 01-CR-12-01 (DVT 9/24/02). In December, the 2nd Circuit reversed the New York decision, and upheld the constitutionality of the Federal Death Penalty Act. *US v Quinones*, No. 02-1403 (2nd Cir 12/10/02).

NYSDA Gives Upstate Lawyers Information Highway Tour

Public defense lawyers in Rochester and Onondaga Counties went on a VIP tour of the Internet at two NYSDA trainers in late 2002. In October, assigned counsel lawyers in the Syracuse area acquired in-depth knowledge about the practical and free criminal defense resources available on the web. Later that month, a presentation on family law and related web resources was given in conjunction with a day of training as part of the "Fourth Department Assigned Counsel Panel Family Court Appeals Seminar" in Rochester.

Nassau County Judge Approves DWI Eye Test

Judge DeRiggi of the Nassau County Court has recognized Horizontal Gaze Nystagmus (HGN) testing in DWI cases. The court conducted a *Frye* hearing and relied upon the testimony of Dr. Jack B. Richman, experienced in optometry and the application of HGN, to conclude that HGN had "general acceptance in the relevant scientific community as being a reliable indicator of intoxication." HGN is based on the principal that the eye's ability to follow an object is affected by alcohol and is evidence of intoxication. In addition to alcohol, drugs or neurological problems can cause positive HGN results. *People v Miley*, NYLJ (Nassau County Ct 12/6/02). Last year, a Franklin County Court reached the same conclusion based on Dr. Richman's testimony. *People v Prue*, 2001 NY Slip Op 40594U (Franklin County Ct 11/29/2001). More information about HGN can be found on the NYSDA web site: www.nysda.org.

Self-Defense for Weapons Charge

Late one night, a dispute erupted between two Bronx neighbors over whether one man had glued the other's apartment door shut. Juan DeLa Rosa was holding the screwdriver he used to pry open his door when he confronted Leonides Ramos. Ramos, believing he was in danger, picked up a nearby length of pipe and struck Rosa, who later filed charges. At trial, Ramos requested a self-defense jury instruction as to both misdemeanor assault and weapons possession charges. The court was con-

strained by *People v Pons*, 68 NY2d 264, 508 NYS2d 403 (1986), which held that justification is not a defense to weapons possession. Finding that "application of the *Pons* rule to this case could lead to considerable jury confusion and would be unfair to the defendant," the court dismissed the weapons charge. CPL 300.40(3)(a). Moreover, the court recommended that *Pons* be reconsidered or at least modified to permit the use of self-defense in weapons possession cases, provided: "a) the weapon is not a *per se* weapon; and b) defendant's evidence (if accepted as true) shows that defendant first picked up (or otherwise obtained) the weapon during the course of the incident at issue solely for the purpose of self-defense." *People v Ramos*, NYLJ (NYC Crim Ct Bronx County 11/1/02).

Reaching Into Suspect's Pocket Is Overreaching

An Ontario County investigator doing surveillance in the City of Geneva saw Jose Antonio Casado exit a station wagon, driven by Felix Osso, and enter an apartment building known for drug activity. Later Casado left the building and met with Osso, who handed something to Casado. Osso placed it in his right front pants pocket. The investigator shouted to Casado, "Police, take your hand out of your pocket." Casado looked around, and continued to keep his right hand in his pocket with the other hand covering it. After other officers arrived and took Osso into custody, the investigator removed Casado's hand from his pocket. Without a pat down search, the investigator reached into Casado's pocket and pulled out a pager, cash, and crack cocaine in a plastic bag. Casado was arrested on federal drug possession charges. His suppression motion was denied and the search upheld as protective in view of Casado's refusal to remove his hand from his pocket. The 2nd Circuit found the search to be unreasonable and excessive under *Terry v Ohio*, 392 US 1 (1968). The investigator "could have protected his safety and the safety of others by employing the less serious intrusion, a pat down," which was well known to him, and "there is no valid reason apparent on the record for his not using it." *United States v Casado*, No. 01-1488 (2nd Cir 9/12/02).

Court TV Challenges Cameras Ban

Court TV is seeking to challenge New York's statutory ban on cameras in the courtroom through a motion for declaratory judgment filed in Manhattan Supreme Court. They claim that Section 52 of the state's Civil Rights Law violates the state and federal constitutions and that there is a "presumptive right to televise trials." (NYLJ, 11/12/02.)

Defendant's DNA Kept Out of City Database

Carlos Rodriguez had been charged with rape in Brooklyn Supreme Court. The prosecution moved to have the defendant's DNA tested. Rodriguez responded by reaffirming his earlier consent and an admonition against "the use of the results for purposes other than this indictment." He claimed that using his DNA for comparisons violated his 4th Amendment right to be free from unreasonable searches and seizures. The DNA would otherwise have been submitted to the local New York City database. The court granted the protective order, relying on Executive Law 995-d(1), which stated "All records, findings, reports, and results of DNA testing performed on any person shall be confidential and may not be disclosed or redisclosed without the consent of the subject of such DNA testing." An exception exists for criminal proceedings. However, the court reasoned that "placing of the information in the LDIS [New York City DNA database] is not the same as revealing DNA information to a court, a prosecutor, or a defense counsel in a criminal proceeding." Violation of the confidentiality statute is a crime. The court noted that it is possible that "the existence of LDIS is a class E-Felony." *People v Rodriguez*, No. 3177-02, NYLJ, 11/20/02 (Sup Ct Kings County).

Internet Resources Sighted

NYSDA continually monitors the Internet for resources that will aid criminal defense attorneys in their daily practice, and help them make the most of the web.

On the Defense News page of the NYSDA web site, there is now a link to *New York Court of Appeals & Legislative News*. This contains up-to-date resources for tracking Court of Appeals activities: *New York Court of Appeals 2002-2003: Criminal Cases*, which are abstracts (with the links to the full-text of current decisions) prepared by NYSDA; and *New York Court of Appeals Updates*, prepared by Robert Dean of the Center for Appellate Litigation, that tracks new filings and decisions.

Among other recent sightings of interest that can be found on the NYSDA web site are:

- *Changing Minds: Impact of College in a Maximum Security Prison* (CUNY 2002). This report describes the effects of the college-in-prison program reintroduced by a private consortium of institutions into the Bedford Hills Correctional Facility in 1997. It concentrates on the women enrolled, the impact on their environment, their families, other inmates, and the long-term post-release results. Their findings showed a cost-saving reduction in recidivism, better control of the prison environment, and improved transition back into society.

- *Dignity Denied: New Report Reveals Bias Against Surviving Family Members Who Oppose the Death Penalty* (MVFR 2002). This is a report issued by Murder Victims' Families for Reconciliation to underscore discrimination facing anti-death penalty victims. The report points out that some victims are kept out of the loop as cases progress. It concludes with recommendations to give equitable treatment to victims regardless of their views on the death penalty.
- *Federal Sentencing Guideline Amendments* (eff. 11/1/02). The document is posted on the Federal Court's Defender Services Division Training Branch's web site under both "What's New" and "Sentencing" at: www.fd.org
- *Finding and Researching Experts [sic] Witnesses on the Web* (LLRX, 10/1/02). This article focuses on library and subject matter sites, search engines, research facilities, academic institutions, and professional associations for finding an authority on a particular subject. Sources of background information are considered, such as expert directories, news, case law, and professional discipline web sites. (Attorneys should also contact NYSDA to get more assistance in locating expert witnesses.)
<http://www.llrx.com/features/findingexperts.htm>
- *Homeland Security Act of 2002*. This statute establishes the Department of Homeland Security. Its stated purpose is to prevent and respond to terrorism, and coordinate the work of various federal agencies. It supersedes the INS through the creation of the Bureau of Citizenship and Immigration Services and the Bureau of Border Security.
<http://www.whitehouse.gov/deptofhomeland/>
- *Investigative and Forensic Sciences* (NIJ) is a web site created by the National Institute of Justice to collect information and links to sources concerning research, development, and evaluation of new and existing forensic technologies and methods.
<http://www.ojp.usdoj.gov/nij/sciencetech/ifs.htm>
- *Motions and Appeals Brief Bank* (FPDDC). The Federal Public Defender for the District of Columbia has posted motions and briefs related to federal criminal practice. The topics range from bail to voir dire.
<http://www.dcfpd.org/motions/Motindex.htm>
- *New York Criminal Jury Instructions* (CJI). The Committee on Criminal Jury Instructions has updated and expanded the Criminal Jury Instructions, 2nd Edition (CJI2d). "It is the only current and official publication of CJI2d charges, and replaces all CJI2d charges previously published in printed format." It is still a work in progress. The Committee is drafting charges for newly defined crimes and revising the

charges of “general applicability” that appear in book one of CJI. Note that CJI charges of “general applicability” not yet revised remain in effect. Since they were drafted nearly twenty years ago, the charges must be scrutinized to make sure that they meet current New York law.

- *New York Slip Opinion Service: Unreported, or “On-line Only” Decisions.* The Court of Appeals has authorized a program under which trial court and Appellate Term decisions not selected for publication in the Miscellaneous Reports may be published in the Slip Opinion Service. These opinions are classified according to the Official Reports Digest-Index and listed in the Advance Sheets.
- *NLM DocMorph* is a free PDF converter made available by the National Library of Medicine. PDFs can be created from text documents through their web site, DocMorph, or by using their software, MyMorph. It includes many other features for document management and conversion.
- *Polygraph and Lie Detection* (NRC 2002). In this book, the National Research Council decried the use of polygraph testing by the federal government for national security or employee testing. It found the technique unreliable for generic or mass screenings.
- *Probono.net* is a web portal intended to provide public interest and pro bono practitioners with resources and promote collaboration through a virtual network. The site has two national practice areas, death penalty and asylum, and several areas focused on specific locations, including New York City. Site content is contributed by local legal services groups who work with pro bono attorneys. Each practice area includes news, message board, library, training calendar, and resources for specific areas of work, such as civil rights and criminal appeals.
- *Shaken Baby Syndrome Defense* (SBS) is a web site created by consultants and experts who have worked on behalf of those falsely accused of abuse. The web site contains tutorials, articles, reference works and other web resources to educate and prepare defense attorneys and doctors to critically examine allegations of SBS.
- *State-by-State Guide to Clemency* (Criminal Justice Policy Foundation). This site contains information on clemency and commutation resources, and contacts across the country. The data is organized by jurisdiction and provides basic information about the clemency process and where to file applications. For more information, visit NYSDA’s Clemency web page: www.nysda.org.

- *“We Are Not the Enemy”*: *Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11* (HRW 2002). Human Rights Watch prepared this report to reveal the impact of hate crimes committed in the aftermath of 9-11. It focuses on government efforts to prevent and respond to hate crimes, and to protect the victims. Research from practices implemented in six cities formed the basis for the report. Responses were examined in terms of police deployment, prosecutions, bias crime monitoring, and outreach to affected communities.
<http://humanrightswatch.org/reports/2002/usahate/>

Prosecutors Who Crossed the Line

Many prosecutors have taken laudable steps to correct injustices, such as District Attorney Morgenthau in the Central Park Jogger case, and District Attorney Hynes in accepting double-blind lineups. Still, prosecutorial misconduct remains a recurring problem in criminal justice.

An ethical lapse by a Queens prosecutor required the District Attorney to consent to a new trial in a murder case. In a letter to the judge, District Attorney Brown revealed that “an assistant district attorney had misled the court about the whereabouts of a woman whose testimony may have contradicted the account of a key witness to the shooting.” (NYLJ, 11/12/02.) In another Queens case, a mistrial was ordered due to *Brady* abuses. “The behavior in question consisted of a serious *Brady* violation which was used by the prosecutor as an instrument to paint the defendants as dangerous types from whom protection was needed by one of the two key prosecution witnesses, and also to circumvent a ruling of the Court as to the introduction of evidence of an uncharged crime, coupled with several extremely prejudicial remarks made in summation, which attempted to inflame the passions of the jury to elicit sympathy for the complainant.” *People v Thomas*, NYLJ, 10/16/02 (Sup Ct Queens County).

Upstate, a Schenectady manslaughter conviction was reversed due to improper remarks by the prosecutor during summation. “Considering the severity and frequency of the improprieties throughout the summation in which the prosecutor made at least a dozen direct references to defendant being a liar, made other references to defendant’s ‘false’ and/or ‘tailored story’ and denigrated the defense expert by characterizing him as a puppeteer with defendant as his puppet, a new trial is warranted.” *People v Skinner*, 2002 NYSlipOp 07333 (3rd Dept 10/17/02).

Finally, prosecutors have been told to pack up their fishing rods when it comes to medical records. *In re Grand Jury Investigation in New York County*, No. 111 (NY 10/15/02), an “unidentified” attacker stabbed a man to death in Manhattan. The police only had a vague description of the suspect—male Caucasian, 30s or early 40s, and

believed to bleeding when he left the scene. More than two years later, the prosecutor served grand jury subpoenas on 23 hospitals asking for “[a]ny and all records pertaining to any male Caucasian patient between the ages of 30 to 45 years, who was treated or who sought treatment on . . . for a laceration, puncture wound or slash, or other injury caused by or possibly caused by a cutting instrument and/or sharp object, said injury being plainly observable to a lay person without expert or professional knowledge.” The hospitals moved to quash the subpoena citing doctor-patient privilege. CPLR 4504(a). The trial court ordered that the records be submitted for *in camera* inspection. The Court of Appeals affirmed the Appellate Division’s decision to quash to the subpoena and reverse the trial court. The “subpoenas inevitably call for a medical determination as to *causation* ‘through the application of professional skill or knowledge’ The inherently medical nature of this judgment is not obviated by attempting to qualify it in terms of what a layperson might plainly observe.”

Prisoners Challenge Rulings

In a variety of settings and courts, prisoners have challenged detrimental actions and rulings, with varied success.

Prisoner Punished for Legal Assistance to Fellow Inmate Seeks Relief

After he had received permission to help another inmate appeal a grievance decision, Upstate Correctional Facility authorities placed Francis Auleta in keeplock for seven days. In a *pro se* 1983 complaint filed in the Northern District of New York, Auleta claimed that prison officials violated due process and retaliated against him in violation of the 1st Amendment. A federal magistrate recommended dismissing Auleta’s due process complaint for not alleging a liberty interest and an atypical hardship—the court agreed. However, Judge Kahn ruled differently on the retaliation claim. “[I]n *Shaw [v Murphy]*, 532 US 223 (2001)], the Supreme Court held that an inmate does not have a special constitutional right to provide unauthorized legal assistance to another inmate. The Supreme Court did not hold that inmate-provided legal assistance is not constitutionally protected. Instead, it held that such conduct must be evaluated under the standard set forth in *Turner [v Safley]*, 482 US 78 (1987)], rather than under a heightened standard that accords greater protection to legal (as opposed to non-legal) communication.” Regarding the *Turner* requirements, the court noted: “While in future cases the government may be able to identify government interests that are supported by punishing inmates for conducting activities that were part of their assigned prison job, this court finds it difficult to

conceive of such interests.” Auleta’s complaint survived since the “placement of an inmate in keeplock because he provided authorized legal assistance to another inmate as part of his assigned employment activities is not reasonably related to legitimate penological interests.” *Auleta v LaFrance*, No. 01-CV-431 (NDNY 11/20/02) (*NYLJ*, 11/27/02).

Son of Sam Law Freezes Inmate’s Excessive Force Award

Abdul Majid is serving time for murder and attempted murder. The NYS Comptroller was about to pay him more than \$15,000 compensation for an excessive force claim when one victim and the family of the other victim asked the Crime Victims Board to freeze the funds until their civil suits against Majid were completed. (*NYLJ*, 9/27/02.) The Son of Sam Law was amended in 2001 to allow victims to sue within three years of learning that an inmate received funds in excess of \$10,000. The Board sought an injunction to preserve the funds. Majid responded by raising a constitutional challenge to the statute of limitations. The court rejected the argument as premature. His *ex post facto* claim was also denied, since the statute authorized the Crime Victims Board to seek an existing civil remedy. Procedural and substantive due process and equal protection claims were similarly rejected as unpersuasive. The court granted the injunction, finding “the victims of defendant’s crimes and the citizens of this State will be irreparably damaged if the defendant is allowed to spend the funds in his inmate account before a court can determine whether he is required to pay that money over to his victims.” *NYS Crime Victims Board v Majid*, *NYLJ*, 10/4/02 (Sup Ct Albany County).

Arizona Law Banning Inmate Access to Internet Overturned

In Arizona, prisoners were proscribed from “corresponding with a ‘communication service provider’ or ‘remote computing service’ and were also charged with a misdemeanor if anyone created a website or accessed the Internet at a prisoner’s request.” The Arizona Department of Corrections had searched the Internet for web sites with information about their inmates, and warned those prisoners to have the information removed or face criminal charges. The ACLU filed a lawsuit alleging the law violated the 1st Amendment. The law impinged on human rights and advocacy groups that helped inmates by publishing information about their cases or making other connections with the outside world. A federal district court overturned the law. Tracy Lamourie, a Director of the Canadian Coalition Against the Death Penalty, one of the litigants, stated: “We are pleased that the Arizona court recognized that states cannot legislate or restrict the action or First Amendment rights of prisoner advocacy

groups or human rights groups such as ours, nor can they attempt to dictate what can be reported on websites or other methods of communications." (*Wired News*, 12/18/02.)

2nd Department News

Program to Speed Appeals Announced

An "Active Management Program" announced in late December is intended to expedite several categories of 2nd Department cases. Effective at the end of 2002, an amendment of New York's Rules of Court 670.4 will allow the court's clerk to issue scheduling orders to speed up the perfection of appeals. Among the types of cases affected will be appeals from Family Court orders; Supreme Court orders and judgments that raise custody and visitation issues; Surrogate's Court orders and decrees concerning the termination of parental rights or the adoption; criminal matters where assigned counsel represents the appellant; and "any other cause specifically designated by the court." (*NYLJ*, 12/30/02.)

Grievance Process to Be Studied

Justice A. Gail Prudenti, Presiding Justice of the 2nd Department, created a committee to examine the attorney disciplinary and admission practices in a ten-county area. The 29-member committee will report on procedures for handling grievances, admissions and reinstatements, and then make recommendations for improvements. Justice Prudenti wants the committee to "'take a good hard look at the differences among the departments and make sure we are acting fairly and equitably' when dealing with an attorney's right to practice." (*NYLJ*, 11/25/02.)

Attorney-Client Privilege Protects Content of Billing Statements

In a federal discrimination claim brought by a student against the Binghamton School District, a conflict of interest developed when the school's auditor, an attorney, became the counsel for the plaintiff. The parents had previously received redacted copies of legal bills from the School District under a FOIL request. However, the auditor had seen the unredacted billing. The School moved to disqualify him as counsel for the parents, since he had access to privileged information from the billing, *i.e.*, factual investigation, purpose of legal advice and services provided. New York and federal common law hold that retainer and fee agreements are not privileged communications. *Priest v Hennessy*, 51 NY2d 62, 431 NYS2d 511 (1980) and *In re Shargel*, 742 F2d 62 (2nd Cir 1984). However, the details of billing statements, except for client identity and fee information, are protected under New York law, *De La Roche v De La Roche*, 209 AD2d 157,

159, 617 NYS2d 767, 769 (1st Dept 1994), and a federal court has extended that protection under federal common law. *Ehrich v Binghamton City School District*, *NYLJ*, 10/22/02 (NDNY).

Fear of "Terrorist Activity Afoot" Did Not Justify Automobile Search

Stephen Elio and William Nye were seen on an embankment near railroad tracks in the City of Mount Vernon. They were wearing hooded clothing and "crossing the train tracks and carry[ing] items back and forth from the[ir] vehicle to the tracks in knapsacks." They did not look like railroad employees to the prosecution witness, Mr. Carter. "Fearful that terrorist activity was afoot" he contacted the police. The two individuals were not apprehended immediately, but police did search their unlocked car and the knapsacks within. The defendants returned to their car an hour later, and were arrested for trespass and possession of graffiti instruments. At a hearing, the court suppressed the search. "No credible evidence was presented that any exigent circumstances existed to permit the search of the vehicle without a warrant. Mr. Carter's heightened concern about terrorist activity even in the wake of September 11, 2001, without more, is insufficient to establish exigent circumstances or probable cause." *People v Elio*, *NYLJ*, 11/12/02 (Westchester City Ct).

Genesee County PD Honored

Genesee County Public Defender and NYSDA board member Gary Horton was honored in late October for his caring commitment to his clients and his community. The Genesee County Mental Health Association presented Horton with the Constance E. Miller Award. This annual award recognizes demonstrated commitment to excellence pertinent to the delivery and/or advocacy of quality community-based mental health services in Genesee County. NYSDA congratulates Gary, and joins others in thanking him for his continuing work for individuals too often overlooked or scorned and for the communities in which they live.

Advocate Against Executing the Mentally Retarded Recognized

James Ellis, who teaches at the University of New Mexico School of Law, is the *National Law Journal's* "Lawyer of the Year." Ellis argued the United States Supreme Court case that found a national consensus against executing persons with mental retardation, making such executions unconstitutional under the 8th amendment. (*Atkins v Virginia*, 536 US 304.) As the *Law Journal* noted, Ellis had helped build that crucial consensus "through extensive writings on mental health and law,

through his work with organizations such as the American Association on Mental Retardation (AAMR) and The ARC of the U.S., through his numerous appearances before state legislative and congressional committees and through his amicus briefs in 13 U.S. Supreme Court cases spanning 27 years." (*NLJ*, 12/24/02.)

Clemency Decisions Touch but Don't Fix Policy Concerns

Governor Pataki granted clemency to four prisoners in 2002. One was a victim of domestic violence, Linda White, who was serving a term of 17 years to life for the murder of her boyfriend. White had obtained an order of protection against him, introduced evidence of domestic abuse at trial, and said "she shot him because she feared he would kill her." (*Newsday*, 12/26/02.) The Governor acknowledged, "[T]he extraordinary powers of clemency allow me to exercise compassion and recognize not only that domestic violence was a factor in this case but that Linda White has demonstrated a true commitment to rebuilding her life through her exemplary prison record." (*Governor's Press Release*, 12/24/02.) The last grant of clemency for a battered woman was Charline Brundidge in 1996.

Three men—Eric Marsh, Victor Vaughn and Ernesto Melendez—serving life sentences under the Rockefeller Drug Laws were also granted clemency. Two had no prior criminal history, and all had excellent records and achievements while in prison. (*Governor's Press Release*, 12/24/02.) All four must face the Parole Board before the final release decision is made. For more information, visit NYSDA's Clemency web page: www.nysda.org.

Picayune Pardons

These recent clemency decisions underscore problems in the criminal justice system, including treatment of defendants who were victims of domestic violence and the mandatory, lengthy sentences doled out to many drug offenders. They do not, of course, solve those problems. Real reform of the Rockefeller Drug Laws remains a need in 2003.

Meanwhile, President Bush's 2002 pardons did not even hint that real problems exist in the federal system. He waited two years before granting pardons to seven people, all for old, minor offenses. A Tennessee man convicted of selling moonshine in 1962, and another man from Mississippi convicted of altering an odometer in 1993 were among those pardoned. (*Associated Press*, 12/24/02.) A *Washington Post* editorial observed, "The [pardon] power was meant as a check on the criminal justice system, a vehicle for mercy and for remedying injustices. The federal inmate population today is larger than it has ever been; the role of pardons should be bigger than ever." (*Washington Post*, 12/24/02.)

Commutations Spur Capital Punishment Comment

Outgoing Governor George Ryan commuted all Illinois death sentences as the *REPORT* went to press. Widespread media coverage and editorial praise for the move should greatly affect dialog about the US death penalty in 2003. (See, e.g., "What U.S. papers say about death penalty," UPI [online], 1/14/03.)

"Empire Page" Available at a Discount

NYSDA members can now subscribe to "Empire Page," an online service with news and information about politics and government, at a discounted rate. Check it out on their web page at www.empirepage.com. The "subscribe" banner is easily accessible in the upper right corner of the home page. NYSDA members pay only \$32.95/year, a 17% discount.

SSH Communications Donates SSH Secure Shell

Thanks to a generous donation by SSH Communications Security, Inc. of Palo Alto, CA, NYSDA's Internet server can now be accessed with the most secure communications tool available, *SSH Secure Shell*. SSH Communications donated both *SSH Secure Shell for Workstations* and *SSH Secure Shell for Servers*, the latter to be used on our webserver/firewall system for development and file transfers.

Although the ssh protocol is now integrated with the linux operating system, which has several programs available to use it, Microsoft does not bundle a convenient, graphically designed program for use of ssh in Windows®, so the ability to now use ssh on our Windows 2000 server is a great benefit. SSH is known to be a first choice of secure communications for numerous banks, insurance companies, government organizations and other security conscious organizations around the world, due not only to the high level of security level provided with *SSH Secure Shell*, but for the ease of both installation and operation of the programs. NYSDA IT staff found the products to be particularly easy and intuitive.

NYSDA thanks SSH Communications Security, Inc for its corporate support of the Association's mission to improve the quality of public defense services throughout the state. Through this state-of-the-art software, NYSDA will now have exceptionally secure access to our business-critical services with easy and efficient passwordless authentication using public-key cryptography, widely recognized as a standard in Internet encryption. ☺

Job Opportunities

The Office of the Appellate Defender (OAD) seeks **Staff Attorneys**. The not-for-profit OAD—part law firm, part training program—is devoted to providing high-quality representation to indigent defendants primarily in state criminal appeals and in collateral proceedings in state and federal court. It offers 2-year positions to lawyers with top-level skills in legal research and writing and a commitment to representing the indigent. Attorneys are intensively trained and supervised, and depart as first-class advocates committed to high-quality public defense. The office is devoted to maintaining a staff of lawyers with diverse backgrounds and experiences. Salary based on years of experience, starting at \$41,000 + benefits. Submit cover letter, resume, and writing sample to: Tuli Taylor, Administrative Attorney, Office of the Appellate Defender, 45 West 45th Street, 7th Floor, New York, NY 10036

Prisoners' Legal Services of New York (PLS) is seeking applicants for a **Staff Attorney** position in their Buffalo, New York regional office. PLS is a statewide program providing civil legal services to people incarcerated in New York State prisons. PLS does both service work and impact litigation, handling cases involving mental health and medical care; prison disciplinary matters; excessive use of force; conditions of confinement; sentence calculations; jail time credit and first amendment issues. PLS provides high quality legal services and has been successful in establishing important rights for its clients. Required: commitment to providing legal services to the disadvantaged; admission to practice in New York (or eligible for admission); at least 3 years experience; and a willingness to litigate in state and federal court. Previous poverty law or civil rights experience preferred. The attorney will work with a managing attorney and one other staff attorney and cooperate with other PLS case handlers throughout the State. Competitive salary, outstanding benefit package including health, dental, long-term disability and life insurance, as well as generous leave policy. EOE; PLS seeks to be a well-balanced multi-cultural organization; people of color, women, and people with disabilities encouraged to apply. Staff fluent in Spanish needed. Deadline for applications 1/27/03. Send letter, resume and list of three references

to: Maria McGuinness, Human Resources Manager, Prisoners' Legal Services of New York, 118 Prospect Street, Suite 307, Ithaca, NY 14850; fax (607)272-9122; e-mail mmcguinness@plsny.org (Word or WP)

**Don't Miss an
Application deadline!**
**Check *The REPORT* as soon as
it hits the web at
www.nysda.org,
and look at Job Opportunities
(under NYSDA Resources)
for notices received after the
REPORT deadline.**

The Youth Advocacy Project of the Roxbury Defenders Unit of the Massachusetts Committee for Public Counsel Services, in Roxbury, MA, seeks a **trial lawyer** to join its team of lawyers, social workers, psychologist, and community outreach staff. Responsibilities: provide representation on delinquency and youthful offender cases using a Youth Development Approach; as appropriate, provide post-dispositional advocacy to DYS committed youth; assist in designing and delivering workshops on law related topics to children, parents, youth workers, and lawyers; work on projects related to improving outcomes for court involved children. Required: creative and zealous advocate with demonstrated interest in representing children; experience with Juvenile Court (experience with related systems such as DSS and public school systems is desirable); able to work well within a multi-disciplinary team; an interest in both direct advocacy and systems reform. Applications will be accepted until position is filled. Review of resumes will begin on Jan. 6, 2003. Send cover letter and resume to: Antoinette DaGraca, Administrative Assistant, Youth Advocacy Project, Ten Malcolm X Blvd, Roxbury, MA 02119; fax (617)541-0904 (must include cover letter); e-mail: adagraca@publiccounsel.net

The Youth Advocacy Project of the Roxbury Defenders Unit also seeks a **Social Worker**. Required: experience working with urban youth and be familiar with systems that impact young people; self-motivated team player highly

committed to helping children and families in crisis; MSW, or related Masters-level degree. Send cover letter and resume to address above.

Associate needed. Must be admitted in NY, have interest and one year experience in family law and/or criminal defense and be willing to work as an assistant public defender. Must consider moving to Washington County, NY. (About 45 minutes north of Albany and 20 minutes south of Lake George). Salary: DOE. Send resumes to: Joseph H. Oswald, Esq., Oswald & McMorris, PO Box 328, Fort Edward, NY 12828; fax (518)747-5664; web site: www.oswaldmcmorris.net

The Bronx Defenders, an innovative community based public defender office in the South Bronx, seeks talented, creative and compassionate attorneys to serve as **Senior Trial Attorney** or **Team Leader**. Salary CWE.

Team Leaders supervise a team of lawyers, social workers, investigators, and support staff in the representation of our clients in and out of the courtroom. Applicants for this position should have a passionate commitment to indigent defense, demonstrated ability to represent clients in complex legal cases, exceptional organizational skills, and the ability to build a team with a shared vision of whole client representation and community involvement.

Senior Trial Attorneys litigate the office's most complex and serious cases. They are expected to be both compassionate and creative in their approach to litigation—filing creative motions, and mounting innovative defenses. Applicants for this position must have outstanding trial skills, exceptional client skills and extensive experience litigating complex felony cases,

For either position, send cover letter, resume and writing sample to Robin G. Steinberg, Executive Director, The Bronx Defenders, 860 Courtlandt Avenue, Bronx, NY 10451

The Legal Aid Society of Orange County, Inc., seeks a **Staff Attorney** to handle criminal defense and family law cases. Required: NY bar admission, related job or clinic experience. Salary \$39-43,000

Job Opportunities *continued*

DOE, good benefits. Submit resume to Legal Aid Society, PO Box 328, Goshen, NY 10924; fax (845)294-2638.

The Louisiana Crisis Assistance Center, a leading trial office based in New Orleans, LA, specializing in the defense of indigent people charged with capital crimes, seeks an experienced **Trial Attorney**. Significant felony trial experience critical; capital defense experience important. Must be willing to sit the next Louisiana bar. Salary negotiable, but you won't ever get rich doing capital trial work in the Deep South. Benefits. EOE; LCAC recognizes the desperate need to attract more minorities and women to capital defense work in the South. Contact Clive Stafford Smith or Kim Watts at (504)558-9867; e-mail lcac@thejusticecenter.org

The Brennan Center for Justice at NYU School of Law seeks an Associate Counsel for its Criminal Justice Program, which tackles the harsh impact of criminal justice policies, enforcement practices, and sanctions on communities of color and low-income communities. Associate Counsel, working with other organizations, will implement the Program's current advocacy agenda while exploring and developing new substantive areas. Responsibilities will include preparing policy analyses, writing reports and other public education materials, participating in legislative and agency advocacy, advising officials and activists, organizing convenings, developing scholarship, and conducting litigation. Required: excellent writing, research, analytic, and oral skills;

initiative and creativity to move ideas from concept to implementation; and ability to collaborate with an array of partners. 6 to 10 years' experience, preferably in the criminal justice arena. Sensitivity to the broad implications of criminal justice policy, passion for system reform, and humor desirable. Salary and benefits comparable to other leading NYC non-profit legal employers. Direct questions to Chelsea Slosky, Program Associate, Criminal Justice Program, (212)998-6282, chelsea.slosky@nyu.edu. Send cover letter, resume, two writing samples, and names of three references to: Associate Counsel Position-Criminal Justice Program, Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 12th Floor, New York, NY 10013 ☎

Northeast Juvenile Defender Center

The mission of the National Juvenile Defender Center is to ensure excellence in juvenile defense and promote justice for all children. As its regional affiliate, the Northeast Juvenile Defender Center strives to increase and support effective advocacy for juveniles in the states of Delaware, New Jersey, New York and Pennsylvania.

Located within the Juvenile Rights Division of the Legal Aid Society in New York City, we work within our target area to evaluate the juvenile justice systems, to advocate for the affected children and to assist professionals who work on their behalf.

Our areas of focus include:

- Detention of children
- Overrepresentation of minorities in the justice system
- Treatment and educational needs of juveniles
- Training and advocacy for persons representing juveniles
- Disposition advocacy
- Adequate staffing, resources and compensation for juvenile defenders

If you would like to receive information about the Northeast Juvenile Defender Center or to become a member of our listserv, please contact:

Joyce E. Brenner
Northeast Juvenile Defender Center
c/o Legal Aid Society/Juvenile Rights Division
304 Park Avenue South, 6th Floor
New York, New York 10010

(212)420-6242 or (518)677-5886
jebrenner@legal-aid.org or jayebren@aol.com

CONFERENCES & SEMINARS

Sponsor: New York Immigration Coalition
Theme: Immigration Consequences of Criminal Behavior
Date: January 23, 2003
Place: New York City
Contact: NYC: tel (212)627-2227; fax (212)627-9314

Sponsor: Minnesota Society for Criminal Justice
Theme: Eighteenth National Seminar—Getting Tough on DWI: The Defense
Dates: February 14-15, 2003
Place: Las Vegas, NV
Contact: Becky Harris or Paula Lohse: (612)321-0122; e-mail bharris@eventlab.net or plohse@eventlab.net

Sponsor: California Attorneys for Criminal Justice & California Public Defenders Association
Theme: Capital Case Defense Seminar: Our Clients, Our Constitution, Ourselves
Dates: February 14-17, 2003
Place: Monterey, CA
Contact: CACJ/CPDA Capital Case Defense Seminar: tel (916)448-8868; fax (916)448-8965; web site www.cacj.org

Sponsor: National Association of Criminal Defense Lawyers
Theme: The Best Defense is a Good Offense
Dates: February 19-22, 2003
Place: Cancun, Mexico
Contact: NACDL: tel (202)872-8600; fax (202)872-8690; e-mail assist@nacdl.org; web site www.nacdl.org

Sponsor: Fordham Urban Law Journal
Theme: Beyond the Sentence: Post-Incarceration Legal, Social, and Economic Consequences of Criminal Convictions
Date: February 20, 2003
Place: New York City
Contact: (212)636-6881; e-mail uljsymposium@hotmail.com; web site www.fordham.edu/law/pubs/fulj-home.htm

Sponsor: New York Association of Criminal Defense Lawyers
Theme: Mad Dog and Friend: Trial Practice Tips
Dates and Places:
February 28, 2003 Brooklyn, NY
October 4, 2003 Buffalo, NY
Contact: NYSACDL: tel (212)532-4434; fax (212)532-4668; e-mail Nysacdl@aol.com; web site www.nysacdl.org

Sponsor: Lorman Educational Services
Theme: Strategies in Handling DWI Cases in New York
Date: March 4, 2003
Place: Albany, NY
Contact: (715)833-3940; e-mail customerservice@lorman.com; web site www.lorman.com

Sponsor: **New York State Defenders Association**
Theme: **17th Annual New York Metropolitan Trainer**
Date: **March 8, 2003**
Place: **New York City**
Contact: **NYSDA: tel (518)465-3524; fax (518)465-3249; e-mail info@nysda.org; web site www.nysda.org**

Sponsor: National Legal Aid and Defender Association
Theme: Life in the Balance 2003 Death Penalty Defense Training
Dates: March 15-18, 2003
Place: Austin, TX
Contact: NLADA: tel (202)452-0620; fax (202)872-1031; e-mail info@nlada.org; web site www.nlada.org

Sponsor: National Association of Sentencing Advocates
Theme: Were They Born This Way? Understanding the Mind, the Behaviors, and the Cultural Differences of Clients: Tools for Effective Advocacy
Dates: April 30-May 2, 2003
Place: Albuquerque, NM
Contact: tel (202)628-0871; fax (202)628-1091; e-mail nasa@sentencingproject.org; web site www.sentencingproject.org/nasa

Sponsor: Trial Lawyers College
Theme: Death Penalty Seminar
Dates: June 6-13, 2003
Place: Dubois, WY
Contact: tel (760)322-3783; fax (760)322-3714; web site www.triallawyerscollege.com ☎

Check the "TRAINING CALENDAR" on NYSDA's web site, www.nysda.org, for up-to-date information on CLE trainings and other events of interest.

From My Vantage Point*

by Jonathan E. Gradess

Hope for 2003

I wish for each of you a New Year filled with hope—a hope for joy, for peace, and for the continued opportunity to fight for justice even when it seems but fleeting. That said, we have our work cut out for us.

The end of 2002 foretold much—but not all—of what this new year will bring.

Public Defense Services

The “90/90” train I wrote about last summer (\$90 per hour in-court/\$90 per hour out-of-court) continues to move toward Albany. As it does, counties have begun to look at abandoning their assigned counsel programs to avoid cost increases arising from the *New York County Lawyers Association* and *Nicholson* cases, and extraordinary fee litigation around the state. Monroe and Broome counties are exploring conflict defender offices. Cattaraugus and Essex counties have switched to Public Defender offices. New York City has cut its assigned counsel budget in half, increased funding to The Legal Aid Society, and is looking to place its assigned counsel family court cases with other institutional providers. More change promises to be on the way.

We must remain vigilant to make sure that new public defense models, forged in the cauldron of cost savings, are effective delivery mechanisms for our clients. If new models are not, we must be ready to fight for their improvement.

I will be spending time this year trying to garner more support for the establishment of an Independent Public Defense Commission, which can act to promulgate standards and serve as the conduit for state funding of public defense services. The events described above make clearer than ever the need for a commission. No guidelines exist for switching and redesigning systems. No standards are in place for what new systems should look like. No brake has been systematically placed on caseloads. There has been no assurance of parity with the prosecution. What we have seen is the abandonment of old systems for new based on fear that the cost of a constitutional assigned counsel defense will be too much to bear. If any new systems work well, they will do so because luck was with our clients or because good people intervened, not because we have a method in place to assure the right to effective defense services.

Such a state of affairs simply cannot continue.

* * *

* The REPORT will periodically feature a column by the Association's Executive Director on major issues concerning public defense in New York State.

Drug Law Reform

We ended the election year without Rockefeller Drug Law reform. Some think that by not achieving change in an election year, we lost our best shot. They may be right, but sentencing reform has never been more needed than it is today. The drug laws and drug law enforcement have never been seen as more bankrupt. Voters, polled on the subject, continue to believe in treatment. Mandatory sentencing and long-term incarceration, daily discredited, will some day be gone in New York. Ours is the challenge to get rid of them no matter how long it takes. While I had hoped for reform in 2002, I'm reminded by history that election-year reforms usually wreak havoc for our clients. I take heart from the recent repeal of Michigan's mandatory minimum sentences for most drug crimes, and press on.

Looking Backward For A Moment

A major reform of the substantive and procedural criminal law of this state took place between 1964 and 1971, resulting in the “new Penal Law” of September 1, 1967 and the Criminal Procedure Law of 1971. Consequently, by the fall of 1971 a defense lawyer in New York representing someone on any offense below a homicide had the opportunity (using the numerous sentencing tools made available in the CPL) to fully advocate, under the Penal Law, for an appropriate alternative to incarceration. Within 24 months, Governor Rockefeller's 1973 drug law cut short these widespread, meaningful, yet nascent reforms. Legislatively-determined mandatory sentences, since shown to be cruel, costly and counterproductive, replaced the work of the New York State Commission on Revision of the Penal Law and Criminal Code. Hopes for the flowering of genuine sentencing advocacy, the fashioning of meaningful sanctions, the adversarial testing of proposed dispositions in open court, and a distinct role for probation, prosecution, defense and judge were dashed.

The laws which indecently married second felony offender and drug law sentencing (1973) have been generating election-year clones for the ensuing three decades: 1976—designated felonies; 1978—violent felony offender and juvenile offender laws; 1980—mandatory gun sentencing; 1982 to 1986—proposed racially discriminatory sentencing guidelines; 1994 to 1995—executions; and 1998—Jenna's Law, with its labyrinthine calculations of post-release supervision replacing parole.

Since 1973, New York has squandered taxpayer money to finance drug enforcement policies that cast primarily Black and Latino people into concrete dungeons. Sentences that are cruel, mandatory, and disproportionate destroy them, their families, and their communities. At the same time, mandatory drug law sentencing has radically altered the courtroom, restricting the power of judges and enhancing the power of district attorneys.

What Should Be

Judges should be legally allowed to view people individually, protecting public safety by interdicting obvious patterns of addiction and drug abuse through *meaningful* treatment. People charged with crimes, yet dependent on drugs, should presumptively be treated, not punished. Credible extenuating circumstances to counter this presumption can be presented by prosecutors in the old-fashioned way—in open court.

Returning to the time when drug treatment could be a court disposition for any case should be the standard. Against this measure, the election-year proposals by the Governor and the Assembly both fell short.

Exclusions in both bills would have continued the discredited practice of legislatively defining in advance the appropriate disposition for drug dependent people. But the Governor and the Legislature cannot define based on the names of penal offenses who should and who should not receive treatment. This should be a clinical and judicial decision made on a case-by-case basis at the appropriate time and place, under all the circumstances, with the prosecutor available to protect the public interest if any particular offender is deemed unworthy of therapeutic intervention.

The basic dignity of the human person and respect for the men, women, and children left in the wake of drug dependent criminality should be ensured by the repeal of the Rockefeller/Wilson/Carey/Cuomo/Pataki drug laws, not left to tinker's chance or the readied whim of prosecutorial discretion.

* * *

The Future—Joint Re-entry Efforts, Gideon at 40, Back to BTSP

At the end of 2002, we started a dialogue among civil legal services providers and defenders to begin efforts at collaborative representation and service delivery for prisoners reentering society. A meeting late last year forged an alliance between us and with client community representatives that will bear fruit this year. You will be hearing

David Feige, Trial Chief at The Bronx Defenders, received the Reginald Heber Smith Award at the 2002 National Legal Aid and Defender Association (NLADA) Annual Conference in November.



more about this as the groups work in partnership with one another to reduce disabilities for ex-offenders, draft a reentry manual, and develop greater civil/criminal cooperation.

By February, we hope to have a second community organizer working within the client community to help give voice to client efforts to improve the quality of public defense services. In cooperation with our client advisory board, this organizer will be continuing our fact finding hearings—in the client community, among farm workers, and with Native American communities—and helping to develop client community support for improvements in the public defense system.

On March 18, 2003, we hope to have all of you in the capital for the 40th anniversary of *Gideon v Wainwright*. In addition to Gideon Coalition legislative visits, a press conference and an exhibit in the hall of the Legislative Office Building, we will be holding a Client Speak Out in the Capitol.

Also, I'm happy to announce that after a one-year hiatus caused by last year's budget debacle, the Basic Trial Skills Program will be back. Plan for it—bigger and stronger than ever, June 1-7, 2003.

We expect to have a hard budget year but also work that fills us with challenge and opportunity. We welcome your input, your help, and your continued support.

Some Final Thoughts

In 2003, as we face the world of problem courts that treat human services for our clients as if they were a newly minted coin, we must together be vigilant. As we face a year in which 9/11 and the national recession will be used to excuse services cuts, we must together call for responsible progressive taxation. As we see further encroachments on the rights of our clients, less respect for the Bill of Rights, more use of secrecy, and less fidelity to the Constitution, we must together stand up for what we believe is right regardless of the unpopularity or the price of doing so.

It is an honor to work shoulder to shoulder with people like you, devoted to justice. ♪

The NLADA Conference brought together NYSDA Advisory Board Chair Marion H. Hathaway (far right), Executive Director



Jonathan E. Gradess, Lawyer Jolanta Teresé Litvinskė of the Public Defender Office of Vilnius, Lithuania (far left) and Valerie A. Wattenberg, Esq., consultant to the Vilnius Public Defenders Office.

Immigration Practice Tips

Defense-Relevant Immigration News

by NYSDA's Immigrant Defense Project*

BIA Now Holds that ANY State Drug Felony Will Result in Mandatory Deportation for ALL Classes of Immigrants. Some Long-term Lawful Permanent Residents Convicted of NY Misdemeanor Drug Possession May Still Apply for Discretionary Relief from Deportation.

The Board of Immigration Appeals (BIA) of the US Department of Justice recently issued several precedent decisions that adopt a new approach to determining whether state drug offenses may be deemed "aggravated felonies" for immigration purposes. See *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA May 13, 2002); *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA May 14, 2002); and *Matter of Elgendi*, 23 I&N Dec. 515 (BIA October 31, 2002).

In general, these decisions mean that a state's classification of a drug offense as a felony or misdemeanor will often be determinative of whether conviction of the offense will be deemed an aggravated felony for immigration purposes. Prior BIA precedent had provided that state drug offenses would be deemed aggravated felonies if they would be treated as felonies under federal law, regardless of how classified by the state. See, e.g., *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995); *Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

The new approach offers mixed news for non-citizens convicted of New York State drug offenses. First, these decisions make clear that New York State misdemeanor drug possession offenses will now no longer be found to be aggravated felonies, even where the offense is preceded by a prior drug possession conviction. See *Matter of Santos-Lopez*; see also *Matter of Elgendi* (making clear that the BIA will apply *Santos-Lopez* in cases arising in the 2nd Circuit US Court of Appeals). These decisions reject arguments by the Immigration and Naturalization Service (INS) that second or subsequent drug possession convictions, even if classified as misdemeanors by the state, could be deemed aggravated felonies because second or subsequent drug possession offenses may be prosecuted as felonies under federal law.¹

Second, these decisions make it much more certain that conviction of *any* New York State felony drug offense will be considered an aggravated felony for immigration

law purposes. See *Matter of Yanez-Garcia*; see also *Matter of Elgendi* (making clear that the BIA will now apply *Yanez-Garcia* in cases arising in the 2nd Circuit). These decisions retreat from prior BIA precedents that held that at least first-time simple possession convictions, no matter how classified by the state, could not be deemed to be aggravated felonies. The *Elgendi* decision also declines to follow the decision of the 2nd Circuit, which had deferred to the prior BIA precedents on this point in the immigration context. See *Aguirre v INS*, 79 F3d 315 (2d Cir. 1996) (deferring to the BIA interpretation in *Matter of L-G-*, and holding that a conviction of the New York felony of second-degree criminal possession of a controlled substance with a sentence of eight years to life is not an aggravated felony for immigration purposes). The BIA instead followed the approach of the 2nd Circuit on this point in the illegal re-entry sentencing context. See, e.g., *United States v Pornes-Garcia*, 171 F3d 142 (2d Cir.), cert. denied, 528 US 880 (1999) (acknowledging the 2nd Circuit's following of the BIA's interpretation in the immigration context in *Aguirre* but, nevertheless, reaffirming prior circuit decisions holding that a state felony possession offense would be considered an aggravated felony for purposes of the sentence enhancement for illegal reentry after removal subsequent to an aggravated felony conviction).²

The Bottom Line: It is now significantly more likely that the determination of whether a particular New York State drug offense will be deemed an aggravated felony for immigration purposes will depend on how the offense is classified under New York law, rather than on how the offense would be treated under federal law. This is tremendously important to know since conviction of an aggravated felony has many very harsh potential consequences, including likely mandatory deportation, ineligibility for asylum, ineligibility to return legally to the United States after deportation, and enhanced sentencing for illegal return. Defense lawyers and other immigrant advocates should warn their non-citizen clients that pleading guilty to virtually any state *felony* drug offense will now be much more likely to result in an aggravated felony finding triggering these very harsh negative immigration consequences—even where the offense is a first-time possession offense. However, defense lawyers should be aware that a plea to a *misdemeanor* drug possession charge, while it may still trigger removability under the broader controlled substance deportability or inadmissibility grounds, should avoid the additional negative consequences of an aggravated felony conviction—even when the defendant has prior drug conviction(s).

2nd Circuit Clarifies Standards for Temporary Stays in Immigration Appeals

On October 24, 2002, the 2nd Circuit held that the heightened standard for injunctive relief provided by sub-

* *The Immigrant Defense Project* provides backup support concerning criminal/immigration issues for public defense attorneys, other immigrant advocates, and immigrants themselves. Manny Vargas is Director of the Project, Saadia Aleem is Staff Attorney and coordinator of the Project's pro bono program, and Aarti Shahani is Advocate/Organizer. For hotline assistance, call the Project on Tuesdays and Thursdays from 1:30 to 4:30 p.m. at (212) 367-9104. For information on the Project's new community organizing initiative, see box p. 19.

section 242(f)(2) of the Immigration and Nationality Act did not apply to a consideration of stay pending appeal, as application would lead to the absurd result that an immigrant would have to make a more persuasive showing to obtain a stay than is required to prevail on the merits. *Mohammad v Reno* 309 F3d 95, (2nd Cir. 2002). In ruling that the traditional standard for stay³ applies to prevent deportation or removal, the 2nd Circuit joins the 6th and 9th circuits, which have also refused to allow the INS to apply such restrictive language to prevent immigrants from staying in this country and fighting the legality of their immigration proceedings. *Bejjani v INS*, 271 F3d 670 (6th Cir. 2001); *Andrieu v Ashcroft*, 253 F3d 477 (9th Cir. 2001) (*en banc*).

The 2nd Circuit ruling is great news for all classes of immigrants who are either in the process of challenging their removal orders or who may one day have to do so. Unfortunately, the ruling does not help Mr. Mohammad himself. Mr. Mohammad, a long-term lawful permanent resident of New York, was sentenced in 1997 for a 1996 criminal possession of stolen property. At the time of the alleged crime, Mr. Mohammad's conviction would not have led to deportation, and, even if he had been deportable, he would have been eligible to seek a waiver of deportation. Mr. Mohammad filed in federal court to challenge the retroactive application of laws eliminating relief from deportation to the pre-law conduct in his case. The 2nd Circuit held that despite a "thoughtful" and "provocative" argument made in favor of Mr. Mohammad, the Court was bound by prior case law on the subject. *Mohammad*, 309 F3d 95; *see also Domond v INS*, 244 F3d 81 (2nd Cir. 2001). The Court did stay the mandate for 30 days to allow Mr. Mohammad time to appeal, which Mr. Mohammad's *pro bono* counsel, David A. Yocis at Dewey Ballentine LLP, has done.

2nd Circuit Holds that Attorney's Affirmative Misrepresentation of Deportation Consequences of Guilty Plea Rendered Counsel Ineffective and Plea Invalid

In 1994, the New York Court of Appeals held that a counsel's failure to advise a defendant of the deportation consequences of a guilty plea did not, *per se*, constitute ineffective assistance of counsel. *People v Ford*, 86 NY2d 397 (1994). It has been an open question as to whether an affirmative misrepresentation about deportation consequence would invalidate a plea under New York law.

On Nov. 15, 2002, the 2nd Circuit held that a defendant's guilty plea to a federal charge was invalid because her counsel was ineffective for misrepresenting the deportation consequences of her guilty plea; the court found that had the defendant known of the consequences, she likely would not have pleaded guilty as her overriding concern was remaining in the US. *United States v Cuoto*, 2002 US App LEXIS 23680 (2d Cir 11/15/02).

Litigation is pending in New York State with respect to analogous state cases.

The Bottom Line: The American Bar Association requires investigation of all laws relevant to a client's decision to plead guilty. *ABA Standards for Criminal Justice, Pleas of Guilty* (3d ed.) Std 14-3.2, at 73 (1994). Commentary makes clear that this includes investigation of immigration consequences.⁴ Given that once a plea is entered, most immigrants will not have the opportunity to contest the plea nor to avoid the collateral immigration consequences, it is increasingly important for defense attorneys to investigate possible immigration consequences for their clients. If you have a non-citizen client please feel free to contact our immigration hotline for assistance.

National Defending Immigrants Partnership Launched

The Immigrant Defense Project of NYSDA has joined with the Immigrant Legal Resource Center (California), the National Legal Aid and Defender Association, and the National Immigration Project of the National Lawyers Guild, to launch a new initiative called the Defending Immigrants Partnership (DIP). DIP will offer information, education, technical assistance and legal back-up to state and federal public defenders, appointed counsel, and private defense counsel on the immigration consequences of crime. DIP's initial mandate is to address the law and practices in California, Florida, Illinois, New Jersey, New York, and Texas—the six most immigrant-populous states and to work with federal defender programs across the country. The thesis underlying our partnership is that the best way to insure that immigrant defendants have informed, effective counsel is for the defender community to embrace the issue of immigration consequences as its own.

Updated Removal Defense Checklist in Criminal Charge Cases Available on NYSDA Website

The Immigrant Defense Project has updated its Removal Defense Checklist in Criminal Charge Cases to include relevant new legal developments over the past several months. The checklist provides a fairly exhaustive compilation of removal defense arguments and strategies, complete with legal citations, to assist lawyers counseling or representing non-citizens in removal proceedings based on criminal charges. The checklist is also a useful tool for defense attorneys who are trying to weigh the risk of various plea agreements. To access or download this resource material (now updated through Oct. 15, 2002) visit NYSDA's website at www.nysda.org and click on Immigrant Defense Project Resources.

Immigrant Defense Project Moves to the Battery Park Area in Lower Manhattan

Increased staff at the IDP has led the Project to move to new offices in the Battery Park area. The move is a temporary one. Plans are for a move to more permanent space in the summer of 2003. Mail sent to our old address will be forwarded to us. Correspondence may also be sent to our new address:

Immigrant Defense Project—NYSDA
2 Washington Street, 7 North
New York, NY, 10004

Until further notice, the Project's hotline number remains the same: (212) 367-9104. ☪

Endnotes

1. The INS may nevertheless continue to argue that a conviction of New York misdemeanor sale of marijuana is an aggravated felony based on a claim that such a "sale" offense is necessarily a "trafficking" offense. This INS argument has been rejected by one federal circuit court. See *Steele v Blackman*, 236 F.3d 130 (3d Cir. 2001) (holding that New York misdemeanor marijuana sale could not be deemed an aggravated felony because the offense could include transfer of a small amount of marijuana without compensation).

2. In *Yanez-Garcia*, the BIA indicated that it would continue to follow any contrary federal circuit court precedents. In *Elgendi*, however, as described in the text, the BIA makes clear that, in the 2nd Circuit, the BIA will follow case law in the illegal re-entry sentencing context, rather than in the immigration context. Nevertheless, New York immigrants and their lawyers might still argue that a New York felony possession offense is not necessarily an aggravated felony in the federal courts, or, if the immigrant winds up being detained in states such as New Jersey or Pennsylvania, in any immigration proceedings in such states, because immigration judges there are bound by 3rd Circuit case law agreeing with the old BIA approach. See *Gerbier v Holmes*, 280 F.3d 297 (3d Cir. 2002).

3. The traditional standard requires consideration of: the likelihood of success on the merits; irreparable injury if a stay is denied; substantial injury to the party opposing a stay if one is issued; and the public interest.

4. Standard 14-3.2, Responsibilities of Defense Counsel, states:

(f) 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 includes:

Standard 14-3.2(f) is another new provision. It requires defense counsel, "sufficiently in advance of the entry of any plea," to determine and advise the defendant as to "the possible collateral consequences that might ensue from entry of the contemplated plea." While the standards always required defense counsel to advise his or her client concerning other considerations "deemed important by defense counsel or the defendant" (Standard 14-3.2(b)), the number and significance

of potential collateral consequences has grown to such an extent that it is important to have a separate standard that addresses this obligation. . . .

Given the ever-increasing host of collateral consequences that may flow from a plea of guilty or nolo contendere, it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances. Courts do not require such an expansive debriefing in order to validate a guilty plea. This Standard, however, strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. *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 defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or Alford plea.* Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces. 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. Knowing the likely consequences of certain types of offense conduct will also be important. Defense counsel should routinely be aware of the collateral consequences that obtain in their jurisdiction with respect of certain categories of conduct. The most obvious of such categories are controlled substance crimes and sex offense because convictions for such offense conduct are, under existing statutory schemes, the most likely to carry with them serious and wide-ranging collateral consequences.

**NYSDA Immigrant Defense Project
Community Organizing Initiative**

- Do you have a loved one getting deported? Yes No
Were you ever in immigration detention? Yes No
Are you sick of how the laws hurt your family? Yes No
Do you want to do something about it? Yes No

If you answered yes to **any** of these questions...

JOIN US!

We are loved ones who have decided
it's time to take our lives and
our loved ones back!!!

For more info contact:

Aarti Shahani
(212) 367-9104
ashahani@nysda.org
or
Subhash Kateel
(347) 524-3374

It's a Free Country: Personal Freedom in America After September 11

By Danny Goldberg, Victor Goldberg, and Robert Greenwald, eds.; RDV Books, 2002, \$19.95, 362 pages

by **Barbara DeMille***

Forty-eight journalists, intellectuals, scholars, legislators, and legal activists in this collection of essays concur: in the aftermath of the attacks on the Pentagon and the World Trade Center in September of 2001, our civil liberties have been attacked and are in danger of their further suppression. In defense of these liberties, the expected voices speak: Tom Hayden, Ira Glasser, Howard Zinn, Jerry Nadler, Barney Frank, Norman Siegal, Michael Isikoff, David Cole, but there are also voices with unfamiliar names. These last are Arab-Americans directly affected in the round-up of over a thousand men of Middle Eastern origins immediately after 9/11, as well as Japanese-Americans and Chinese-Americans, comparing their experiences of incarceration and discrimination in the aftermath of December 7, 1941.

Among the most effective in this compendium are the satiric voices, the political cartoonists, reducing the dangerous inclinations of the Bush administration, and those of our present attorney general, John Ashcroft, to laughter and scorn: Janna Malamud Smith, Matt Groening, and Michael Moore. But with whatever approach to these excesses of repression and zeal recounted here, the central tone is one of immediacy and anger. For as with the Alien and Sedition Acts of John Adams's presidency, as with the Palmer Raids directly following the first World War, and as with the internment of American citizens of Japanese origins during World War II, we are once again, in our haste to prevent further massive terrorism in our country, veering too closely toward a climate of mistrust and fear.

Over and over these essayists agree that a climate of repression and suspicion, such as that fostered by the Anti-Terrorism and Effective Death Penalty Act of 1996, enacted following the Oklahoma City bombing, and the USA PATRIOT Act, hastily pushed through Congress following the collapse of the World Trade Center and related attacks, does little to secure the necessary intelligence to avert further disasters. Rather, these acts greatly endanger the very democratic freedoms—*habeas corpus*, the rights to face one's accuser, and prompt trial—we supposedly legislate to protect.

There is a great deal in this collection of essays, too much to outline completely. Much of the material has appeared elsewhere; however the advantage, I think, is the pure force of its collective concern. If such a diverse

group of our writers, thinkers, and activists feel equally and immediately threatened, surely the rest of us would do well to take heed.

Although, it is true, with very few exceptions, that the abuses of due process and the instances of racial profiling documented here have so far been inflicted upon non-citizens both within and without the United States, this is small reason for complacency. Perhaps the most effective quotation in the book, among many in this collection, that best sums up this true sense of common danger is the now-oft-noted statement of the theologian Martin Niemöller (cited by Michael Sheadeh, affiliated with the American Arab Anti-Discrimination Committee and arrested in a pre-dawn raid by a FBI/INS swat team in Los Angeles in 1987) charged with being a member of an organization advocating doctrines of world Communism:

First they came for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, but by that time, no one was left to speak up.

Reading these essays, one after the other so intensely concerned with the potential for blanket suppression of both civil rights and our tradition of social and political dissent in this country, it is not an exaggerated leap to think of the progress of fascism in Germany in the 30s, and Russian and Chinese totalitarianism, and the establishment of police states. If the repressive intentions of the Bush/Ashcroft measures, as they are presented by these who are concerned, are allowed to remain unchecked, our democracy is under siege.

Reaching the mainstream of Americans most often shy of controversy and political protest with these warnings is always the question, for in reality, these writers and speakers most often speak to those already primed to hear. But reach them we must. As Norman Siegal writes: "It's when people of goodwill become silent and even quiet . . . look the other way, rationalize and minimize what their government is doing in their name" that our collective democratic health, which flourishes within a tradition of diversity and dissent, is in grave danger.

Or in the four hundred year old words of John Donne: "No man is an island entire of itself; every man is a piece of the continent, a part of the main. . . . Any man's death diminishes me, because I am involved in mankind, and therefore, never send to hear for whom the bell tolls; it tolls for thee." Truly, arrest and incarceration without charge, lack of access to counsel and prompt trial, racial profiling in the aftermath of Middle Eastern terrorists' attack, a general climate in our country discouraging—in the name of "patriotism"—discussion and opposition to administration policy, involve *and* diminish us all. ♪

* **Barbara DeMille** holds a PhD in English Literature, earned at SUNY at Buffalo. Her work was heard on Northeast Public Radio from 1993 to 1995. She has published numerous essays and articles.

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

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

United States Supreme Court

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

Federal Law (Procedure) FDL; 166(30)

United States v Bean, No. 01-704, 12/10/02, 537 US ___, 2002 US LEXIS 9236, 2002 WL 31746754

The respondent, a former gun dealer, was not allowed as a convicted felon to possess, distribute, or receive firearms or ammunition. 18 USC 922(g)(1). He applied to the federal Bureau of Alcohol, Tobacco and Firearms (ATF) for relief from his firearms disabilities. ATF refused to process or investigate the application due to a congressional bar on use of funding for such applications. A federal district court granted the respondent's request for relief from firearms disabilities. The 5th Circuit affirmed, finding that congressional refusal to fund ATF review of applications such as respondent's was not a "direct and definite suspension or repeal of the subject rights."

Holding: Federal law empowers the Secretary of the Treasury, and derivatively ATF, to grant relief from firearms disabilities provided "the circumstances regarding the disability, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest." 18 USC 925(c). There must be a "denial" based upon the statutory criteria before judicial review is permitted. Refusing to process an application because of a congressional funding bar was neither a denial nor an abuse of discretion. The respondent was not entitled to judicial review. Judgment reversed.

Habeas Corpus (Federal) HAB; 182.5(15)

Abdur'Rahman v Bell, No. 01-9094, 12/10/2002, 537 US ___, 2002 US LEXIS 240, 2002 WL 31746755

The petitioner raised ineffectiveness of counsel and prosecutorial misconduct claims in a habeas corpus challenge to his death penalty conviction. A federal district court granted relief on the first claim but denied the second as unexhausted in state court. The decision to grant the writ was set aside on appeal. The petitioner had not appealed the exhaustion issue in the prosecutorial mis-

conduct claim. Later, he filed a Federal Rule of Civil Procedure 60(b) motion in district court claiming its decision as to the second claim was erroneous in light of a new state court rule on exhaustion requirements. The district court found the motion to be a second or successive habeas corpus application and held it did not have jurisdiction to decide it. 28 USC 2244. The Court of Appeals affirmed.

Holding: Writ of certiorari is dismissed as improvidently granted.

Dissent: [Stevens, J] The petitioner's Rule 60(b) motion sought relief from the district court's final order in the habeas corpus proceeding, not the state court's judgment of conviction on the basis of a new constitutional claim. Second or successive habeas corpus petitions are intended to remedy constitutional violations, while Rule 60(b) motions are aimed at procedural violations in court proceedings. If Rule 60(b) motions are always considered 'second or successive' habeas corpus petitions, courts will have to turn a blind eye to abuse of the judicial process, resulting in a miscarriage of justice, where, for example, a death row inmate can show that a prosecutor committed fraud upon the district court during habeas corpus proceedings. *See Mobley v Head*, 306 F3d 1096, 1100-1105 (11th Cir 2002) (dissenting opinion); *see also Stewart v Martinez-Villareal*, 523 US 637 (1998); *Slack v McDaniel*, 529 US 473 (2000). The Rule 60(b) motion here challenged the district court's decision based on a change in the legal landscape, a new state court rule that undermined the federal court's procedural bar decision, and should have been heard by the district court. *Agostini v Felton*, 521 US 203, 215 (1997).

New York State Court of Appeals

Driving While Intoxicated (Evidence) DWI; 130(15)

People v Blair, No. 169, 9/17/02

County Court dismissed a City Court charge of common-law driving while intoxicated under Vehicle and Traffic Law 1192(3).

Holding: By statute, a blood alcohol level between .07 and .10 shall be prima facie evidence that the person is not intoxicated, although this presumption may be rebutted. *See* Vehicle and Traffic Law 1195(2)(c). The presumption of sobriety was sufficiently rebutted by the factual allegations in the supporting documentation to the accusatory instrument. The defendant: had a .08% blood alcohol level; drove without headlights or tail lights; exhibited glassy eyes and impaired speech and motor coordination; smelled of alcohol; and failed four field sobriety tests. The defendant admitted that he drank five to six beers before driving and should not have been operating his vehicle. Order reversed, dismissal denied, case remitted.

NY Court of Appeals *continued*

Accusatory Instruments (Sufficiency) ACI; 11(15)

Contempt (Elements) CNT; 85(7)

People v D'Angelo, No. 118, 10/10/02

A temporary protection order forbade the defendant to contact specified people. For leaving threatening voice mail for one of those people despite the order, he was convicted of charges of first and second-degree criminal contempt. The Appellate Division affirmed.

Holding: The defendant alleged on appeal that the indictment was jurisdictionally defective because the second-degree criminal contempt counts lacked factual recitals showing the defendant's calls did not involve or grow out of labor disputes. A jurisdictionally sound indictment must correctly charge each crime. *People v Iannone*, 45 NY2d 589, 600. Specific reference to a statute constitutes allegations of all elements of the crime. *People v Cohen* 52 NY2d 584, 586. *Cohen* is not limited to instances where a defendant obtains a plea bargain and challenges the indictment only on appeal, or when the element not recited "would be obvious to or is admitted by the accused." Since the defendant did not file a timely motion to dismiss, there is no need to consider "whether statutory mandates beyond the jurisdictional minimum required the indictment to recite that defendant's calls did not arise in a case 'involving or growing out of labor disputes' (see Criminal Procedure Law § 200.50(7)(a); Penal Law 215.50(3), or whether this labor dispute exemption is an exception or a proviso (cf. *People v Kirkham*, 273 AD2d 509 [2000])." Order affirmed.

Speedy Trial (Statutory Limits) SPX; 355(45)

People v Cooper, No. 119, 10/10/02

The defendant was initially charged with felonies and class A misdemeanors. The prosecution moved to dismiss the felony complaint, and an information was filed on the A misdemeanors. Before trial, the prosecution moved to reduce the charges to class B "attempt" misdemeanors. The defendant asserted the motion was "time-barred" because B misdemeanors have a 60-day "readiness" period and 73 days had already passed. The defendant was convicted of the B misdemeanors and Appellate Term affirmed.

Holding: During the same criminal action, the replacement of a felony complaint by a misdemeanor information may alter the date on which the action is deemed to have commenced. See CPL 30.30(5)(c). Where a particular type of change in charging instruments is not mentioned in that section of the statute, it does not apply. See eg *People v Tychanski* 78 NY2d 909 and *People v Cooper*

90 NY2d 292. In such instances, the general terms of Criminal Procedure Law 30.30(1) govern. The first reduction here, from felony complaint to misdemeanor information, fell within CPL 30.30(5)(c), making the operative time limit 90 days. The second reduction, from A to B misdemeanors, is not enumerated in the 30.30(5) exceptions and so did not change the time limit. Order affirmed.

Evidence (Privileges) EVI; 155(115)

**Subpoenas and Subpoenas
Duces Tecum (General)** SUB; 365(7)

**Matter of the Grand Jury Investigation in New York
County, NYC Health and Hospitals Corp. v
Morgenthau, No. 111, 10/15/02**

A year and a half after an unsolved stabbing, the prosecutor served grand jury subpoenas *duces tecum* on 23 hospitals seeking records pertaining to "any male Caucasian patient" aged 30 to 45 years who sought treatment near the time of the killing for any observable injury possibly caused by a sharp object. The records sought included identifying information and all other information except that necessary to enable medical professionals to act in that capacity. A motion to quash was denied and *in camera* inspection of the records ordered. The Appellate Division reversed and quashed the subpoenas.

Holding: New York was the first state to enact a physician-patient privilege statute. CPLR 4504(a). The privilege is to be construed broadly and liberally. While the privilege generally does not extend to data obtained outside medical diagnosis and treatment, there is no way to comply with the demand for identifying information about persons possibly suffering a stab wound without disclosing privileged diagnosis and treatment information. *Matter of Grand Jury Investigation in Onondaga County*, 59 NY2d 130, 134. Hospitals cannot reasonably determine, by reviewing emergency medical records, what information was discernable to layperson and what only to medical personnel. The policy objectives of the statute justify nondisclosure here; none of the statutory exceptions apply. Order affirmed.

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

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

People v Collins, No. 125, 10/15/02

Charges against the defendant included second-degree burglary for entering the complainant's apartment and third-degree burglary for entering the building in which the apartment was located. The Appellate Division affirmed his convictions, including one for second-degree burglary.

NY Court of Appeals *continued*

Holding: The defendant was not denied his right to be present at a material stage of the proceedings (CPL 310.30) by the manner in which the jury was instructed. The defense asked, after the initial charge on all counts, that language be added to the verdict form saying the jury could consider third-degree burglary only if it had acquitted the defendant of second-degree burglary. In the defendant's absence, specific language was then discussed. After moving to dismiss the third-degree burglary count, defense counsel agreed that the verdict sheet would be submitted with the alternative burglary counts, but if the defendant was found guilty of third-degree, that count would be dismissed. In response to a subsequent jury note, the court reinstructed the jury on all counts, and did not say to consider third-degree burglary only if the defendant was acquitted of second-degree. That the jury learned only via the written form about this stricture did not violate CPL 310.30. It related to the order in which the jury was to consider the charges. *See People v Cole*, 85 NY2d 990, 991-992. Resolving the language in which the verdict form would state that proposition was a ministerial act and involved purely legal argument for which the defendant need not have been present. Order affirmed.

Appeals And Writs (Judgments and Orders Appealable) **APP; 25(45) (63)**
(Preservation of Error for Review)

People v Davidson, No. 132, 10/15/02

Holding: The defendant moved to set aside the verdict after being convicted of loitering in a public place for the purpose of gambling with gambling paraphernalia as prohibited by Penal Law 240.35(2). The court granted the motion; the Appellate Division reversed. Because that reversal was predicated on an unpreserved issue, it did not meet the requirements of CPL 450.90(2)(a). The defendant's constitutional challenge to the loitering statute was made only in a CPL 330.30 motion, and not in a timely motion under CPL 210.20(1)(a) or 210.25(3). While a trial court may entertain a dismissal motion in the interest of justice and for good cause shown anytime before sentence (*see* CPL 255.20[3]), no such motion was made here. The issue was therefore unpreserved. *See People v Hines*, 97 NY2d 56, 61. Appeal dismissed.

First Department

Contempt (General) **CNT; 85(8)**
Family Court (Violation of Family Court Orders) **FAM; 164(60)**

November-December 2002

Juveniles (Persons in Need of Supervision)**JUV; 230(110)****Re Edwin G., 296 AD2d 7, 742 NYS2d 53 (1st Dept 2002)**

The appellant violated explicit terms of an order issued with a Person In Need of Supervision (PINS) disposition by absconding from Administration for Children's Services (ACS). Family Court held him in second-degree criminal contempt and adjudicated him a juvenile delinquent. The appellant argued that Family Court lacked the authority to order him not to abscond and that New York law prohibits placing a PINS youth in a secure facility.

Holding: Family Court lacks the authority to hold a PINS violator in contempt. Judiciary Law 750 give courts power to adjudge persons in contempt, but section 156 of the Family Court Act (FCA) restricts the Family Court's contempt power when "a specific punishment or other remedy for such violation is provided in this act or any other law." Family Court has consistently been found to lack contempt power when the FCA provided for other specific remedies. *Michael N.G. v Elsa R.*, 233 AD2d 264. Here, FCA 777 to 779 provided for other remedies, and there "is no provision that corresponds with the sanction for contempt arising from the violation of a [PINS] dispositional order." FCA 720[2] states that a PINS youth can't be detained in a secure detention facility. The court may not therefore 'bootstrap' the present PINS proceeding into a juvenile delinquency proceeding under article 3 of the FCA to justify the use of contempt for what is PINS-type behavior rather than true delinquency. Matter remanded for a new dispositional hearing. Judgment reversed. (Family Ct, Bronx Co [Martinez-Perez, JJ])

Guilty Pleas (General) **GYP; 181(25)****Plea Bargaining (General)** **PLE; 284(10)****People v Alvarez, 294 AD2d 219, 741 NYS2d 853 (1st Dept 2002)**

The defendant was convicted of attempted first-degree drug possession and was sentenced to 8 years to life.

Holding: "The minutes of the plea proceeding show that the parties were under the mistaken impression that in pleading guilty to the crime of attempted criminal possession of a controlled substance in the first degree defendant could be sentenced to the promised eight years to life, when, in fact, the attempt to commit such a crime remains a Class A-1 felony (Penal Law § 110.05(1)), requiring a minimum of at least 15 years (Penal Law 70.00[3][a][I]). We thus modify the conviction to conform to the parties' intent as regards sentence." Judgment modified, conviction vacated and attempted second-degree

First Department *continued*

possession conviction substituted. (Supreme Ct, New York Co [Fried, JJ])

Speedy Trial (Prosecutor's Readiness for Trial) (Statutory Limits) **SPX; 355 (32)(45)**

People v DiMeglio, 294 AD2d 239, 743 NYS2d 83 (1st Dept 2002)

Holding: The prosecutor was required to be ready for trial within 183 days; dismissal of the indictment on speedy trial grounds was proper. The argument that the last day of a chargeable period should be excluded from calculation because the prosecution could hypothetically have declared ready then is rejected. New York courts have consistently held that, "when computing a period of days, the first day is excluded but the last day is included." *H.E.&S. Transp. Corp v Checker Cab Sales Corp.*, 271 NY 239, 240; see also *People v Stiles*, 70 NY2d 765 (citing General Construction Law 20). A claim that defense counsel had requested an adjournment was unreserved and unsupported by the record. A seven-day adjournment by the prosecutor due to a family emergency did not constitute "exceptional circumstances" pursuant to CPL 30.30(3)(b); there was no showing that reassigning this simple weapon possession case at least for the suppression hearing would have been onerous. As the prosecution was not ready the following week or a month later, the record suggests they were not ready regardless of the emergency. See *People v Middlemiss*, 198 AD2d 755. As 191 days was chargeable to the prosecutor, the indictment was properly dismissed. Order affirmed. (Supreme Ct, Bronx Co [Williams, JJ])

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

Narcotics (Instructions) **NAR; 265(33)**

People v Hoyte, 294 AD2d 263, 741 NYS2d 873 (1st Dept 2002)

Holding: The defendant was found guilty of first-degree criminal possession of a controlled substance. His motion to vacate the judgment was properly granted. He was deprived of effective assistance of counsel where defense counsel failed to ask the court to instruct the jury, pursuant to *People v Ryan*, 82 NY2d 497, that the prosecutor had to prove that the defendant knew he possessed the statutorily-specified weight of drugs. The record showed that this was an error, not a strategy. *Ryan* applied because the offense occurred before the knowledge-of-weight requirement was eliminated by statute. Penal Law

15.20(4). The absence of a *Ryan* charge was prejudicial, seriously affecting the fairness of the proceeding as a whole. See *People v Benevento*, 91 NY2d 708, 713-14. Order affirmed. (Supreme Ct, Bronx Co [Mogulescu, JJ])

Trial (Confrontation of Witnesses) (Presence of Defendant) [Trial in Absentia] **TRI; 375(5) (45)**

People v Casiano, 294 AD2d 277, 743 NYS2d 405 (1st Dept 2002)

Holding: The court held an off-the-record bench conference with a eyewitness outside the presence of the defendant, then placed on the record the issues raised at the closed conference and ruled that the witness could testify. Defendants have a constitutional right to be present at all material stages of the trial and proceedings at which they may have something valuable to contribute, or at ancillary proceedings where their presence would have a substantial effect on their ability to defend against the charges. See *People v Williams*, 85 NY2d 945, 947 *cert den sub nom. Chisholm v New York*, 528 US 971; see also CPL 260.20. Here, it was clear that the defendant might have had meaningful input during the off-the-record conference concerning identification testimony, and therefore his presence was required. See *People v Turaine*, 78 NY2d 871. Judgment reversed, matter remanded. (Supreme Ct, Bronx Co [Bamberger, JJ])

Counsel (Competence/Effective Assistance/ Adequacy) (Malpractice) **COU; 95(15) (23)**

Wilson v City of New York, 294 AD2d 290, 743 NYS2d 30 (1st Dept 2002)

The plaintiff, a homeless, mentally disabled 33-year-old, was arrested and charged with first-degree robbery, although no complainants identified him and three of five said he was not a perpetrator. The defendant attorney was assigned to represent the plaintiff, who pled guilty to attempted second-degree robbery. The conviction was later dismissed on the prosecution's motion. The plaintiff spent four months incarcerated. The defendant attorney's motion to dismiss this civil action as to him was denied.

Holding: Legal malpractice does not afford recovery for non-pecuniary loss or damage. See *Wolkstein v Morgenstern*, 275 AD2d 635, 637. This applies to malpractice in criminal matters. The plaintiff failed to establish causation on the malpractice claim. As he was without resources from which to post bail, he fails to show that he would have been released earlier but for the attorney's failure to make further bail application. The prosecutor knew of a co-defendant's assertion that the plaintiff was innocent. The co-defendant's post-indictment cooperation influ-

First Department *continued*

enced the eventual motion to dismiss. This suggests that the defendant attorney had no power to hasten the plaintiff's release. The plaintiff's incarceration in State prison after sentence shows neither causation as to injury received in prison nor any delay in the ultimate dismissal of the case. The assertions here do not meet the test for extreme, outrageous conduct set forth in *Wolkstein* for negligent infliction of emotional distress. Order reversed, complaint as to defendant attorney dismissed. (Supreme Ct, Bronx Co [McKeon, JJ])

Second Department

Misconduct (Prosecution) MIS; 250(15)

Witnesses (Credibility) WIT; 390 (10)

**People v Littles, 295 AD2d 369, 743 NYS2d 290
(2nd Dept 2002)**

Holding: During trial, a prosecution witness under indictment on unrelated charges changed his testimony and alleged that the prosecutor had made undisclosed promises and directed him to lie at the defendant's trial. These allegations were made in a letter to the defendant's lawyer that the witness acknowledged on cross-examination. The prosecution initially agreed to a hearing but then objected that it would delay the trial. At the end of trial, the court denied a hearing regarding these allegations. Undisclosed promises to the witness would warrant a reversal. *See People v Novoa* 70 NY2d 490, 496-98. A hearing is warranted. *People v Pons* 236 AD2d 562, 563-64. Appeal held in abeyance, matter remitted for a hearing and report. (Supreme Ct, Queens Co [Naro, JJ])

**Search and Seizure (Arrest/
Scene of the Crime Searches
[Probable Cause]) (Motions
to Suppress [CPL Article 710])** SEA; 335(10g) (45)

Witnesses (Credibility) (Police) WIT; 390(10) (40)

**People v Hills, 295 AD2d 365, 743 NYS2d 525
(2nd Dept 2002)**

Holding: Three detectives testified at a suppression hearing. They claimed that the defendant, after someone else yelled "Five O," meaning police, said when approached by the detectives (who had been in an unmarked vehicle), "There is no guns here." He exposed one side of his torso while one detective spotted a gun on the other side. The defendant was given his *Miranda* rights. *Miranda v Arizona* 384 US 436 (1966). He allegedly

then said, "All right, you got me." The defendant denied that the gun was visible, said the conversation had been about whether the others present were selling drugs, and that at the police station he signed a written statement much of which was not visible when he signed it. Although a hearing court's findings are given great weight (*see People v Prochilo* 41 NY2d 759), it was against the weight of the evidence not to give credence to the detectives. Their testimony was not incredible as a matter of law; it was not physically impossible, contrary to experience, or self-contradictory. *People v Garafalo*, 44 AD2d 86. In any event, recovery of the gun that the defendant abandoned established probable cause for the arrest. *See People v Wilson* 147 AD2d 602. Order reversed, suppression denied, indictment reinstated. (Supreme Ct, Kings Co [Reichbach, JJ])

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

Misconduct (Juror) MIS; 250(12)

**People v Corines, 295 AD2d 445, 743 NYS2d 314
(2nd Dept 2002)**

Holding: The defendant moved under CPL 330.30 to set aside, due to jury misconduct, his conviction for the unauthorized practice of medicine. He has sufficiently shown that one or more jurors employed as medical professionals improperly influenced other jury members. The court erred in not conducting a hearing. The court is to conduct a hearing and report its findings with all deliberate speed. Matter remitted and held in abeyance in the interim. (Supreme Ct, Queens Co [Blackburne, JJ])

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

**People v Brown, 295 AD2d 530, 744 NYS2d 688
(2nd Dept 2002)**

Holding: Viewing the evidence in the light most favorable to the prosecution, there was legally sufficient evidence to support the conviction. *See People v Contes* 60 NY2d 620. However, the sentence for criminal possession of stolen property should run concurrently with the sentence for illegal possession of a vehicle identification number. Consecutive sentences on these convictions for actions involving the same stolen vehicle violate Penal Law 70.25(2). *See People v Laureano* 87 NY2d 640. Judgment modified and as modified, affirmed. (Supreme Ct, Richmond Co [Rooney, J])

Discrimination (Race) DCM; 110.5(50)

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

Second Department *continued*

People v Ramirez, 295 AD2d 542, 744 NYS2d 683 (2nd Dept 2002)

Holding: The court required the prosecutor to provide race-neutral reasons for three out of five peremptory challenges contested by a codefendant pursuant to *Batson v Kentucky* (476 US 79 [1986]). The defendant then argued that race-neutral reasons should also be given for the other two challenges. The defendant's *Batson* challenge (a claim that the prosecutor used a peremptory to dismiss the two black jurors based solely their race) was timely, as he made it before commencement of trial. See *People v Scott*, 70 NY2d 420, 425. The presumption of purposeful discrimination was not rebutted as to those jurors, and a hearing must be held. Appeal held in abeyance, matter remitted. (Supreme Ct, Queens Co [Buchter, JJ])

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

Witnesses (Credibility) WIT; 390(10)

People v Wilson, 295 AD2d 545, 744 NYS2d 692 (2nd Dept 2002)

Holding: The defendant claimed that admitting the testimony from the complainant's daughter, the detective that interviewed the daughter, and the investigating detective constituted improper bolstering. This was unpreserved. See CPL 470.05[2]; *People v Udzenski* 146 AD2d 245. Furthermore, the testimony did not constitute reversible error. See *People v Holt* 67 NY2d 819. Judgment affirmed. (Supreme Ct, Kings Co [Leventhal, JJ])

Third Department

Evidence (Newly Discovered) EVI; 155(88)

Sentencing (Enhancement) (Persistent Violent Felony Offender) SEN; 345(32) (59)

People v Hayes, No. 11315B, 3rd Dept, 6/20/02

After the defendant was convicted of rape, coercion, burglary and unlawful imprisonment, he moved to set aside the verdict on the basis of newly discovered evidence. This motion was denied and he was sentenced as a persistent violent felony offender to 25 years to life. The 3rd Department reversed on a *Sandoval* issue. The Court of Appeals reversed and asked the Appellate Division to consider the remaining contentions from the original appeal.

Holding: The newly found evidence in this case did not "create the probability of a different result" and merely tended to impeach the testimony of a trial witness. See *People v Salemi*, 309 NY 208, 215-216, cert den 350 US 950. To be sentenced as a "persistent violent felony offender" requires a violent felony conviction. Even though the defendant's initial felony conviction was from Illinois, the statutory definition for "aggravated criminal sexual assault" in Illinois—force or threat of force—is similar enough to New York's definition—forcible compulsion—to make the enhanced sentencing appropriate. The Illinois element is defined as "including but not limited to" situations of threats to use force or violence against a person. Contrary to the defendant's assertion, this does not qualify the definition in a way that permits a threat to property to satisfy the statute. Judgment affirmed. (County Ct, Washington Co [Berke, JJ])

Appeals and Writs (General) (Scope and Extent of Review) APP; 25(35) (90)

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

People v Sczepankowski, No. 11855, 3rd Dept, 6/20/02

Holding: The defendant pled guilty to one count of selling drugs and waived his right to appeal. He was sentenced to 8¹/₃ to 25 years, forfeited the money on him at time of arrest and agreed to pay \$620 in restitution. He challenged the accuracy of one of the charges of the indictment, because a lab report received after return of the indictment showed that he had not possessed an eighth of an ounce or more of cocaine. The report was fully disclosed when received. Even if there was an evidentiary flaw in the charge, the defendant forfeited it by pleading guilty. *People v Hansen*, 95 NY2d 227, 232. The plea was to a different count, unlike the facts in *People v Pelchat* (62 NY2d 97, 108), where the plea had been to the entire, void indictment.

A defendant may "surrender" a guaranteed right by pleading guilty, see *People v Seaberg* (74 NY2d 1, 7), as long as the waiver is not constitutionally defective or prohibited by public policy. See *People v Callahan*, 80 NY2d 273, 285. This case is distinguishable from *People v Sanders* (289 AD2d 1019), where there was an agreement to have a restitution hearing, which was held but flawed. The waiver of appeal applied to the forfeiture provision here. See *US v Hollingworth*, 81 F3d 171. Judgment affirmed. (County Ct, Montgomery Co [Catena, JJ])

Sentencing (General) (Hearing) SEN; 345(37) (42)

People v Iovinella, No. 12103, 3rd Dept, 6/20/02

Holding: The defendant pled guilty to first-degree assault in satisfaction of a 16-count indictment and was sentenced to 6 to 12 years in prison. He contended that the

Third Department *continued*

complainant should not have been permitted to read her parents' written statements at sentencing, making them a part of the record. The statute permitting a victim to speak before sentence does not preclude statements by others, particularly family members. See CPL 380.50(2) (b); *People v Arroyo*, 284 AD2d 735, 736 lv den 96 NY2d 216. There is no reason to reconsider the *Arroyo* decision. Judgment affirmed. (County Ct, Schenectady Co [Tomlinson, JJ])

Speedy Trial (Cause for Delay) (General) **SPX; 355(12) (30)**
People v Kirkley, No. 13079, 3rd Dept, 6/20/02

Holding: The defendant pled guilty to attempting to sell a controlled substance. He argued that his due process rights were denied by the one-year delay between the time of this attempted sale and his ultimate arrest. Where there is a larger investigation underway that requires secrecy, this type of delay on a single case is allowed. See *People v Singer*, 44 NY2d 241, 254. The court here credited the prosecution's explanation of the delay, unlike in *People v Townsend* (270 AD2d 720). A violation of due process can be shown where the delay is lengthy and without good cause even where there is no actual prejudice, but where, as here, the delay is not protracted, whether the defense was impaired is important. See *eg People v Collier* 290 AD2d 816 lv den 97 NY2d 752. Judgment affirmed. (County Ct, Schenectady Co [Eidens, JJ])

Counsel (Competence/ Effective Assistance/Adequacy) **COU; 95 (15)**
Evidence (Uncharged Crimes) **EVI; 155(132)****Misconduct (Prosecution)** **MIS; 250(15)****People v Fleegle, No. 13195, 3rd Dept, 6/20/02**

Holding: The defendant was convicted of several sex crimes. The prosecutor's reference to and introduction of testimony regarding uncharged crimes, some barred by the statute of limitations, was reversible error even though it was offered and received without the objection of defense counsel. The prosecution failed to seek a ruling on introducing such evidence, and the court failed to hold, a *Ventimiglia* hearing. See *People v Janota*, 181 AD2d 932, 933. The court also failed to give limiting instructions as to the complainant's testimony about uncharged crimes. *People v Intelisano*, 188 AD2d 881, 883.

Defense counsel's "efforts fell short of a meaningful representation," which "seriously compromised" the defendant's right to a fair trial. Counsel failed to object to references in the prosecutor's opening statement to

uncharged crimes and to the complainant's testimony regarding those crimes. Counsel "inexplicably elicited additional proof regarding those uncharged sex crimes during his cross-examination" of the complainant. See *People v Hollins* 221 AD2d 863, 864. Counsel "failed to move to compel a bill of particulars regarding each count of the indictment after the People refused to respond to his demand for the same, suggesting their offer to review their file was sufficient disclosure." The record does not reveal any legitimate explanation for these actions or inactions. See *People v Rivera*, 71 NY2d 705, 709. Judgment reversed, the matter remitted for new trial. (County Ct, St. Lawrence Co [Nicandri, JJ])

Probation and Conditional Discharge (General) **PRO; 305(18)**
Sentencing (General) (Resentencing) **SEN; 345(37) (70.5)****People v Maynard, No. 12734, 3rd Dept, 7/27/2002**

Holding: The defendant was convicted on two separate superior court informations for driving while ability impaired and aggravated unlicensed operation. He received a sentence of six months and five years probation on each, to run concurrently. After he violated probation, he received sentences of twelve months in jail and five years probation, to run consecutively. On two subsequent occasions he again violated his probation, and was re-sentenced to 1¹/₃ to 4 years in prison. As the prosecution concedes, the initial re-sentencing to 12 months plus probation was illegal. See Penal Law 60.01(2)(d); 65.15(1); see also *People v Sawinski*, __AD2d__, 742 NY2d 690. The sentences imposed for subsequent probation violations predicated upon breach of that unauthorized sentence should be vacated. Judgment modified, sentence vacated, remitted for re-sentencing. (County Ct, Sullivan Co [La Buda, JJ])

Search and Seizure (Motions to Suppress [CPL Article 710]) **SEA; 335(45)**
People v Hogencamp, No. 12912, 3rd Dept, 7/27/02

Holding: Following a denial of the defendant's motion to suppress evidence and certain oral statements, the defendant pled guilty to burglary, reserving the right to appeal these rulings. The physical evidence seized and the oral statements taken by police were unlawful, as they resulted from an illegal stop and detention. See *People v Hollman*, 79 NY2d 181. The police initially stopped the defendant when he was walking on the shoulder of a road near a city water supply intake on New Years Day. Even if the reason for that stop was objective and credible, and the subsequent search of the defendant's jacket was consensual, further detention was unlawful. Once the officer satisfied his suspicion by searching the defendant's jacket

Third Department *continued*

and running the defendant’s drivers license through the system, further involuntary detention of the defendant—a local resident with a lawful reason for being in the area—was unjustified. *See eg People v Banks*, 85 NY2d 558 *cert den* 516 US 868. Continued questioning of the defendant because he appeared nervous was improper. Judgment is reversed, motion to suppress granted, indictment dismissed. (County Ct, Delaware Co [Estes, JJ])

Fourth Department

Counsel (Conflict of Interest) **COU; 95(10) (15)**
(Competence/ Effective Assistance/Adequacy)

Pro Se Representation (General) **PSR; 304.5(10)**

People v Coleman, 294 AD2d 843, 741 NYS2d 463 (4th Dept 2002)

Holding: The defendant was convicted after a bench trial of numerous offenses. Before trial, defense counsel moved to withdraw from the case because the defendant had lost confidence in his ability. Counsel said he had represented the defendant “to the best of [his] ability as much as anyone could in Western New York” and the defendant stated that he did not “really have a problem with defense counsel.” While an attorney cannot become a witness against a client by taking an adverse position (*see People v Betsch*, 286 AD2d 887), the record shows that the court’s denial of the motion to withdraw was not influenced by the attorney’s comment. However, the defendant was denied effective assistance of counsel with respect to his *pro se* CPL 330 motion to set aside the verdict. Defense counsel refused to address the issues in defendant’s motion, which included the issue of ineffective assistance of counsel, other than to say he thought he had done everything an attorney should do in the case. This position was directly adverse to that of the defendant. *See People v Lewis* 286 AD2d 934, 935. It is not shown that the court was not influenced by this. The 330 motion must be decided *de novo*. Decision reserved, matter remitted. (County Ct, Erie Co. [D’Amico, JJ])

Assault (Evidence) (Lesser Included Offenses) **ASS; 45(25) (50)**

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Lewis, 294 AD2d 847, 741 NYS2d 760 (4th Dept 2002)

Holding: There was not legally sufficient evidence to sustain the conviction of third-degree assault, which includes a requirement that there have been physical

impairment or substantial pain. Penal Law 10.00(9); *see People v McDowell*, 28 NY2d 373, 375. The prosecution failed to prove that the complainant suffered either; she received no medical treatment and testified only to red marks on her neck, not to suffering any pain. *Cf People v Bogan* 70 NY2d 860 *rearg den* 70 NY2d 951. Therefore the defendant’s conviction should be for the lesser-included offense of attempted third-degree assault. *See CPL 470.15 (2)(a)*. The prosecution concedes that the court erred in certifying the defendant as a sex offender under the Sex Offender Registration Act (Correction Law art 6-C) as a result of his conviction of second-degree unlawful imprisonment. The victim was not less than 17 years old; the criminal act was not a “sex offense.” *See Correction Law 168-a(2)(a)*. Judgment modified, and as modified, affirmed. (Supreme Ct, Erie Co [Rossetti, JJ])

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Mosca, 294 AD2d 938, 741 NYS2d 780 (4th Dept 2002)

Holding: The defendant was convicted of sodomy and endangering the welfare a child based on sexual abuse of four boys. Most of his claims were not preserved for review and are not reviewed in the interest of justice. The defendant failed to move to reopen his suppression hearing and cannot rely on trial testimony to challenge the suppression ruling. *People v Gold* 249 AD2d 414, 415 *lv den* 92 NY2d 897. The contention that the defendant was denied effective assistance of counsel is outside the record. *People v Medina* 288 AD2d 61, 62. However, the sentence imposed was illegal. The prosecutor failed to establish that the defendant had committed the sodomy on or after Sept. 1, 1998. *See L 1998, ch 1, §44*. The only authorized sentence for this count is an indeterminate term of imprisonment pursuant to Penal Law 70.02. Judgment modified, affirmed as modified, and remitted for resentencing on count three. (County Ct, Herkimer Co [Kirk, JJ])

Counsel (Conflict of Interest) **COU; 95(10) (15)**
(Competence/ Effective Assistance/Adequacy)

People v Chaney, 294 AD2d 931, 741 NYS2d 776 (4th Dept 2002)

Holding: The defendant pled guilty to third-degree insurance fraud. He “was denied effective assistance of counsel when his attorney took a position that was adverse to that of defendant and became a witness against him (*see People v Stephens*, __ AD2d __ [737 NYS2d 889] . . .)” Counsel had no duty to support the defendant’s *pro se* motion but could not take an adverse position. The court should not have decided the motion to withdraw

Fourth Department *continued*

the plea without first assigning different counsel. New counsel should now be assigned and a *de novo* determination made on the motion to withdraw. Case held, matter remitted. (County Ct, Monroe Co [Egan, JJ])

Probation and Conditional Discharge (General) (Modification) (Termination) PRO; 305(18) (25) (35)

Sentencing (Resentencing) SEN; 345(70.5)

People v John P. Jr., 294 AD2d 951, 741 NYS2d 785 (4th Dept 2002)

Holding: The adjudication restoring the defendant to probation, terminating the sentence of probation, and imposing a conditional discharge is modified by vacating the conditional discharge. The defendant could not be sentenced to a three-year conditional discharge after his term of probation had expired. Once probation is terminated under CPL 410.90(1), the court has no authority to impose another sentence. This issue need not be preserved (*see People v Samms*, 95 NY2d 52, 55-6); the right to be sentenced in accordance with law cannot be waived. *See People v Taylor*, 197 AD2d 858, 859. Judgment modified. (County Ct, Monroe Co [Bristol, JJ])

Guilty Pleas (Withdrawal) GYP; 181(65)

Plea Bargaining (General) PLE; 284(10)

People v Leeper, 294 AD2d 885, 741 NYS2d 487 (4th Dept 2002)

Holding: The defendant, charged with a class B felony, pled guilty to a class C felony. The three-to-six-year sentence imposed was to run concurrently with an existing sentence. The defendant was then resentenced so that the terms would be consecutive, to comply with Penal Law 70.25 (2-a). At the resentencing, the defendant was offered a class D felony charge with a consecutive sentence of two to four years. Nothing was said about waiving appeal until counsel asked in the midst of the colloquy on that plea if the defendant retained the right to appeal. The prosecutor said if the defendant waived that right they could proceed, but if he did not, the prosecution would proceed with a B felony charge. The defendant wanted to accept the plea but did not want to waive appeal. The prosecutor said they could go forward with a class C felony plea, and the court said it would sentence the defendant thereon. The defendant said he pled guilty to the class D felony. The court refused to accept this plea and, over objection, sentenced the defendant to three to six years on a class C felony. In the interest of justice, as a

matter of discretion, the defendant's sentence is vacated. He should be given an opportunity to withdraw his guilty plea and waive his right to appeal and to plead guilty to a class D felony, with a sentence of 2-4 years, or withdraw his plea altogether. *See* CPL 470.15 (3)(c); *People v Saletnik*, 285 AD2d 665, 667-668. If the defendant refuses these options, his original plea will stand and he must be resentenced to the consecutive three-to-six term. Judgment modified, affirmed as modified, and matter remitted. (County Ct, Chautauqua Co [Cass, JJ])

Fraud (General)

FRD; 176(10)

Admissions (Miranda Advice)

ADM; 15(25)

People v Bastian, 294 AD2d 882, 743 NYS2d 217 (4th Dept 2002)

Holding: The defendant was convicted of first-degree fraud and fourth-degree grand larceny for promising to make an undercover officer's DWI conviction disappear in exchange for money. The prosecutor sufficiently established fraudulent intent; an inference of wrongful intent logically flowed from the facts, and a jury could rationally find that the defendant committed the offense. *People v Norman* 85 NY2d 609, 620. The court properly admitted evidence of the defendant's prior crimes; evidence of similar crimes is admissible to negate the existence of an innocent mind. *People v Lowenstein* 203 AD2d 304, 305 *lv den* 83 NY2d 873.

An officer who apprehended the defendant after listening to his conversation with the undercover officer via a wire asked the defendant where the money was. The defendant's reply, made before he was read his *Miranda* warnings, should have been suppressed. Contrary to the prosecution's argument, the query was designed to elicit an incriminating response, not general or clarifying information. *People v Crowley*, 98 AD2d 628, 630. However, the court's failure to suppress it was harmless error. *See People v Crimmins* 36 NY2d 230, 237. Judgment affirmed. (County Ct, Livingston Co [Alonzo, JJ])

Admissions (Interrogation) (Miranda Advice)

ADM; 15(22) (25)

People v Evans, 294 AD2d 918, 741 NYS2d 811 (4th Dept 2002)

Holding: The defendant was convicted of fifth and seventh-degree drug possession after a police officer stopped his car and found drugs in it. The officer asked each of the occupants of the car "whose cocaine it was" and told the defendant that each of the occupants could be arrested. The defendant admitted the cocaine was his. After this admission, the officer read the defendant his *Miranda* warnings and took a written statement. The defendant's initial admission was in response to a ques-

Fourth Department *continued*

tion “aimed at eliciting an incriminating statement.” *People v Fernandez* 207 AD2d 663, 663 *lv den* 84 NY2d 935. The admission was the product of custodial interrogation, as the defendant was handcuffed and placed in the back seat of the police car. *See People v Brown*, 195 AD2 1055, 1055 *lv den* 82 NY2d 848. There was no pronounced break between the admission before the *Miranda* warnings and the formal written statement; both the admission and the formal written statement must be suppressed. *See People v Bethea*, 67 NY2d 364, 367-68. Judgment reversed, suppression and new trial granted. (County Ct, Onondaga Co [Fahey, JJ])

Family Court (General) **FAM; 164(20)**

Juveniles (Abuse) (Neglect) **JUV; 230(3) (80)**

Matter of Miranda O., 294 AD2d 940; 741 NYS2d 817 (4th Dept 2002)

Holding: Family Court found after a hearing that the respondent had left her two-year-old daughter alone with her boyfriend, who caused the child to suffer immersion burns on her hands. When the respondent returned from work during the night, the household was asleep. At 4:00 a.m. on his way to work, the boyfriend told her about the burns. The daughter remained asleep. At 9:00 a.m the respondent took her daughter to the doctor. This is legally insufficient evidence that the child was abused by the respondent. An abused child is one “whose parent or other person legally responsible for her care inflicts or allows to be inflicted on such a child serious physical injury by other than accidental means.” Family Ct Act 1012 (e)(i). Here, there is no indication that the burns were intentionally inflicted, nor is there any evidence that the respondent knew or should have known that the boyfriend would intentionally inflict injury on her child. The evidence is legally insufficient that this child was neglected based on the delay in medical treatment. A neglected child is one “whose physical condition has been impaired as a result of the failure of her parent to exercise a minimum degree of care in supplying the child with adequate medical care.” Family Ct Act 1012 (f)(i)(A). There is no evidence that the child was further harmed by the few hours delay in seeking medical attention for her burns. *See eg Matter of Ronnie XX*. 273 AD2d 491, 494. Judgment reversed, petition against the respondent dismissed. (Family Ct, Erie Co [Mix, JJ])

Sentencing (Modification) (Resentencing) **SEN; 345(55) (70.5)**

Sex Offenses (Sentencing) **SEX; 350(25)**

People v Schenk, 294 AD2d 914, 741 NYS2d 474 (4th Dept 2002)

Holding: The defendant was found guilty, after a jury trial, of first-degree sexual abuse. The evidence presented at trial was legally sufficient to warrant a conviction. *See gen People v Bleakley* 69 NY2d 490, 495. The defendant claimed that the prosecutor failed to prove the element of sexual gratification, but this element may be inferred from the defendant’s conduct. *People v Anthony D.*, 259 AD2d 1011 *lv den* 93 NY2d 1001. The defendant’s other claims were not preserved for review. However, there was a discrepancy between the sentencing minutes and the “corrected” certificate of conviction. The sentencing minutes did not contain a period of post-release supervision, while the “corrected” certificate of conviction calls for a three-year period of post-release supervision. Even though the defendant did not raise this argument, the sentence must be vacated and the defendant resentenced. *See People v Freeney*, 291 AD2d 913. Judgment modified, affirmed as modified, and matter remitted. (County Ct, Ontario Co [Henry, Jr., JJ])

Family Court (General) **FAM; 164(20)**

Prisoners (General) **PRS I; 300(17)**

Matter of Onondaga County Dept. of Social Services O/B/O Gloria T. v Timothy S., 294 AD2d 27, 741 NYS2d 622 (4th Dept 2002)

Holding: The Hearing Examiner erred in determining that the respondents, who petitioned Family Court to modify the amount of child support that had accrued while they were incarcerated, were entitled to the benefit of Family Court Act 413(1)(g). The act states that “where the noncustodial parent’s income is less than or equal to the poverty income guidelines amount, unpaid child support arrears in excess of five hundred dollars shall not accrue.” This is a different situation than that of a parent who had no income but received a retroactive disability award (which was still below the poverty level). *See Matter of Blake v Syck*, 230 AD2d 596, 599-600 *lv den* 90 NY2d 811. Family Court should not reduce the amount of money the respondents owe for child support, because their financial hardship is the result of their own wrongful conduct which led to their incarceration. *See Matter of Knights v Knights*, 71 NY2d 865, 867. To come to a different conclusion “would allow an incarcerated noncustodial parent to benefit from the conduct that led to his or her incarceration.” Judgment reversed. (Family Ct, Onondaga Co [Hood, JJ])

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

Misconduct (Prosecution) **MIS; 250(15)**

Fourth Department *continued***People v Benedetto, 294 AD2d 958, 744 NYS2nd 92
(4th Dept 2002)**

Holding: The court erred by allowing into evidence notes from the sexual abuse counseling sessions of the complainant. The counselor's notes do not qualify for certification under CPLR 2306, nor were attempts made to satisfy the certification requirements under CPLR 4518 (c). No effort was made to present testimony establishing the foundation necessary to admission of the notes into evidence as business records. *See* CPLR 4518(a); *People v Cratsley* 86 NY2d 81, 89-91. Irrespective of this, the counseling notes could not be admitted into evidence because they contained "inadmissible hearsay declarations that bolstered the victim's testimony." The declarations went far beyond the basic information needed for or germane to diagnosis and treatment. *See Williams v Alexander* 309 NY 283, 287. Given that these notes, along with the complainant's testimony, were the only evidence used to establish guilt, admitting them was prejudicial and not harmless error. *People v Becraft* 177 AD2d 945 *lv den* 79 NY2d 853. The prosecutor acted inappropriately by commenting at trial on the religious affiliations of witnesses (*see People v Wood* 66 NY2d 374, 378-81) and by comparing the defendant's apparent lack of religious affiliation with the faith of the complainant. *See People v Astafan* 283 AD2d 907, 907-908. The prosecutor attempted to shift the burden of proof, by making statements that characterized the prosecution "as a 'search for the truth' and 'for justice.'" *See People v Rivera*, 116 AD2d 371, 375-376. Judgment reversed, new trial granted. (County Ct, Oswego Co [Hafner, Jr., JJ])

Counsel (Competence/Effective Assistance/ Adequacy) (Malpractice) COU; 95(15) (23)

**Swain v New York, 294 AD2d 956, 741 NYS2d 788
(4th Dept 2002)**

Holding: The Court of Claims refused to add to a suit for unjust conviction and imprisonment the claimant's contention that the State should be held liable for assigning him ineffective counsel during his first trial, where he was convicted of fifth-degree drug possession. A new lawyer had secured reversal of the conviction and dismissal of the indictment for insufficiency of evidence. Original assigned counsel was neither an officer nor employee of the State (*see* Court of Claims Act 10[3]). The State therefore cannot be held liable for malpractice. *Murph v State of New York*, 105 Misc2d 684, 686. The Court has the inherent power to assign counsel (*see People v Ward*, 199 AD2d 683, 684), and acts in connection with such assignment are cloaked with judicial immunity. *See*

Weiner v State of New York, 273 AD2d 95, 96-98. The claimant did not prove by clear and convincing evidence that he did not do any of the acts for which he was indicted. Court of Claims Act 8-b(5)(c); *see Groce v State of New York* 272 AD2d 519, 520. The claim was properly dismissed following trial. Judgment affirmed. (Ct of Claims [Collins, JJ]) ⚖

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